S230899

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

BARRY S. JAMESON,
Plaintiff and Appellant

vs.

TADDESE DESTA, M.D.,
Defendant and Respondent

California Court of Appeal, Fourth Appellate Dist., Div. One, Case No. D066793
San Diego County Superior Court Case No. GIS 9465
Hon. Joel M. Pressman, Judge

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other:

I.

INTRODUCTION

In this action, the plaintiff, who was incarcerated, alleges that the defendant, Taddese Desta, M.D., negligently treated his hepatitis with a one-year regimen of a drug known as "alpha-interferon," from which he suffered adverse side effects. He claims that rather than a one-year regimen of alpha-interferon, Dr. Desta should have treated him with a six-month regimen of a two-drug combination.

After several reversals on appeal, the action proceeded to trial in April 2014. Because of the onerous budget cuts faced by the courts at the time, the San Diego Superior Court did not provide official court reporters for civil proceedings, and the trial proceedings were not reported. Following opening statements, the trial court granted the defendant's motion for nonsuit on the grounds that based on plaintiff's opening statement, the plaintiff was unable to establish his case.[1] The Court of Appeal affirmed, holding that the plaintiff was precluded from obtaining a reversal of the nonsuit on appeal in the absence of a reporter's transcript. (Typed Opn., p. 17.)

The plaintiff contends that the trial court abused its discretion and violated

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[1]A nonsuit following opening statements is authorized by Code of Civil Procedure section 581c(a). "A defendant is entitled to nonsuit after the plaintiff's opening statement only if the trial court determines that, as a matter of law, the evidence to be presented is insufficient to permit a jury to find in the plaintiff's favor." Ewing v. Northridge Hospital Medical Center (2004) 120 Cal. App.4th 1289, 1296.

his constitutional rights in establishing a policy that did not provide for free court reporters to indigent plaintiffs in civil cases. He claims that the San Diego Superior Court's policy precluded him and other indigent plaintiffs in civil actions from obtaining meaningful access to appeal.

The plaintiff was not entitled to a free reporter at trial for the following reasons:

- In their long history of considering the issue, neither the United States Supreme Court nor the courts of this State have held that a plaintiff in a civil action is entitled to a free reporter or a free reporter's transcript on appeal.
- The San Diego Superior Court acted within its discretion in not providing reporters in civil cases in light of the onerous budget cuts it faced.
- Constitutional equal protection and due process requirements do not mandate that an indigent plaintiff in a civil action be provided with a free reporter or a free reporter's transcript on appeal.
- Providing an indigent plaintiff with a free reporter at trial is an illusory right unless the courts also provide the plaintiff with a free transcript, which they have no obligation to do.
- Mandating the provision of official court reporters to indigents in

civil actions would be contrary to the Legislative scheme set forth in Government Code sections 68086 and 68086.1, which provides the courts with discretion in determining whether to provide official court reporters.

Even if this Court determines that the San Diego Superior Court abused its discretion or violated the plaintiff's constitutional rights in not providing him with a court reporter, the judgment should nevertheless be affirmed for the following reasons:

- The plaintiff had a viable method for obtaining meaningful appellate court review by means of a settled statement (California Rules of Court, Rule 8.137), which he chose not to use.
- Any error was harmless, because the plaintiff could not have purchased a transcript even if a reporter had been made available at trial.
- The record is clear, even without a reporter's transcript or a settled statement, that nonsuit was properly granted.

II.

PROCEDURAL HISTORY AND RELEVANT FACTS

In this action, filed in 2002, the plaintiff proceeded on causes of action

against Dr. Desta for medical negligence and breach of fiduciary duty. As stated by the Court of Appeal, "In his complaint, Jameson alleged that he had been suffering from hepatitis and that Desta negligently prescribed interferon for Jameson while Jameson was incarcerated at Donovan [Richard J. Donovan Correctional Facility] and Desta was performing services as a physician for the Department [of Corrections and Rehabilitation]. Jameson further alleged that the interferon caused him to suffer serious physical injuries, including irreversible damage to his eyesight." (Typed Opn., p. 4.)

The action was dismissed and reversed on appeal on three separate occasions: First was a reversal from a dismissal for delay in prosecution.[2] Second was a reversal from a dismissal for plaintiff's failure to appear at a case management conference and subsequent order to show cause.[3] Third was a reversal from a summary judgment.[4]

Following the third reversal, the matter proceeding to trial. On April 18,

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[2]The trial court dismissed the action based on the plaintiff's delay in serving Dr. Desta with process, but the Court of Appeal reversed, having determined that service had been effective and that the trial erred in dismissing the action for lack of diligent service. (Court of Appeal case no. D047824; R.A. 16-36.)

[3]The appellate court held that the plaintiff's failure to appear telephonically at the case management conference and subsequent order to show cause hearing was not willful. Jameson v. Desta (2009) 179 Cal. App.4th 672.

[4]The appellate court determined that expert evidence submitted by the plaintiff raised a triable issue of fact regarding breach of the standard of care and causation. Jameson v. Desta (2013) 215 Cal. App.4th 1144, 1149.

2014, ten days prior to the commencement of trial on April 28, 2014, "the trial court informed the parties that 'the Court no longer provides court reporters for civil trials, and that parties have to provide their own reporters for trial.'" (R.A. 231; 254; Typed Opn., p. 11.) The plaintiff filed no document in which he either objected to proceeding without a court reporter or requested that the court provide him with a reporter, and there is nothing in the record to indicate that he requested a reporter.

On April 21, 2014, the defendant filed a motion in limine to preclude the plaintiff from introducing expert deposition testimony in lieu of live testimony at trial. (R.A. 233-247.) The defendant asserted that the plaintiff failed to designate his expert, Allen Cooper, M.D., in either of the two expert witness designations he served, and therefore, the plaintiff should be precluded from introducing expert witness testimony, whether live or via deposition, at trial. (R.A. 234.) In addition, the plaintiff did not establish that Dr. Cooper was "unavailable," and therefore, it would be improper to allow him to use Dr. Cooper's deposition testimony in lieu of live testimony. (R.A. 234.) Furthermore, the deposition was unsigned, which precluded its use. (R.A. 234.) Finally, defense counsel maintained that if Dr. Cooper's testimony was going to be permitted, he should be permitted to cross-examine Dr. Cooper live at trial. (R.A. 234-235.)

The motion was argued on April 23, 2014, although the Court did not rule

on it at that time. (R.A. 252.) On the day of trial, April 28, 2014, the Court issued an order precluding Dr. Cooper's testimony: "The Court states that it is clear that Mr. Jameson has not designated an expert, and that there will be no expert to testify live at trial." (R.A. 254.) "The Court states that the plaintiff had not established Dr. Cooper was unavailable..." (R.A. 258.)

On April 22, 2014, the defendant filed a motion to dismiss pursuant to Code of Civil Procedure section 583.310 for failure to bring the matter to trial within the statutorily required time. The defendant submitted a table setting forth the dates that the five-year time limit ran and the dates it was stayed during the course of the twelve years that the action had been pending. The defendant maintained that the time within which the plaintiff had to bring the case to trial expired. (7A.A. 1194-1197.) In opposition to the motion, the plaintiff stated that he "is not disagreeing with the calculations in the motion." (7A.A. 1199:2-3.) The motion was heard following opening statements on April 28, 2014, at which time it was granted. (R.A. 257.)

In addition to the motion to dismiss for failure to bring the matter to trial within the required time, after opening statements Dr. Desta also moved for nonsuit on the grounds that based on the plaintiff's opening statement, the plaintiff could not establish causation or a breach of the standard of care. The court granted the motion, explaining, "Mr. Jameson did not establish causation in his opening

statement. The Court allowed all of the plaintiff's exhibits into evidence as requested. The court finds that Mr. Jameson did not have an expert available. The Court finds that it's clear that the plaintiff cannot establish causal connection between treatment [by] Dr. Desta and alleged damages. The Court states that the plaintiff had not established Dr. Cooper was unavailable and even in the deposition Dr. Cooper gave no opinion on causation or damages. It is clear, that no matter how far the Court allowed the plaintiff to go in trial he could not overcome these issues. The Court GRANTS the non-suit on all causes of action...." (R.A. 257-258.) The court determined that the plaintiff did not have evidence by which a jury could find that Dr. Desta "did not meet the standard of care and causal damage to plaintiff; nor breached any fiduciary duty." (R.A. 258.)

