S216566

IN THE SUPREME COURT OF CALIFORNIA

F.P.,
Plaintiff and Respondent

v.

JOSEPH MONIER,
Defendant and Appellant.

Third District Court of Appeal
(Case No. C062329)

County of Sacramento Superior Court
Honorable Judge Robert Ahern
(Case No. 06AS00671)

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

After a five-day bench trial, the trial court found that Defendant-Appellant Joseph Monier repeatedly sexually abused Plaintiff-Appellee F.P. when she was ten years old. On appeal, Monier did not challenge the trial court's finding that he molested F.P., but sought automatic reversal on the ground that the trial court failed to render a statement of decision. According to Monier, the trial court erred in not setting forth findings on the issue of apportionment of noneconomic damages between him and F.P.'s father, who was not named in the suit but who also sexually molested F.P. when she was a child. The Court of Appeal rejected Monier's argument. The court held that Monier was required to show prejudice from the absence of a statement of decision—a showing he could not make because he had forfeited any right to apportionment by failing to raise the issue at trial.

The Court of Appeal's conclusion is correct, and this Court's further review is not warranted. Monier first seeks this Court's review on whether a trial court's failure to render a statement of decision is reversible *per se*. But as the Court of Appeal noted, and as he concedes, Monier never asked for a statement of decision on the only issue relevant to this appeal (apportionment). In addition, this Court has observed (and Monier concedes) that the absence of a statement of decision is not invariably subject to *per se* reversal. Furthermore, Monier's concern that trial

courts will disregard the duty to issue statements of decision if this kind of error is not subjected to the rare and drastic remedy of *per se* reversal is altogether absent in this case. The record in this case does not show that the trial court was even aware of the request for a statement of decision when it entered judgment.

Review on this issue is also unwarranted because the lack of findings on apportionment was of no consequence. As the Court of Appeal concluded, Monier was not entitled to apportionment of the $250,000 in noneconomic damages awarded, because, as he concedes, he did not ask the trial court during trial to allocate damages between him and any other alleged tortfeasor.

The second issue presented in the petition—whether a defendant can wait until after trial to ask the court to apportion damages—also does not merit this Court's review. Monier asserts no split of authority among the courts of appeal and cites no authority in support of the procedure he advocates: vaguely raise a boiler plate affirmative defense of comparative fault in the answer, fail to mention the affirmative defense throughout trial or in the request for a statement of decision, and then surface the issue for the first time in post-trial objections to a statement of decision. Indeed, courts have rejected this kind of belated effort to inject new issues into a case. Further review of this issue is unwarranted.

The petition for review should be denied.

BACKGROUND

Defendant Joseph Monier molested F.P., his ten-year-old cousin, while she was under the care and supervision of his parents. (Slip opn. at p. 3.) In 1990 and 1991, Monier committed various acts of sexual battery, including sodomizing F.P. and forcing her to orally copulate him. (*Ibid.*)

In 2006, F.P. filed suit against Monier and his parents, seeking damages for the injuries she suffered as a result of Monier's sexual assaults. (Slip opn. at p. 4; Clerk's Transcript ("C.T.") at pp. 1-8.) Her complaint alleged seven causes of action, including four counts of sexual battery (lewd and lascivious acts with a minor, oral copulation with a minor, sexual penetration with a minor, and sodomy with a minor), intentional infliction of emotional distress, negligence, and gender violence in violation of Civil Code § 52.4, subdivision (a). (Slip opn. at p. 4; C.T. at pp. 3-8.)

Monier filed an answer with a general denial and sixteen different affirmative defenses. (Slip opn. at p. 4; C.T. at pp. 18-24.) His affirmative defenses alleged, among other things, that F.P had assumed the risk of his molestations and had consented to them, that his conduct was privileged, that F.P.'s complaint was time-barred, and that comparative fault principles required apportionment of any liability for the molestations. (C.T. at pp. 20-23.) With respect to Monier's comparative fault defense, the answer named no other

individual (other than F.P. herself) who allegedly caused F.P.'s injuries. (See *id.* at p. 20.)