In its Opinion affirming the judgment, the Court of Appeal held that the trial court did not err in failing to have the trial proceedings recorded by a court reporter. The appellate court recognized that while Government Code section 68086(b) provides for a waiver of a reporter's fee for indigents where the court provides an official court reporter, "[t]he statute does not mandate that a trial court provide indigent litigants with court reporter services where no official court reporter is provided by the court, as was true in this case." (Typed Opn., pp. 14-15.)

In regard to the granting of nonsuit in favor of the defendant, the Court of

Appeal concluded that the plaintiff could not obtain a reversal in the absence of a reporter's transcript: "Because an order granting a nonsuit is dependent on a review of the evidence to be presented at trial, an appellant cannot obtain reversal of such order in the absence of a reporter's transcript." (Typed Opn., p. 17.)

In light of the fact that the judgment on the nonsuit was affirmed, the appellate court did not reach the issue of whether the trial court properly granted the defendant's motion to dismiss for failure to timely bring the matter to trial. (Typed Opn., p. 3, fn. 1.)

III.

THE STATUTORY SCHEME

Government Code section 68086 governs payment of the fee for court reporting services in the superior court. The statute distinguishes between two types of reporters, official court reporters and certified shorthand reporters who serve as official pro tempore reporters, and sets forth a separate payment scheme for each. The statute provides that official court reporters are provided "at the expense of the court"[5] and provides for a fee to be paid by the parties to reimburse the court for the expense of providing official court reporters. Section 68086, subdivision (b) provides that the fee "shall be waived for a person who has been

[5]Government Code section 68086(a)(1)

granted a fee waiver under Section 68631."

Section 68086, subdivision (d) authorizes the Judicial Council to adopt rules to ensure that "if an official court reporter is not available, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter..." and that if an official pro tempore reporter is used, "no other charge shall be made to the parties." In other words, the court does not charge a fee where a pro tempore reporter is used.

In accordance with section 68086(d), the Judicial Council enacted California Rules of Court, Rule 2.956, which provides at subdivision (c), "If the services of an official court reporter are not available for a hearing or trial in a civil case, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter. It is that party's responsibility to pay the reporter's fee for attendance at the proceedings, but the expense may be recoverable as part of the costs, as provided by law."

In other words, where the court does not provide an official court reporter, a party can go out and hire a certified shorthand reporter to serve as an official pro tempore reporter, which includes paying the certified shorthand reporter directly for the reporting services rather than paying the court a fee for a reporter's services.

Importantly, whereas subdivision (b) of section 68086 provides that the fee

charged to parties to reimburse the court for the expense of an official court reporter is waived for parties who have obtained a fee waiver, no similar provision waiving the cost for a court reporter applies where a party retains a certified shorthand reporter to serve as an official pro tempore reporter. The statutory scheme does not obligate the court to pay the cost of hiring a reporter to act as an official pro tempore reporter on behalf of a party who has obtained a fee waiver, and it does not require that the court provide an official court reporter to such litigants. To the contrary, the statute expressly recognizes that courts do not have to provide court reporters, and that proceedings can go unreported.

The Legislature's intent can be seen in Government Code section 68086.1, which directs that a portion of court filing fees goes to the Trial Court Trust Fund to be used to pay for the services of official court reporters in civil proceedings. The statute states that "[i]t is the intent of the Legislature ... to continue an incentive to courts to use the services of an official court reporter in civil proceedings." Thus, while expressing a preference that trial courts use official court reporters and providing an incentive to do so, the Legislature clearly left it to the courts in each county to determine whether and to what extent official court reporters would be used in civil proceedings.

The waiver of the court reporter fee for indigents provided for in subdivision (b) of section 68086 was added to the statute by way of a 2013

amendment effective January 1, 2014. Prior to that time, there was no statutory court reporter fee waiver for indigent litigants. The fee waiver provided for in subdivision (b) does not constitute a legislative pronouncement, policy or determination that courts are required to provide reporters to all indigent litigants. There is nothing in the legislative history to indicate that the Legislature intended anything more than a fee waiver.[6]

If the Legislature wanted to mandate that reporters be provided to indigent litigants, it could have easily amended the statute to so provide. "Had the Legislature intended to craft such a rule, it certainly could have done so. But it chose instead to write a narrower rule..." Flores v. Presbyterian Intercommunity Hospital (May 5, 2016, S209836) ___ Cal.4th ___ [2016 DJDAR 4341, 4344]. Here, the Legislature enacted a fee waiver for indigents in cases in which courts provide official court reporters, without enacting any mandate that courts provide

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[6]The purpose of the 2013 bill to amend section 68086 (AB 648) was to provide guidance on how to implement the $30 fee charged to litigants for court reporting services in civil proceedings lasting less than one hour. (See Bill Analysis, April 22, 2013.) The bill as originally introduced on February 21, 2013 did not contain the fee waiver provision at issue herein. The fee waiver was added to an amended version of the bill on April 29, 2013. There is no indication in the legislative history that by enacting the fee waiver, the Legislature intended to mandate that indigent litigants be provided with an official court reporter at the expense of the court in all civil proceedings. The Legislature was merely waiving the court reporter fee in those civil proceedings where the courts provided official court reporters. The legislative history, including the Bill Analysis, can be found on the Legislature's website at http://www.legislature.ca.gov/index.html.

reporters to all indigent litigants.

This was not some "oversight" on the part of the Legislature, but indicates that the Legislature did not intend to mandate that courts provide reporters in all cases involving indigents. There is an enormous difference between waiving a fee and mandating the provision of a service. If the Legislature had intended to provide court reporters to all indigent litigants, it would have done so. In construing a statute the court's function is to ascertain what is in terms or in substance contained therein, "not to insert what has been omitted, or to omit what has been inserted." Code of Civil Procedure section 1858.

Contrary to the plaintiff's argument that Code of Civil Procedure section 269 mandates the provision of a reporter upon the request of a party (Opening Brief, pages 21-22), the statute read in conjunction with Government Code section 68086 does not mandate the provision of a reporter in civil litigation where the court does not provide reporters. If Code of Civil Procedure section 269 mandated the provision of a reporter to any party who requested one, it would nullify subdivision (d) of Government Code section 68086, which recognizes that court reporters are not provided by all courts or in all cases.

In addition, section Code of Civil Procedure section 269 predates Government Code section 68086, enacted in 1992, and the provision in section 68086 allowing parties to arrange for pro tempore reporters clearly supercedes any

requirement in Code of Civil Procedure section 269 that reporters be provided by the court upon request of a party.

To the extent that the plaintiff cites California Court Reporters Association, Inc. v. Judicial Council of California (1995) 39 Cal. App.4th 15, 18 as holding that Code of Civil Procedure section 269 mandates the provision of a reporter at the request of a party (Opening Brief, pages 20-21), any such language in that opinion was dicta, as the court merely held that electronic recording was not a permitted method of reporting a case in California. It did not hold that there is a right to have a reporter present in a civil proceeding when one is requested where the court does not provide court reporters.

Citing Elkins v. Superior Court (2007) 41 Cal.4th 1337, the plaintiff argues that the San Diego Superior Court's policy of not providing reporters in civil cases is contrary to statute. (Opening Brief, page 28, citing Elkins at 1353-1354.) However, the Superior Court's policy at issue herein is not contrary to Government Code section 68086. That statute specifically adopted a dual system for providing court reporters, discussed above. Nothing in section 68086 mandates that courts provide reporters for indigent plaintiffs, and the San Diego Superior Court's policy was not in conflict with the statute.

IV.

THE DEVELOPMENT OF RELEVANT LAW

REGARDING INDIGENT LITIGANTS

In the long history of jurisprudence on the issue, neither the United States Supreme Court nor the courts of this State have held that an indigent plaintiff in a personal injury action is entitled to the provision of a free court reporter at trial or a free reporter's transcript on appeal. Equally significant, even in criminal and other cases in which the courts have required the provision of a free transcript, the cases unanimously hold that a party has no such right where there exist alternative methods for providing an adequate record on appeal, such as an agreed or a settled statement.

Almost one hundred years ago, in Martin v. Superior Court (1917) 176 Cal. 289, the California Supreme Court recognized the right of an indigent plaintiff in a civil action to proceed without the payment of court fees. At issue in that wrongful death action was the payment of jury fees. Id. at 290-291. No statute existed at the time that provided for proceeding *in forma pauperis*, and the defendant maintained that only the Legislature could waive court fees for indigents by way of legislation. Id. at 292. The California Supreme Court rejected this argument, noting that the statutes governing the payment of court fees were not "susceptible of the construction that the design of the legislature was to deny to the courts the

exercise of their most just and most necessary inherent power." Id. at 297.

However, 17 years later, in Rucker v. Superior Court (1930) 104 Cal. App. 683, Court of Appeal held that civil litigants were *not* entitled to a free transcript on appeal. The appellate court explained that there was "no legal mode" of paying the reporter for the reporter's transcript "out of the public treasury." Id. at 685. The court noted that the defendants were not without remedy, because they could pursue their appeal by way of a bill of exceptions, which was permitted by statute as an alternative to a reporter's transcript on appeal. Id. at 686. "It is quite possible to prepare a bill of exceptions without the expense of a reporter's transcript. In times past this has often been done." Id.

In the seminal case of Griffin v. Illinois (1956) 351 U.S. 12, the United States Supreme Court held that the indigent defendants in that criminal action had a right to a free transcript on appeal. It was undisputed that a reporter's transcript was needed in that case in order for the defendants to obtain adequate appellate review of their convictions. Id. at 16. The Court held that the denial of a free reporter's transcript on appeal to the defendants was a violation of the Due Process and Equal Protection provisions of the United States Constitution: "Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside." Id. at 18-19.

However, in so holding, the majority expressly noted that an indigent criminal defendant *was not entitled to a free transcript in every case*, and that *alternative methods of presenting the record on appeal could be utilized*: "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The [Illinois] Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. [Footnote.]" Id. at 20. Thus, the Court did not mandate that free reporter's transcripts be provided to criminal defendants in all appeals, but only in those appeals where there did not exist other means of presenting an adequate record by which meaningful review could be had.

In Draper v. Washington (1963) 372 U.S. 487, the United States Supreme Court overturned a rule in the State of Washington that required that indigent defendants in criminal actions had to establish that the appeal was not frivolous before being allowed a free transcript. However, in doing so, the Court "reaffirm[ed] the principle, declared by the Court in *Griffin,* that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. [Citation.] Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from

which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript." Id. at 495.

In Ferguson v. Keays (1971) 4 Cal.3d 649, the California Supreme Court held that the appellate court had the inherent power to waive its own filing fees for indigent civil litigants. At the time, California had no statute relieving indigent litigants of various fees and costs at the trial or appellate court level. Id. at 653. The Court explained, "That such power [to waive filing fees] exists, and may be exercised in the absence of statutory provisions to the contrary, seems apparent from our review of the pertinent authorities." Id. at 654. The Court noted that it was "not faced with the question of whether indigents must be given funds by the county or some other source to pay transcript fees, publication costs, or other similar third-party charges." Id. at 654.

In Mayer v. Chicago (1971) 404 U.S. 189, the United States Supreme Court held that the Griffin court's holding regarding indigent defendants convicted of felonies being afforded an adequate record on appeal applied to indigents convicted of nonfelony charges as well, and that the right to an adequate record was not limited to criminal convictions where the defendant faced incarceration.

Id. at 196-197. As in previous Supreme Court decisions, the court in Mayer pointed out that a criminal defendant did not have to be provided with a reporter's transcript of the proceedings where another form of the record permitted proper review of the claims presented. Relying on the holdings of the courts in Griffin and Draper, the court in Mayer stated that "[a] 'record of sufficient completeness' does not translate automatically into a complete verbatim transcript." Mayer at 194.

In March v. Municipal Court (1972) 7 Cal.3d 422, the California Supreme Court held that indigents convicted of misdemeanors were entitled to "a free transcript or adequate substitute" on appeal.

In a set of series of three cases decided on a single day, the Second District Court of Appeal addressed three factual scenarios in determining whether an indigent is entitled to a free reporter's transcript:

a) In Leslie v. Roe (1974) 41 Cal. App.3d 104, the Court affirmed the denial of free clerk's and reporter's transcripts to indigent plaintiffs in a civil action, explaining, "The ordinary civil litigant is not entitled to free transcripts on appeal at public expense." Id. at 107.

b) In Smith v. Superior Court (1974) 41 Cal. App.3d 109, the Court held that in an appeal by a mother denied the opportunity to withdraw her consent to an adoption, the mother was entitled to a free reporter's transcript on appeal because

the statutes authorizing the appeal expressly mandated the provision of a free transcript on appeal for indigents. Id. at 113-114.

c) In Crespo v. Superior Court (1974) 41 Cal. App.3d 115, the Court of Appeal concluded that the trial court had authority to order transcripts on appeal at county expense for indigent parents in a parental custody and control case, explaining that the Legislature's providing for appointment of counsel for such parents [former Civil Code section 237.5], including on appeal, necessarily included providing transcripts by which such appointed counsel could pursue an appeal. The court explained that the Legislature did not provide for appointment of counsel on appeal while at the same time "impairing that right of appeal by permitting the indigent parents' inability to afford transcripts to preclude effective utilization of the right to appellate review." Id. at 118-119.

The court in Crespo emphasized that the right to a free transcript on appeal is "limited to those cases where a transcript is actually necessary" and recognized that there are "many cases in which a complete reporter's transcript will not be necessary to assure effective appellate review, and an agreed or settled statement or partial reporter's transcript ... will be adequate." Id. at 119.

In Payne v. Superior Court (1976) 17 Cal.3d 908, the California Supreme Court held that when an indigent prisoner is named as a *defendant* in a lawsuit which threatens the prisoner's property, due process and equal protection entitle

the defendant to appointment of counsel where necessary to provide the defendant with a meaningful opportunity to be heard. Id. at 926-927. The Court in Payne pointed out that its holding did not apply to indigent prisoners who are *plaintiffs* in civil actions: "Finally, we emphasize the limits of our holding. We have not ruled that all indigents have a right to counsel in civil cases. Nor have we established that indigent prisoners who are plaintiffs in civil actions may secure appointed counsel or the right to appear personally. [Citations.] Neither of those questions is before us, and we do not resolve them here. Id. at 926-927.[7]

In his Opening Brief, the plaintiff overstates the holding of the Court in the Payne case. Citing Payne, the plaintiff argues, "Ultimately, the Court determined that only a compelling interest may justify denial of a prisoner's right of access to the courts." (Opening Brief, page 16.) However, the Court in Payne was specifically addressing an incarcerated *defendant's* right of access, and expressly stated that its holding did not apply to incarcerated *plaintiffs*. Id. at 926-927.

In City of Rohnert Park v. Superior Court (1983) 146 Cal. App.3d 420, the appellate court reversed the trial court's order waiving the cost of clerk's and

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[7]The Court's holding in Payne was reaffirmed in Yarbrough v. Superior Court (1985) 39 Cal.3d 197, where the Court held, "In an appropriate case, and as a last alternative, appointment of counsel may be the only way to provide an incarcerated, indigent civil *defendant* with access to the courts for the protection of threatened personal and property rights." Id. at 200-201. (Emphasis added.) Yarbrough has no application to incarcerated plaintiffs.

reporter's transcripts for the indigent appellants in that case. The Court explained, "With only minor exceptions, easily distinguished from the routine civil appeal [citations] transcript preparation costs have uniformly been denied civil appellants proceeding in forma pauperis [citations]." Id. at 428-429.

In Zumwalt v. San Diego County Department of Social Services (1985) 167 Cal. App.3d 835, the indigent petitioner wanted to appeal the imposition of a conservatorship and his confinement in a county mental health facility. Claiming that a public conservatorship proceeding is criminal in nature, the petitioner requested free transcripts and appointed counsel. Id. at 836. Pointing out that indigents wishing to appeal grave disability proceedings under the Lanterman-Petris-Short Act are entitled to counsel, the court held that such individuals are also entitled to a free transcript on appeal: "Common sense dictates appointed appellate counsel cannot act on Waltz's behalf without a transcript of the trial proceedings. Waltz's constitutional right to effective counsel includes the right to reasonably necessary ancillary services. [Citation.] Indigent persons appealing grave disability proceedings must be provided with the necessary record for appeal free of charge." Id. at 838.

Finally, in M.L.B. v. S.L.J. (1996) 519 U.S. 102, an appeal by an indigent mother challenging an order terminating her parental rights, because of the fundamental interest at stake where parental rights were terminated, the United

States Supreme Court recognized constitutional Due Process and Equal Protection rights to a free transcript on appeal. Id. at 116-117.

The issue in regard to an indigent plaintiff's right to have a reporter present in the courtroom at taxpayer expense is the same as the right to a free transcript on appeal. If an indigent litigant does not have the right to a free transcript on appeal, then an indigent litigant does not have the right to the provision of a free reporter. The issues are one and the same. There is no more basis for holding that an indigent plaintiff is entitled to the provision of a reporter at county expense than there is for holding that an indigent plaintiff is entitled to a free transcript at county expense.