The case was tried without a jury by the Honorable Robert Ahern, a retired judge from Santa Clara County assigned to the case. (Slip opn. at pp. 1, 5.) During trial, F.P.'s treating psychologist testified that F.P. suffered from post-traumatic stress disorder caused by molestations perpetrated by both Monier and F.P.'s father. (*Id.* at p. 3.) A psychologist who performed a one-day evaluation of F.P. testified that the molestations by F.P.'s father were more traumatic than those by Monier. (*Id.* at pp. 3-4.)

In closing argument, Monier's counsel argued that the molestations never happened. (Reporter's Transcript ("R.T.") at 902:16 through 903:4.) Instead of asserting a right to apportionment, counsel argued that, with respect to F.P.'s claim for emotional distress damages, "no fixed standard exists for deciding the amount. The court is to use its judgment to decide a reasonable amount." (R.T. 909:9-12 [discussing civil jury instruction 3905(a)].) He continued: "for all the reasons I indicated earlier about [F.P.'s] testimony as to her alleged injuries, there are none. So there is no basis upon which the Court can grant or award emotional distress damages. First because the incidents never happened, but second, because there's no evidence of it." (R.T. 909:13-19.)

On April 29, 2009, the trial court orally announced its decision in favor of F.P. (Slip opn. at p. 5.) The court found that Monier molested F.P. numerous times when she was about ten years old, that his conduct was "outrageous," and that his acts were a substantial factor in causing F.P.'s injuries. (R.T. 922:18-23.) The court awarded her damages of approximately $305,000, of which $250,000 represented general noneconomic damages. (Slip opn. at p. 5.) The court directed F.P.'s attorney to prepare the judgment. (R.T. 923:22-23.)

Later that day, Monier filed a request for a statement of decision asking the court to set forth, as relevant here, "the basis upon which the Court awarded special damages, the basis upon which the court awarded emotional distress damages, the basis upon which the court awarded past and future medical expenses, and the basis upon which the court granted lost wages." (Slip opn. at p. 5; Augmented C.T. at p. 1.) The request made no mention of apportionment, comparative fault, F.P.'s father, or any other alleged tortfeasor. (See slip opn. at pp. 5, 15; Augmented C.T. at p. 1.) The proof of service accompanying the request indicated that it was sent to F.P.'s attorney via regular mail. (Augmented C.T. at p. 2.) Meanwhile, F.P.'s attorney prepared the proposed judgment and faxed it to Monier's attorney for approval as to form. (See slip opn. at p. 5.) When Monier's attorney failed to respond to the faxed judgment, F.P.'s attorney telephoned Monier's attorney's office and left a message advising him that the trial court judge

needed the judgment immediately as he was leaving Sacramento on May 1, 2009. (*Ibid.*) Still there was no response. (*Ibid.*) On May 1, 2009, F.P.'s attorney submitted the proposed judgment to the court with a declaration explaining his efforts to obtain Monier's counsel's approval as to form. (*Ibid.*)

That same day, the day the visiting trial court judge was due to leave Sacramento, the court entered judgment. (Slip opn. at p. 5; C.T. at pp. 33-34.) Among other things, the judgment concluded that "Defendant Joseph Monier molested his biological cousin, Plaintiff [F.P.] numerous times when she was ten years old, including acts of unlawful penetration, sodomy, oral copulation of him and other lewd and lascivious acts." (C.T. at p. 34.) The record does not show that the court took notice of Monier's request for a statement of decision before issuing the judgment, and no statement of decision was rendered. (Slip opn. at pp. 5-6.)

Monier appealed the judgment, contesting the trial court's damages award but not his liability for sexually battering F.P. (See slip opn. at p. 2.) Among other things, he argued that the trial court's failure to render a statement of decision following his timely request required reversal *per se*, without any inquiry into prejudice. (*Ibid.*) Under his theory, the absence of a statement of decision denied him the ability to assure himself that none of the $250,000 in noneconomic damages he was ordered to pay was attributable to F.P.'s father; he also claimed that the lack of a statement deprived him of the opportunity to request that

noneconomic damages be apportioned between him and F.P.'s father. (*Id.* at pp. 2, 15.)