In fact, providing an indigent plaintiff with a reporter is an idle act if the plaintiff is not also provided with a free transcript. An indigent plaintiff does not gain "access" to review in the Court of Appeal merely by having a reporter present in the courtroom if the plaintiff is not also provided a free transcript on appeal. As the Court in Crespo v. Superior Court, *supra*, 41 Cal. App.3d at 118-119 noted, providing an indigent appellant with counsel on appeal is useless unless the appellant is also provided a free transcript. Similarly, providing an indigent party with a free court reporter is useless unless the party is also provided with a free transcript.

Although the issue of whether an indigent litigant is entitled to a free

transcript on appeal has not expressly been raised as an issue for review by the plaintiff (and the plaintiff expressly disavows any such issue in his Opening Brief), this Court should consider that issue when ruling on the issue of whether the plaintiff was entitled to a court reporter, because the right to a court reporter necessarily implies the right to a free transcript, just as a right to counsel in the Crespo case necessarily implied a right to a free transcript. (Both the right to counsel on appeal and the right to a court reporter are useless without a transcript.)

Even if the Court does not expressly decide the issue of whether indigent litigants are entitled to free transcripts on appeal, the issue of whether such litigants are entitled to the provision of court reporters is inextricably intertwined with the issue of whether they are entitled to free transcripts. The Court should take into account the fact that a decision that indigent litigants are entitled to court reporters implies that they are also entitled to free transcripts.

Ultimately, as discussed in the next section of this brief, the San Diego Superior Court did not abuse its discretion in denying the plaintiff a court reporter.

V.

THE SAN DIEGO SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN NOT PROVIDING COURT REPORTERS TO INDIGENT PLAINTIFFS IN CIVIL ACTIONS

Apparently recognizing that it is unlikely that this Court would decide that an indigent plaintiff in a civil action is entitled to a free transcript on appeal, the plaintiff herein frames his issue more narrowly to argue that as an indigent litigant he was entitled to a free *reporter* rather than to a free *transcript* on appeal. The plaintiff asserts that his appeal "addresses only the issue of the *court reporter's appearance fee*, not the actual cost of preparing an appellate transcript." (Opening Brief, page 15, fn. 9.) The plaintiff urges this Court not to worry about payment of the actual transcript cost because "[t]he state maintains a Transcript Reimbursement fund to assist indigent appellants in paying transcript fees. (See Bus. & Prof. Code, § 8030.6.)" (Opening Brief, page 15, fn. 9.) That Fund, the plaintiff suggests, "compensates for *transcript preparation fees*, not the *court reporter appearance fees* at issue in this case." (Opening Brief on the Merits, page 15, fn. 9.)[8]

In other words, the plaintiff maintains that indigent litigants will obtain

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[8]The plaintiff did not raise the Transcript Reimbursement Fund in the Court of Appeal.

access to the Court of Appeal if only they are provided with free court reporters, because the cost of the transcript is covered. However, the plaintiff's counsel fails to recognize that the Transcript Reimbursement Fund provides *only $30,000 per year statewide* to self represented parties. Business & Professions Code section 8030.5(b). Because of this extremely limited funding, only a handful of appellants can obtain a transcript through the Fund. In the overwhelming majority of cases (probably approaching 99%), the Fund is not going to pay for self represented indigents to purchase a reporter's transcript on appeal.

To hold that an indigent litigant is entitled to a court reporter without also holding that the indigent litigant is entitled to a free transcript on appeal would be to establish an illusory right, which would amount to an enormous waste of judicial resources, because the Transcript Reimbursement Fund is a minimal source of funding for transcript payment fees.

The Transcript Reimbursement Fund, governed by Bus. & Prof. Code sections 8030.2 et seq., was established for the purpose of providing "shorthand reporting services to low-income litigants in civil cases, who are unable to otherwise afford those services." Section 8030.2. Prior to the enactment of section 8030.5 in 2010, the Fund did not provide reimbursement to parties appearing in pro per. Bus. & Prof. Code section 8030.4(a) limited applicants to "a qualified legal services project, qualified support center, other qualified project, or

pro bono attorney." Pro se litigants were expressly excluded from obtaining reimbursement.[9]

Because the Fund had "not been fully utilized in recent years by eligible applicants for whom its use had been intended,"[10] the Legislature enacted section 8030.5, which provides that indigents representing themselves may apply for funds from the Transcript Reimbursement Fund. However, and of critical importance, section 8030.5(b) provides that "total disbursements to cover the cost of providing transcripts to all applicants pursuant to this section shall not exceed thirty thousand dollars ($30,000) annually and shall not exceed one thousand five hundred dollars ($1,500) per case." The $30,000 maximum annual disbursement includes reimbursement for both court and deposition proceedings. Section 8030.6.

Thus, reimbursement from the Transcript Reimbursement Fund is unavailable to indigent litigants aside from the first handful of applicants in any given year. The fact that reimbursement is limited to $1,500 in any given case[11] further limits the cases in which indigents will be able to pay for a transcript on appeal through the Fund.

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[9]Section 8030.4(a) provides, "The term 'applicant' shall not include a person appearing pro se to represent himself or herself at any stage of a case."

[10]Business & Professions Code section 8030.5(d).

[11]A "case" is defined by section 8030.4(b) as "a single legal proceeding from its inception, through all levels of hearing, trial, and appeal, until its ultimate conclusion and disposition."

In addition, section 8030.5 has a sunset provision, wherein the statute expires on January 1, 2017 unless extended by the Legislature by that date. Section 8030.5(p). (Thus, although in effect at the time of the filing of this brief, reimbursement to plaintiffs representing themselves may no longer be available by the time the Court hears this case.)

The San Diego Superior Court certainly did not abuse its discretion in not providing a court reporter to indigent litigants where there was no reasonable likelihood that such litigants would be able to afford to pay for the transcript on appeal and where the Transcript Reimbursement Fund did not pay for the transcripts of more than a handful of such litigants *statewide*. Based on the extremely limited funds made available to self represented indigent litigants through the Fund, it would be unlikely that more than a few such litigants in San Diego County would qualify for funds in any given year.[12]

In light of the fact that so few San Diego County indigent litigants in any given year would actually be able to afford to pay for a reporter's transcript on appeal through the Fund, it was not an abuse of discretion on the part of the San

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[12]As any given litigant is entitled to no more than a $1,500 reimbursement, and the maximum annual reimbursements statewide is $30,000, and assuming that some litigants receive less than the maximum $1,500, the number of litigants receiving reimbursements statewide is perhaps 30 in any given year. As San Diego County represents approximately 8% of the statewide population, the number of San Diego County residents obtaining reimbursement from the Fund in any given year would probably be around three.

Diego Superior Court to choose not to provide reporters in civil actions involving indigent litigants. Putting reporters in courtrooms is a mere idle act if the parties do not have the means to purchase a transcript.

In fact, it would have been an enormous waste of resources for the County to pay for reporters to be present in such cases where virtually none of the litigants would actually be able to afford to pay for a transcript. It was a perfectly reasonable decision on the part of the San Diego Superior Court not to pay for a reporter in each of those cases where only a few of those litigants would even be able to afford the cost of a transcript on appeal.

The plaintiff's argument that the only thing at issue is the cost of a reporter rather than the cost of a transcript because indigents can obtain a transcript utilizing the Transcript Reimbursement Fund actually demonstrates why the court's policy was *not* an abuse of discretion. The County should not be required to pay for reporters to attend hearings and trials in hundreds of cases each year so that perhaps three litigants will be able to obtain an actual transcript on appeal.

Ultimately, to hold that indigents have the right to a court reporter present in the courtroom without also providing them with the right to a free transcript is to provide them with an illusory right. If indigent litigants do not have access to the Court of Appeal because of the San Diego Superior Court's policy, as the plaintiff maintains, they would not gain such access with a reporter at county

expense without an ability to purchase a transcript on appeal. The plaintiff has failed to explain how indigent litigants would gain "access" to the Court of Appeal with the presence of a reporter whose transcription they cannot afford to purchase.

In each of the cases in which this Court has issued an opinion expanding an indigent litigant's right of access to the courts, such access has been real rather than illusory: Martin v. Superior Court, *supra*, 176 Cal. 289 [right of an indigent plaintiff in a civil action to proceed without the payment of court fees]; Ferguson v. Keays, *supra*, 4 Cal.3d 649 [waiver of appellate court filing fees for indigent civil litigants]; March v. Municipal Court, *supra*, 7 Cal.3d 422 [right to free transcript or adequate substitute in criminal appeal]; Payne v. Superior Court, *supra*, 17 Cal.3d 908 [incarcerated indigent defendant in civil action may be entitled to appointment of counsel].