The Court of Appeal rejected Monier's arguments. The court concluded that the trial court had erred in not issuing a statement of decision, but that, under Article VI, section 13 of the state Constitution, Monier was not entitled to relief unless he could show that he was harmed by the error. (Slip opn. at pp. 6-7.) Monier could not make such a showing, the court concluded, because he had forfeited any right to apportionment by failing to timely raise the issue at trial. (*Id.* at pp. 14-17.) The Court of Appeal explained that, while Monier had pleaded comparative fault in his answer, he "never raised the issue of apportionment at trial. He did not request that noneconomic damages, if any, be apportioned between himself and *any* other individual or entity, much less between himself and plaintiff's father. Nor did he argue how they should be apportioned." (*Id.* at p. 15, italics in original.) The court also rejected Monier's claim that he was entitled to raise the apportionment issue in his objections to the trial court's statement of decision. (*Id.* at pp. 15-16.) "Having failed to raise the issue of apportionment at trial or in his request for a statement of decision, defendant would have had no basis to object to the trial court's proposed statement on the ground the trial court failed to apportion plaintiff's noneconomic damages between himself and plaintiff's father." (*Ibid.*) In light of this conclusion, the Court of Appeal declined

to consider F.P.'s additional argument that intentional tortfeasors are not entitled to apportionment under Proposition 51. (*Id.* at p. 17, fn. 8.)

The Court of Appeal reduced the trial court's lost income calculation and held that Monier was entitled to offset his parents' pretrial settlement against F.P.'s award of economic damages. (Slip opn. at pp. 17-24.) As modified, the court affirmed the judgment. (*Id.* at p. 24.)

Monier filed a petition for rehearing, contending, among other things, that, because no party had briefed the application of the prejudicial-error standard in Article VI, section 13 or Code of Civil Procedure section 475, the court had erred in reaching that issue. (Appellant's Petn. for Rehearing at pp. 2-4.) The Court of Appeal denied rehearing, and this petition for review followed.

ARGUMENT

I. THE COURT SHOULD DENY REVIEW ON WHETHER THE ABSENCE OF A STATEMENT OF DECISION REQUIRES *PER SE* REVERSAL, WITHOUT REGARD TO PREJUDICE.

The Court should deny review on the first issue presented in the petition: whether a trial court's failure to render a statement of decision is reversible *per se*. In this case, Monier seeks *per se* reversal based on the trial court's failure to make findings on the apportionment of noneconomic damages between him and F.P.'s father. Monier asserts that, without a statement of decision, he could not discern

whether the trial court allocated damages between him and F.P.'s father as he claims was required. (Slip opn. at p. 2; Petn at p. 24.) But as the Court of Appeal noted, Monier never asked the trial court to render a statement of decision on that issue. Moreover, the Court of Appeal correctly held that Monier had to show prejudice before disturbing the judgment in this case. Monier could not make such a showing because he forfeited any right to argue for apportionment of damages by failing to raise the issue at trial.

A. Monier Waived Any Right to a Statement of Decision on Apportionment.

By failing to request a statement of decision on apportionment, Monier waived his right to complain about the absence of a finding on that issue. Code of Civil Procedure section 632 expressly requires parties to specify the issues on which they seek findings. (Code Civ. Proc., § 632.) "Section 632 is unmistakably clear that '[t]he request for a statement of decision *shall* specify those controverted issues as to which the party is requesting a statement of decision.'" (*City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1292, italics in decision, quoting Code Civ. Proc. § 632) (hereafter *City of Coachella*).)

A party who fails to request findings on a specific issue may not complain about a lack of findings on that issue. (See *Atari Inc. v. State Bd. of Equalization*

(1985) 170 Cal.App.3d 665, 675 [failure to request findings on specific issues waives right to appeal on those issues]; see also *In re Marriage of Hebbring* (1989) 207 Cal.App.3d 1260, 1274 [same; stating that parties may waive statement as to particular controverted issue by failing to specify the issue].) For example, in *City of Coachella*, the Court of Appeal held that a defendant's failure to specify the affirmative defense of laches as an issue to be addressed in the statement of decision waived the defendant's right to object to the trial court's failure to address that issue. (*Supra*, 210 Cal.App.3d at p. 1292.) Although the defendant in *City of Coachella* made no request for a statement of decision, the court's analysis is on point: the court reasoned that waiver in that case arose not from the defendant's failure to request a statement of decision, but rather from its failure to specify laches as an issue to be addressed. (*Ibid.* [defendant's "failure to specify laches as an issue to be addressed" operated as waiver; "[h]aving failed to specify that the statement of decision should address the issue of laches, [defendant] is deemed to have waived its right to object to the failure of the statement of decision to do so"].)

In this case, there is no dispute that Monier failed to seek findings on apportionment. The Court of Appeal noted that Monier did not raise the issue of apportionment in his request for a statement of decision. (Slip opn. at p. 15). And Monier himself conceded that his request was silent on this issue. (See *ibid.*; see

also Appellant's Opening Brief at p. 22 ["[Monier's] request for statement of decision did not ask for findings on apportionment and offset"].) Accordingly, Monier waived any right to a statement of decision on apportionment.

B. In Any Event, the Court of Appeal Correctly Held that the Absence of a Statement of Decision Here Was Not *Per Se* Reversible.

Review should be denied for the additional reason that the Court of Appeal correctly held that the trial court's failure to render a statement of decision was not reversible *per se*. Article VI, section 13 of the state constitution provides that "[n]o judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; see also Code Civ. Proc., § 475.) This principle ensures that a reversal will not be ordered unless it is reasonably probable that the outcome would be more favorable to the appealing party in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

This Court has confirmed that the lack of findings by a trial court does not invariably require reversal. For example, in *West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, 613, the Court observed that a trial court's failure to make a finding would not be reversible when the finding would be

adverse to the complaining party—in other words, when the lack of a finding causes the complaining party no harm. Likewise, in *Guardianship of Brown* (1976) 16 Cal.3d 326, the Court stated that "failure to find on a material issue will *ordinarily* constitute reversible error." (*Id.* at p. 333, italics added.) Put another way, such a failure does not require reversal *per se* in all cases. (See *ibid.*) In *Brown*, moreover, the Court held that the trial court's failure to make a finding on a particular issue (the best interest of the incompetent person) required reversal, but only after concluding that the complaining party had introduced substantial evidence to support a finding in her favor. (*Id.* at p. 336; see also *Edgar v. Hitch* (1956) 46 Cal.2d 309, 312 [reversing where failure to make a finding "would constitute prejudicial error" where, absent a finding, support for the judgment could not be ascertained].)[1] And then the Court went on to conclude that, had the trial court made a finding on the issue adverse to the complaining party, such a finding was not supported by substantial evidence. (*Id.* at p. 340 [reversing order appointing mother guardian "not only because of the trial court's failure to make a finding on a material issue, but also because, assuming such a finding had been made, it would not have been supported by substantial evidence"].)

[1] Monier's assertion that the Court stated that failure to make required findings is prejudicial error in *City of Vernon v. City of Los Angeles* (1955) 45 Cal.2d 710 (Petn. at p. 13) is incorrect. The cited passage in *City of Vernon* appears in the dissent. (See *id.* at p. 727 (dis. opn. of Carter, J.).)

Monier claims that there are certain "exceptions" to a general rule of *per se* reversibility. (Petn. at pp. 16-17.) But Monier's exceptions swallow his purported rule. In particular, Monier argues that an appellate court need not reverse when "there is no evidence that could support a finding in appellant's favor." (*Id.* at p. 17.) But that is another way of saying that an appellate court need not reverse when the error did not harm the complaining party.