In fact, the March case illustrates the illusory nature of the right argued for by the plaintiff in this case. The California Supreme Court, citing Griffin v. Illinois, *supra*, 351 U.S. at 19, noted that the Court in Griffin "held that 'equal access' included the right to secure adequate appellate review, and that in those cases involving indigent defendants, where a transcript was essential to the appeal, it had to be provided at state expense." It was the right to a *free transcript* that the

Court recognized provided indigent defendants with access.[13] Mandating the presence of a reporter in the courtroom does not in any way provide access to the Court of Appeal without providing a party with a way of obtaining the transcript.

The plaintiff cites Government Code section 68630(a) as setting forth the policy of this State "'[t]hat our legal system cannot provide "equal justice under law" unless all persons have access to the courts without regard to their economic means.'" (Opening Brief, page 12.) However, the plaintiff leaves out the next sentence of that statutory provision: "California law and court procedures should ensure that **court fees** are not a barrier to court access for those with insufficient economic means to pay **those fees**." In other words, the statutorily recognized policy of providing access to those without adequate means is limited to the *waiver of court fees*. It does not extend to mandating the provision of services. Here, the plaintiff is not simply asking that the Court waive a fee, but to mandate the provision of a service.

A record on appeal is not the only thing a party needs in order to obtain meaningful review. Many self represented appellants have their appeals dismissed because they are unable to successfully navigate the appellate court rules, and if they are able to navigate the rules, they lose because they are unable to effectively

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[13]Similarly, see Griffin v. Illinois, *supra*, 351 U.S. 12, Draper v. Washington, *supra*, 372 U.S. 487, Mayer v. Chicago, *supra*, 404 U.S. 189 and M.L.B. v. S.L.J., *supra*, 519 U.S. 102, all of which found a right to a *free transcript.*

present their case. However, there is no right to appointment of counsel to a plaintiff in a civil action at county expense to prosecute an appeal even though appointment of counsel is in many cases the only way the appellant would obtain meaningful review.

The plaintiff argues that "'Access to justice is a fundamental and essential right in a democratic society." (Opening Brief, page 12.) However, meaningful "access to justice" requires having the ability to establish a case. In a medical malpractice case such as this one, meaningful "access to justice" requires that an indigent plaintiff have an attorney and one or more expert witnesses. (The reality is that very few self represented indigent plaintiffs can prevail on a meritorious medical malpractice action without counsel.) These things are not provided to indigent plaintiffs.

Realistically, there is no meaningful "access to justice" if the plaintiff is provided with a court reporter but not a free transcript on appeal, or if he is provided with a reporter and a free transcript but not an attorney to prepare the appeal, or if he is provided with a reporter and a free transcript and an attorney but not expert witnesses to testify at trial should he obtain a reversal on appeal. A self represented indigent plaintiff has no meaningful "access to justice" without these things, yet neither the Legislature nor any court has mandated the provision of such services at county expense to indigent plaintiffs.

The fact that *some* appeals brought by indigent plaintiffs will not be successful because of a lack of a transcript does not justify mandating the provision of reporters to indigent plaintiffs in personal injury actions. In many or most appeals, a reporter's transcript is not necessary for effective appellate review. A reporter's transcript is not necessary to obtain reversal of an erroneous court ruling on a demurrer, a summary judgment motion, many dismissal motions (such as for violation of a discovery order or delay in prosecution), proceedings or trials in which a purely legal issue is presented, or in cases where a settled statement provides an adequate record on appeal. (In fact, as discussed *infra*, the plaintiff herein could have submitted a sufficient record on appeal with a settled statement.)

For example, the Court of Appeal reviewed a number of issues raised by Jameson in this appeal on the merits, despite the fact that there was no reporter's transcript, including Jameson's contention that his summary judgment motion was erroneously denied, his claim that he was erroneously denied a court reporter, his claim that the judge was impartial, denial of his motion to change venue, denial of his motion for judgment on the pleadings, and his claim of cumulative error. In addition, there was no reporter's transcript in two of the three prior appeals in this case in which Jameson obtained reversals, including reversal of the court's order of dismissal for failing to timely serve the defendant with process (Court of Appeal case no. D047824) and reversal of summary judgment (Jameson v. Desta, *supra*,

215 Cal. App.4th 1144). Thus, Jameson has had a lot of access to the Court of Appeal without reporter's transcripts.

The plaintiff overstates the extent of the denial of "access to justice" resulting from a court not providing a reporter to indigent plaintiffs. In most cases, an appeal can proceed on the merits without a record of the oral proceedings or with a settled statement summarizing those proceedings. There are a very limited number of cases (primarily, lengthy trials) in which an indigent plaintiff cannot effectively appeal without a reporter's transcript.[14] Even if providing court reporters to indigent plaintiffs could somehow provide them with access to the Court of Appeal in cases where a reporter's transcript is necessary to obtain meaningful review (which would also require that they be provided with a free transcript), only a small percentage of appeals would even be affected, because a transcript is not needed in the large majority of appeals.

Ultimately, the right of access that has been recognized for indigent plaintiffs in civil actions is the right to appear. Generally, this has been through the waiver of court fees. It has also included the right of an incarcerated plaintiff to appear telephonically to participate in the proceedings (Jameson v. Desta, *supra*, 179 Cal. App.4th at 674-675), although there is no right to be physically present in

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[14]With its $1,500 per case limit, the Transcript Reimbursement Fund is not going to provide a plaintiff with the means to appeal following a lengthy trial.

court (Payne v. Superior Court, *supra*, 17 Cal.3d 926-927). The right of access afforded to a plaintiff in a civil action is the right to *participate* in the proceedings, but has *not* been held to be the right to prosecute the action effectively, such as a right to counsel, expert witnesses, an interpreter, and a reporter's transcript.

Here, Mr. Jameson had the type of access that courts have held indigent *plaintiffs* in civil actions are entitled to, which is *the right to participate*. The courts have recognized that the right of access by a plaintiff in a civil action is not as extensive as the right of access by a defendant in a civil or criminal case. There is no right on the part of an indigent plaintiff in a civil case to a free transcript on appeal, and because there is no right to a free transcript, there is no right to have a reporter present in the courtroom.

The court's exercise of its discretion in not providing reporters in civil actions must be considered in light of the fiscal crisis facing the courts. In light of the extreme budget cuts faced by the courts in recent years, it was not an abuse of discretion for the San Diego Superior Court to limit its provision of court reporters in the manner it did.

As explained in Reed Smith LLP, *Why You Need a Court Reporter to Set the Record Straight* (September 2014),[15] "Privately arranging for and paying for

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[15]http://www.reedsmith.com/Why-You-Need-a-Court-Reporter-To-Set-the-Record-Straight-09-03-2014/

court reporters is the new normal. [¶] California's ongoing budget woes are the primary reason for this change. In 2013 alone, the courts absorbed nearly a half-billion-dollar cut. Chief Justice Tani Cantil-Sakauye has estimated that the courts need *at least* $266 million just to tread water this year. The Chief Justice also outlined a Three-Year Blueprint for a Fully Functioning Judicial Branch, which does not even mention the return of reporters to the courtroom."

The website maintained by the California Courts states on the page entitled *Reduced Court Services,*[16] "Superior courts statewide continue to face significant financial challenges as the result of the current fiscal crisis, which the Legislature has recognized as one of the most serious and dire ever to affect the state." As reported by KQED News, *Cutbacks Still Felt Deeply in California's Civil Courts* March 11, 2015),[17] "Since 2008, according to the Judicial Council of California, thousands of court staffers have lost jobs while 52 courthouses and more than 200 courtrooms have been shuttered. In some counties, residents must now make a long drive to a different city to simply pay a fine; in all, the council estimates that 2.1 million Californians have lost access to a courtroom in their community."

Courthouse closures can be a denial of meaningful access to the courts for many, including the poor, the elderly and the disabled, who are unable to make the

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[16]http://www.courts.ca.gov/12973.htm

[17]http://ww2.kqed.org/news/2015/03/12/court-budget-cuts-delay-justice

long journey to the courthouse now that local courthouses have been closed. Will the added cost of providing court reporters in some civil actions result in or contribute to the closing of another courthouse, thereby reducing access to justice by some? (The provision of illusory access could result in the loss of real access.) These are the type of budgetary decisions that should be left to the discretion of the individual county court systems, as the Legislature has done. The plaintiff has made no showing that the San Diego Superior Court abused its discretion in its policy regarding court reporters. "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." Walker v. Superior Court (1991) 53 Cal.3d 257, 272.