As Monier asserts, some courts of appeal have concluded that a trial court's failure to render a statement of decision is reversible *per se*. (E.g., *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1129.) But, unlike here, *per se* reversal in other cases served what Monier sees as one of the primary purposes of that drastic remedy, namely, ensuring that trial courts do not, in his view, "disregard the mandate" of Section 632. (Petn. at p. 22.) For example, in *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, the trial court responded to a request for a statement of decision by noting "'that he did not do findings because he did not have a secretary'" and that defendants were not entitled to findings. (*Id.* at p. 1397.) Concluding that the "refusal of the trial court to comply because the court did not have a secretary was frivolous at best," the Court of Appeal explained that *per se* reversal applied. (*Id.* at pp. 1397-1398 [reversing for other reasons]; see also *Whittingon v. McKinney* (1991) 234 Cal.App.3d 123, 127-129 [discussing application of *per se* reversal where trial court followed a "'special little

procedure,'" which designated entire reporter's transcripts as the statement of decision, but holding appellant waived right to statement of decision by acquiescing in the trial court's nonstatutory procedure].) Here, the record bears no indicia of the trial court's disregard of a duty to render a statement of decision. As the Court of Appeal observed, the record does not show that the trial court even saw the request for a statement of decision before rendering judgment. (Slip opn. at pp. 5-6.)

C. The Absence of a Statement of Decision Did Not Prejudice Monier.

Review should also be denied because the absence of a statement of decision in this case was of no consequence. Monier argues that without a statement of decision he could not assure himself that none of the $250,000 in noneconomic damages he was ordered to pay was attributable to F.P.'s father. But as the Court of Appeal found, Monier forfeited any right to apportionment by failing to raise the issue at trial. Monier's claim that he was entitled to wait to raise the issue until he filed objections to a proposed statement of decision is without merit.

Because apportionment is an affirmative defense, defendants bear the burden of proving their entitlement to an allocation of damages. (See *Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 369.) In the jury trial context, a defendant must propose a special verdict form requesting allocation of damages or else forfeit any

right to apportionment. (*Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1398; see also Petn. at p. 7.) A defendant's obligation to bring issues to the attention of the trial court is no different. (See *Del Cerro Mobile Estates v. Proffer* (2001) 87 Cal.App.4th 943, 951 [claim to apportionment of attorneys' fee waived on appeal where appellant failed to raise issue with trial court].) It is not sufficient to plead comparative fault in an answer as one of sixteen affirmative defenses and then, on appeal, argue that snippets of testimony support that defense. Rather, the defendant must explicitly bring the issue to the trial court's attention.

Monier's further claim that a litigant in a bench trial may surface issues for the first time in objections to a statement of decision (Petn. at p. 21) is incorrect. Contrary to Monier's view of the case law (*id.* at p. 7), parties may not raise a theory for the first time in post-trial objections to the trial court's statement of decision.

For example, in *Colony Ins. Co. v. Crusader Ins. Co.* (2010) 188 Cal.App.4th 743, the Court of Appeal held that a losing party waived a theory of liability by raising it for the first time in its objections to the statement of decision. There, plaintiff Colony Insurance Company sought a declaration that defendant Crusader Insurance Company improperly refused to defend a lawsuit against an insured. (*Id.* at p. 746.) Crusader took the position that it had no duty to defend the insured because of misrepresentations made in the insured's application for

insurance coverage. (*Id.* at p. 748.) At trial, evidence was introduced that Crusader had failed to follow its internal guidelines in investigating the insured's application. (*Id.* at pp. 748-749.) After the trial court ruled for Crusader, Colony argued in its objections to the court's proposed statement of decision that Crusader had waived its right to deny coverage or was estopped from denying coverage based on its alleged failure to follow its internal guidelines in investigating coverage. (*Id.* at p. 749.) The Court of Appeal held that Colony had forfeited the waiver/estoppel argument because it was neither raised in Colony's complaint nor presented as a theory at trial. (*Id.* at pp. 750-751.) Rejecting Colony's claim that its post-trial objection to the statement of decision was sufficient, the court explained that statements of decision "cover[] only issues *litigated in the case.*" (*Id.* at p. 750, italics added.) Because the waiver/estoppel argument "was not litigated at trial, ... the trial court was under no obligation to address it." (*Id.* at p. 751.) Colony was not entitled to raise a new argument "under the guise of an objection to the court's failure to resolve a controverted issue." (*Ibid.*)

The same is true here. Monier may not, "under the guise of an objection" to a statement of decision, inject an issue that he did not raise during trial. By failing to seek apportionment at trial, Monier forfeited any claim he had to allocate noneconomic damages.