The San Diego County Superior Court made a rational decision not to provide reporters in civil actions, including those cases in which there are indigent litigants. The California Courts' website page for "Reduced Court Services"[18] contains all the written notices submitted by courts regarding proposed plans to reduce costs.[19] Three such notices were submitted by the San Diego County

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[18]www.courts.ca.gov/12973.htm

[19]Government Code section 68106(b) requires the submission of notices of plans to close courtrooms or close or reduce the hours of clerks' offices to the public and to the Judicial Council prior to putting such plan into effect. The statute does not require courts to provide notice of a plan to curtail the provision of court reporters. However, California Rules of Court, Rule 2.956 provides the method by which courts are to give notice of the unavailability of official court reporters. (The California Courts' website erroneously identifies the pertinent statute as Government Code section "6816" rather than "68106".)

Superior Court, on July 2, 2012, September 20, 2012, and October 22, 2014. These notices demonstrate how the court struggled with budgetary reductions and was faced with making difficult decisions regarding what services to curtail.

The July 2, 2012 notice states that the San Diego County Superior Court faced a reduced operating revenue of approximately 25% since the 2007-2008 budget, and that as a result, it closed courtrooms, laid off and furloughed staff, and cut operating and technology expenses.

In light of the foregoing, it was not an abuse of discretion on the part of the San Diego Superior Court to issue a policy that official court reporters are not provided in civil proceedings, including civil proceedings in which indigents are parties.

VI.

THE PLAINTIFF DID NOT HAVE A CONSTITUTIONAL RIGHT TO HAVE A REPORTER PROVIDED TO HIM

The plaintiff makes a sparse argument at pages 28-30 of his Opening Brief that he was denied Due Process and Equal Protection by not being provided with a free reporter at trial. However, the authorities are clear that an indigent litigant in a civil action does not have a Due Process or Equal Protection right to a free reporter or a free transcript.

A. Relevant United States Supreme Court Authority.

In Boddie v. Connecticut (1971) 401 U.S. 371, the United States Supreme Court held that there was a constitutional right to a waiver of court filing fees for indigents seeking a divorce. In doing so, the Court emphasized that its holding was narrow, limited to dissolution of marriage: "In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the *bona fides* of both appellants' indigency and desire for divorce are here beyond dispute. ... Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." Id. at 382-383.

In United States v. Kras (1973) 409 U.S. 434, the United States Supreme Court held that there was no constitutional right to waiver of a $50 fee to secure a discharge in bankruptcy. The court distinguished Boddie on the grounds that Boddie concerned a more fundamental right involving the marital relationship. "The denial of access to the judicial forum in *Boddie* touched directly, as has been noted, on the marital relationship and on the associational interests that surround

the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. [Citations.] ... Kras' alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level." Id. at 444-445.

The Court also explained that there was no denial of equal protection resulting from the filing fee. "Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated. [Citation.] Neither does it touch upon what have been said to be the suspect criteria of race, nationality, or alienage. [Citation.] Instead, bankruptcy legislation is in the area of economics and social welfare. [Citations.] This being so, the applicable standard, in measuring the propriety of Congress' classification, is that of rational justification." Id. at 446. The Court found that such rational justification for the fee existed. Id. at 446-449.

In Ortwein v. Schwab (1973) 410 U.S. 656, the United States Supreme Court held that Oregon's $25 appellate court filing fee did not violate the Due Process or Equal Protection rights of appellants in civil actions. The appellants in

that case challenged agency decisions that resulted in reductions in their welfare benefits. The Court recognized that its holding in Kras rather than its holding in Boddie governed the case, and rejected the argument that filing fee violated the appellants' due process rights: "The Court has held that procedural due process requires that a welfare recipient be given a pretermination evidentiary hearing. [Citation.] These appellants have had hearings. The hearings provide a procedure, not conditioned on payment of any fee, through which appellants have been able to seek redress. This Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellate system. [Citations.] Under the facts of this case, appellants were not denied due process." Id. at 658-660.

The Court in Ortwein rejected the argument that "the filing fee violates the Equal Protection Clause by unconstitutionally discriminating against the poor." Because the litigation was "'in the area of economics and social welfare,'" and no suspect classification was present, the Court applied a "rational justification" standard, and concluded that the standard was met: "The Oregon court system incurs operating costs, and the fee produces some small revenue to assist in offsetting those expenses." Id. at 660.

The Court also rejected the argument that Equal Protection was violated because Oregon waived appellate filing fees for certain types of indigents, including criminal appeals, certain habeas corpus petitions, and appeals from

terminations of parental rights: "If the Oregon courts have interpreted the applicable law to give special rights in the criminal area, in civil cases that result in loss of liberty, and in cases terminating parental rights, we cannot say that this categorization is capricious or arbitrary." Id. at 661.

In M.L.B. v. S.L.J., *supra*, 519 U.S. 102, a mother's parental rights to her two children were terminated. The mother sought to appeal, but was unable to pay for the preparation of the reporter's transcript on appeal, so her appeal was dismissed. The United State Supreme Court set forth the issue and its holding as follows: "May a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees? We hold that, just as a State may not block an indigent petty offender's access to an appeal afforded others ... so Mississippi may not deny M. L. B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent." Id. at 107.

In so holding, the Court recognized the existence of a fundamental interest at stake where parental rights were terminated: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' [citation] rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or

disrespect. [Citations.] M. L. B.'s case, involving the State's authority to sever permanently a parent-child bond, [footnote] demands the close consideration the Court has long required when a family association so undeniably important is at stake." Id. at 116-117.

B. Relevant California Authority.

In March v. Municipal Court, *supra*, 7 Cal.3d 422, wherein the California Supreme Court held that indigents convicted of misdemeanors were entitled to "a free transcript or adequate substitute" on appeal, the Court stated that "Equal protection does not require that in every instance where there is an indigent appeal that the state must supply a verbatim transcript. [Citing Griffin at 20.] Equal protection does require, however, that the state must afford the indigent defendant a 'record of sufficient completeness' to permit proper consideration of [his] claims." (Internal quotations omitted.) March at 428. Thus, even in criminal cases, the defendants are not entitled to free transcripts in all cases.

In Payne v. Superior Court, *supra*, 17 Cal.3d 908, the California Supreme Court held that when an indigent prisoner is named as a defendant in a lawsuit which threatens the prisoner's property, the prisoner is entitled to appointment of counsel where necessary to provide him or her with a meaningful opportunity to be heard. The Court recognized that "[t]he Fourteenth Amendment to the United

States Constitution prohibits a state from depriving any person of property without due process of law," and that "the United States Supreme Court has long recognized a constitutional right of access to the courts for all persons, including prisoners." Id. at 914.

The Court concluded that an incarcerated indigent *defendant* in civil litigation has a due process right of access to the court, and that denial of such access is also a violation of the defendant's equal protection rights. "In short, petitioner, as an indigent prisoner seeking to defend a civil suit, has a due process right of access to the courts which has been abridged. ... [¶] The denial of access also constitutes a prima facie equal protection violation. [Footnote.] Indigent prisoners are denied access to the courts to defend a civil suit, while free persons and prisoners possessing the means to hire counsel retain an access right. As has been established, to be heard in court to defend one's property is a right of fundamental constitutional dimension..." Id. at 920.

The Court limited its holding to incarcerated indigent defendants, and pointed out that its holding did not apply to indigent defendants who were not incarcerated or to indigent prisoners who are plaintiffs in civil actions. "All we decide is that when a prisoner is threatened with a judicially sanctioned deprivation of his property, due process and equal protection require a meaningful opportunity to be heard. How that is to be achieved is to be determined by the exercise of

discretion by the trial court." Id. at 926-927.

In Civil Service Commission of Los Angeles County v. Superior Court (1976) 63 Cal. App.3d 627, the Court held that an indigent person seeking judicial review of an administrative determination is not entitled to a free transcript of the administrative record even though the transcript is required so that the reviewing court may exercise its independent judgment of the evidence. Id. at 629. The Court held that due process and equal protection did not require the provision of free transcripts to those seeking to protect an economic interest: "Price also asserts that due process and equal protection of the law require that he be supplied with a free transcript in view of his indigent status. Authority is to the contrary where the interest which an appeal seeks to protect is an economic one." Id. at 631, citing Otwein v. Schwab, *supra*, 410 U.S. 656, 659; United States v. Kras, *supra*, 409 U.S. 434.