II. THE COURT SHOULD DENY REVIEW ON THE ISSUE OF WHETHER MONIER WAS ENTITLED TO WAIT UNTIL AFTER TRIAL TO SEEK APPORTIONMENT.

The Court should also deny review on the second question presented in the Petition: whether a defendant may wait until post-trial objections to a statement of decision to bring apportionment to the trial court's attention.

As just explained, the Court of Appeal's conclusion that Monier was obligated to raise apportionment at trial is correct. (See *supra* at pp. 14-16.) Monier could not reasonably argue that the court was compelled to review and address each of Monier's sixteen affirmative defenses pled in his answer, just in case Monier later claims reliance on one of them as crucial to his defense. Monier should not now be heard to claim that he was prejudiced by the court not giving an answer to a question that Monier never asked. At trial, the onus was on Monier to specifically raise any affirmative defense that was pled in his answer that he believed the court should consider. Even assuming that Monier was entitled to assert apportionment as a defense, for Monier to remain silent during trial, and then wait until after trial concludes, and ostensibly after a statement of decision is prepared, to assert the defense invited what Monier now belatedly claims is error. Because he did not raise the defense at trial, he forfeited his right to assert apportionment of damages as a defense.

In addition, the issue satisfies none of the criteria for this Court's review. (See Cal. Rules of Court, rule 8.500(b).) Monier cites no decisions that have deviated from the approach taken by the Court of Appeal here. (Petn. at p. 8.) Indeed, as explained above, post-judgment objections to a statement of decision have been found to be inadequate.

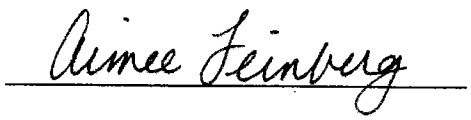
The issue also implicates no important question of law necessitating this Court's intervention. Although Monier claims that the process for asserting apportionment in bench trials is vitally important, he cites no other reported decision in which the issue has even come up. (Petn. at p. 8.)

CONCLUSION

For the foregoing reasons, F.P. respectfully requests that Monier's petition for review be denied.

March 11, 2014

Respectfully submitted,



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CERTIFICATE OF WORD COUNT
(California Rule of Court 8.504(d)(1))

This brief, including footnotes but excluding those portions of the brief excludable under California Rule of Court 8.504(d)(3), contains 4,353 words as counted by the Microsoft Word word processing program.

Dated: March 11, 2014

Aimee Feinberg

Aimee Feinberg

PROOF OF SERVICE

I am employed in the County of Yolo, State of California. I am over the age of 18 and not a party to the within action. My business address is UC Davis Law School, 400 Mrak Hall Drive, Davis, CA 95616.

On March 11, 2014, I served the foregoing document described as:

ANSWER TO PETITION FOR REVIEW

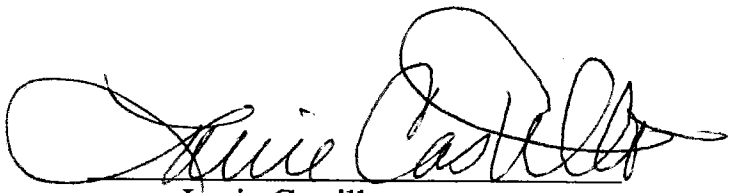
on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

[X] By Mail: I caused to be enclosed a copy of the aforementioned document in a sealed envelope and caused it to be deposited with postage prepaid with the U.S. Postal Service.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 11, 2014, at Davis, California.



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