In Zumwalt v. San Diego County Department of Social Services, *supra*, 167 Cal. App.3d 835, where the indigent petitioner wanted to appeal the imposition of a conservatorship and his confinement in a county mental health facility, the court held that equal protection required that he be provided with a free transcript, stating, "Where one's liberty is at stake application of the strict scrutiny test is required." Id. at 839.

Here, the only interest at stake is the plaintiff's economic interest as a

plaintiff in a personal injury lawsuit. The courts have not recognized this interest as being so fundamental that a plaintiff in a civil action has a constitutional right to a court reporter or a free transcript on appeal.

VII.

THE ISSUE SHOULD BE LEFT TO THE LEGISLATURE

Ultimately, the decision whether to mandate the provision of reporters in such actions should be left to the Legislature. The Legislature can analyze the fiscal impact of such policy and it can fashion legislation that would be most effective if it chooses to do so. The Legislature has allowed the trial courts to adopt policies in this regard. The county courts, well aware of their budgetary needs and constraints, are in the best position to make such determinations.

For example, if reporters are to be provided to indigent litigants in civil actions, then the question arises whether they should be provided for all hearings or only trials. The record in this case reflects that there were numerous pretrial hearings held. Was the plaintiff entitled to have a reporter present at each of those? Arguably, reporters would have to be provided to indigent litigants at all hearings, because an appealable issue can arise at *any* hearing. Such decisions involve a weighing of the costs and benefits of providing a court reporter for pretrial hearings.

In addition, the Legislature can authorize funding that would provide a means for indigents to obtain transcripts, so that the reporting of proceedings is not a mere idle act. The plaintiff has provided this Court with no evidence regarding the fiscal impact on the courts of having to absorb the cost of providing reporters in all civil cases involving indigent litigants.

Government Code sections 68086 and 68086.1 allow each county to determine on its own whether to provide court reporters in civil actions, and the extent to which such services are provided. This allows for a flexible approach whereby each county can weigh its funding abilities and priorities. Except where there is a constitutional right to a court service (such as the provision of counsel or reporter's transcripts to indigent criminal defendants), the allocation of resources is best left to the Legislature and the individual county court systems.

The California Court's website contains a statement by the Chief Justice on the Governor's proposed 2016-2017 budget, in which Justice Cantil-Sakauye noted that the budget would provide $146.3 million in new funding for the courts. As stated by the Chief Justice, "The budget contains 'proposals to support efforts by the Judicial Council to improve court operations **and increase access.**'"[20] (Emphasis added.) Lack of access, such as the type argued by the plaintiff, is

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[20]"Chief Justice's statement in response to the Governor's Budget Proposal (Jan 7, 2016)," which can be found on the California Courts' website at the "Budget & Finance" page at the "Policy & Administration" tab. http://www.courts.ca.gov/34062.htm

resolved through the legislative process based on the State's ability to provide funding.

For example, the Chief Justice's statement on the proposed budget referenced above contains a link to a discussion of the proposed budget for the judicial branch, which states, "Given California's diversity, the court system is faced with significant linguistic challenges. The Judicial Council's current annual budget allocation for interpreter services is $94.5 million. To improve language access for limited English proficient court users, the Budget includes an additional $7 million General Fund to provide court interpreter services in civil proceedings."[21]

Thus, the court system faces all kinds of "lack of access" issues (courtroom closures, language barriers, lack of reporters in civil cases, and so on), but such issues are best left to the Legislature to resolve through legislation and funding, which the Legislature can and does do. In the absence of a constitutional right, which does not exist in this case, this Court should not intervene in this political process to mandate the provision of such services.

In City of Rohnert Park v. Superior Court, *supra*, 146 Cal. App.3d 420, in ruling that indigent litigants in a civil action are not entitled to free transcripts on

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[21]This can be found in the "Governor's Budget Summary – 2016-2017" at http://www.courts.ca.gov/documents/JudicialBranch_BudgetSummary.pdf.

appeal, the Court expressly recognized the issue presented herein, which is that the right of an indigent to appeal is "rendered a hollow right" if the appeal requires the preparation of an expensive transcript. Nevertheless, the Court held that it is for the Legislature to provide for free transcripts rather than the courts: "We recognize the force of the argument that the right to appeal in forma pauperis is rendered a hollow right if assertion of appellate contentions requires preparation of an expensive transcript or transcripts. We could envision the Legislature concluding that in forma pauperis appellants should be furnished free transcripts to support their appeals. But because the contrary approach is both standard practice and established decisional law, the Legislature must make clear its intention to provide such a right to in forma pauperis appellants if it makes that decision." Id. at 429.

Thus, it should be left to the Legislature to determine whether courts are required to provide free reporters to indigents and under what circumstances. The current statutory scheme does not provide for free reporters to indigent litigants in courts that do not provide such reporters, and if that is to be changed, it is the role of the Legislature to do so by amending section 68086.

VIII.

THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE PLAINTIFF FAILED TO UTILIZE AN ALTERNATIVE MEANS FOR SUBMITTING AN ADEQUATE RECORD ON APPEAL

The judgment should be affirmed even if this Court finds that the trial court erred in not providing a reporter at trial. Although the plaintiff was unable to submit a reporter's transcript on appeal, he had a perfectly acceptable alternative available to him by way of a settled statement, pursuant to California Rules of Court, Rule 8.137. This was not an appeal following a lengthy trial where the appellant is challenging the sufficiency of the evidence, wherein a settled statement may not be a viable means of presenting what happened in the lower court. (For example, see Sidebothom v. Superior Court (1958) 161 Cal. App.2d 624, in which the trial court refused to settle a statement following a 40-day trial that took place over seven months and in which 27 witnesses testified.) This was an appeal following opening statements, in which a settled statement merely had to summarize what was said during plaintiff's opening statement, including objections and rulings thereon. (See Sweet v. Markwart (1953) 115 Cal. App.2d 735, 743-745, in which Court of Appeal allowed an appeal from a nonsuit to proceed by way of a settled statement.)

In the cases that have found that indigents in certain types of cases are

entitled to free transcripts, the courts have held that such transcripts do not have to be provided where adequate alternatives to a reporter's transcript exist. Mayer v. Chicago, *supra*, 404 U.S. at 194; Draper v. Washington, *supra*, 372 U.S. at 495 ["full narrative statement based perhaps on the trial judge's minutes taken during trial" might be an adequate substitute]; Griffin v. Illinois, *supra*, 351 U.S. at 20 ["bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases"]; Crespo v. Superior Court, *supra*, 41 Cal. App.3d at 119 [there are "many cases in which an agreed or settled statement ... will be adequate"]; Rucker v. Superior Court, *supra*, 104 Cal. App. at 686 [bill of exceptions adequate alternative to reporter's transcript].

In Agnew v. Contractors Safety Association (1963) 216 Cal. App.2d 154, the plaintiff appealed from a judgment against him and the denial of his motion for new trial, as well as from the court's order denying the plaintiff's request for the preparation of the reporter's and clerks transcripts on appeal at public expense. The appellate court noted that "[t]he California Rules of Court provide for several methods of presenting a record on appeal," citing the rules allowing for a reporter's transcript, a clerk's transcript, an agreed statement and a settled statement. Id. at 160. The court recognized that in the absence of reporter's and clerk's transcripts, the plaintiff could have utilized an agreed statement or a settled statement. Id. at 160-161.

The "gist of plaintiff's appeal" in Agnew was insufficiency of the evidence to support the findings of fact. Id. at 162. Although the plaintiff submitted a settled statement, the Court determined that the plaintiff failed to include in it what was needed to review the issues on appeal. Id. at 162, fn. 6. However, of critical importance, it is clear from the Court's opinion that the plaintiff *could have* proceeded to obtain review of these issues had he submitted an adequate and properly prepared settled statement. In other words, a settled statement is a recognized and acceptable method of presenting a record on appeal involving review of *evidentiary* issues. There was nothing that prohibited the plaintiff in the instant action from proceeding by way of a settled statement other than the fact that he opted not to do so.

In Leslie v. Roe, *supra*, 41 Cal. App.3d 104, in holding that indigent plaintiffs in civil actions are not entitled to free reporter's transcripts on appeal, the Court recognized that an agreed statement or a settled statement may provide an adequate record on appeal: "Although appellants do not have the right to transcripts at public expense, the California Rules of Court provide alternative means of preparing the record on appeal which should prove adequate. The relevant facts may be stated in an agreed statement of the parties (rule 6) or a settled statement (rule 7). Perhaps only a partial reporter's transcript would be necessary (rule 4) and its cost might be low enough for appellants to afford." Id. at

108.

In Garziano v. Appellate Dept. (1978) 84 Cal. App.3d 799, one factor on which the appellate court relied in affirming a lower court order denying an indigent litigant's request for a free transcript on appeal was that the plaintiff did not request the preparation of an agreed or settled statement: "And we observe that Graziano **made no effort to secure an agreed or settled statement or partial reporter's transcript**." (Emphasis added.) Id. at 801.

Similarly, in the instant action, the plaintiff made no effort to secure an agreed or settled statement. Rule 8.137 requires that a party file a motion in the trial court in order to proceed by way of settled statement. "Unless there is some justifiable excuse, a trial judge may not arbitrarily refuse to settle the statement." Western States Const. Co. v. Municipal Court of San Francisco (1951) 38 Cal.2d 146, 148-149. The plaintiff in the instant action was no stranger to filing motions, as evidenced by the many motions and four appeals he filed in this case. He certainly could have proceeded by way of a settled statement in this case, but he chose not to do so.

The plaintiff states at page 20 of his Opening Brief that "the trial court in this case did *nothing at all* to ensure that Jameson had meaningful access to the appellate process following the fourth dismissal of his case." That would only be true if the judge denied a motion to use a settled statement. It was Jameson who

"did nothing at all" to ensure meaningful access to the appellate court by failing to seek to proceed by way of a settled statement.

Rule 8.137 demonstrates that a settled statement was intended to be used in situations exactly like that presented herein, where there was no reporter or where the plaintiff cannot afford to purchase a transcript. Two of the three alternative reasons set forth in the Rule for proceeding by way of a settled statement are that "[t]he designated oral proceedings were not reported or cannot be transcribed" and "[t]he appellant is unable to pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund..." Rule 8.137, subdivisions (a)(2)(B) and (a)(2)(c)).

As one commentator recognized, "It does appear, though, that where valid alternatives [to the provision of a free transcript on appeal] are available, the Court will insist that these alternatives be exercised." Stewart, "*The Right of an Indigent to a Free Transcript on Appeal in Civil Litigation*," 2 W. St. L. Rev. 220, 226 (1974).

The burden is on the appellant to present an adequate record on appeal. Maria P. v. Riles (1987) 43 Cal.3d 1281, 1295. As the proceedings were not reported, the plaintiff was *obligated* to seek to proceed by way of a settled statement. He was not entitled to sit on his hands and do nothing, and then seek a reversal on the grounds that he did not have an adequate record on appeal. "Pro.

per. litigants are held to the same standards as attorneys." Kobayashi v. Superior Court (2009) 175 Cal. App.4th 536, 543.

In Maria P., the defendants maintained that the trial court's failure to issue a statement of decision explaining how it reached its attorney fee award precluded review of the award. The California Supreme Court recognized that "The court's failure to specify in its written order the basis of its calculation of the award, and the absence in the appellate record of a transcript of the fee hearing or a settled statement of that proceeding (Cal. Rules of Court, rule 4(e)) make it impossible for us to determine whether the trial court based its award on the lodestar adjustment method." Id. at 1295. The Court affirmed the award because "defendants should have augmented the record with a settled statement of the proceeding. ... Because they failed to furnish an adequate record of the attorney fee proceedings, defendants' claim must be resolved against them." Id. at 1295.

Regardless of whether it was error to deny the plaintiff a court reporter, the judgment should be affirmed, because any error was harmless, as the plaintiff could have proceeded by way of a settled statement, and any error was waived in light of the plaintiff's failure to proceed by way of a settled statement. Any error on the part of the trial court in denying the plaintiff a court reporter could have been easily remedied had the plaintiff filed a motion for a settled statement. By failing to seek to proceed by way of a settled statement, the plaintiff failed to meet

his burden of presenting an adequate record on appeal, and he should be deemed to have waived any right to a reversal on the grounds that there did not exist an adequate record on appeal.

IX.

ANY ERROR WAS HARMLESS BECAUSE THE PLAINTIFF COULD NOT HAVE PURCHASED A TRANSCRIPT

In addition to the foregoing, the judgment should be affirmed even if the San Diego County Superior Court abused its discretion in its policy regarding reporters, because the plaintiff failed to demonstrate that he would have been able to obtain a transcript to use on appeal *even if* a reporter had been present for the trial.

As has been discussed herein, the Transcript Reimbursement Fund provides minimal funding for self represented parties, and the plaintiff made no showing that he would have been able to obtain reimbursement from the Fund to purchase a record on appeal. In fact, the plaintiff made no effort to utilize the Fund in the first three appeals he filed in this case, and there is no reason to believe he was even aware of the Fund's existence. It is pure speculation to suggest that the plaintiff would have been able to purchase a transcript through the Fund. In fact, he almost certainly would not have.

Code of Civil Procedure section 475 provides that no appealed judgment shall be reversed by reason of any error unless the record demonstrates that the error was prejudicial and that a "different result would have been probable" absent the error. The plaintiff has failed to show that a different result would have been probable if he had been provided with a reporter during trial.

X.

ANY ERROR WAS HARMLESS BECAUSE THE RECORD SHOWS THAT THE PLAINTIFF DID NOT HAVE AN EXPERT TO TESTIFY AT TRIAL

In Landeros v. Flood (1976) 17 Cal.3d 399, the California Supreme Court determined that the standard of care against which the acts of healthcare providers are measured is a matter within the knowledge of medical experts and can only be proven by their testimony. The rationale for requiring expert testimony in medical malpractice actions was succinctly stated by the Court in Barton v. Owen (1977) 71 Cal. App.3d 484, 494: "In most instances there is a need for expert testimony on the subject of just what constitutes medical negligence, because the average judge or juror does not possess the necessary level of knowledge about medical malpractice to decide on its own whether the (healthcare provider) was negligent."

In ruling on the defendant's motion for nonsuit, the trial court found that

Jameson did not have an expert available to testify at trial, and that he did not establish that his expert, Dr. Cooper, was unavailable.[22] (Typed Opn., p. 16.) Therefore, he could not submit Dr. Cooper's deposition testimony into evidence to establish a breach of the standard of care or causation. Code of Civil Procedure section 2025.620(c)). In his appellate brief filed in the Court of Appeal, Jameson stated, "Due to being a pauper, Jameson is unable to pay to have his expert testify in Court." (App. Op. Brf., page 14.) That constitutes an admission that he did not have an expert to testify at trial. Thus, regardless of whether the plaintiff was provided with a court reporter, he was unable to establish his case, and the judgment should be affirmed.

XI.

IF THE COURT FINDS IN FAVOR OF THE PLAINTIFF ON THE ISSUE PRESENTED, THE COURT SHOULD REMAND TO THE COURT OF APPEAL FOR FURTHER PROCEEDINGS

The trial court entered judgment in favor of Dr. Desta based on having granted *both* Dr. Desta's motion for nonsuit *and* Dr. Desta's motion to dismiss for failure to bring the matter to trial within the time required by Code of Civil Procedure section 583.310. As the Court of Appeal affirmed the judgment on the

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[22]Code of Civil Procedure section 2025.620(c).

nonsuit, it expressly declined to address whether the trial court properly granted the defendant's motion to dismiss for failure to timely bring the matter to trial. (Typed Opn., p. 3, fn. 1.) In the event this Court reverses the judgment, the defendant requests that the Court remand the matter to the Court of Appeal for a determination regarding whether the trial court properly granted the section 583.310 motion.

The section 583.310 motion was not an evidentiary hearing in which a reporter's transcript is needed for review. The appellate court can determine based on the record on appeal whether the motion was properly granted. Therefore, even if this Court reverses the judgment of nonsuit on the grounds that the plaintiff was not provided with a court reporter, the Court should still order further proceedings on the section 583.310 motion.

XII.

CONCLUSION

Based on the foregoing, the decision of the Court of Appeal should be affirmed.

DATED: May 10, 2016

LA FOLLETTE, JOHNSON,
DE HAAS, FESLER & AMES

By _____
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CERTIFICATE OF COMPLIANCE

Counsel certifies that the enclosed brief is produced using 13-point Roman type, including footnotes, and contains approximately 13,975 words. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: May 10, 2016

David J. Ozeran

PROOF OF SERVICE - 1013a, 2015.5 C.C.P.

STATE OF CALIFORNIA]
] ss.
COUNTY OF LOS ANGELES]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 865 South Figueroa Street, 32nd Floor, Los Angeles, California 90017-5431.

On May 11, 2016, I served the foregoing document described as **ANSWER BRIEF ON THE MERITS** on the interested parties in *Jameson v. Desta*, California Supreme Court case no. S230899, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I caused such envelope to be served via **overnight mail**.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 11, 2016, at Los Angeles, California.

Ruth Vowels