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IN THE SUPREME COURT OF CALIFORNIA

F.P.,

Plaintiff and Respondent,

vs.

JOSEPH MONIER,

Defendant and Appellant.

No. S216566

3 Civil No. C062329

Sacramento County Superior Court
Case No. 06AS00671

REPLY TO ANSWER TO PETITION FOR REVIEW

After a decision of the
Court of Appeal, Third Appellate District

Appeal from a Judgment of the Superior Court
Of the State of California, County of Sacramento
Honorable Robert Ahern, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER

INTRODUCTION

Over a century of appellate decisions, beginning with this Court's earliest decisions, hold that the failure to render findings on a contested issue when required is error reversible *per se*. The court of appeal reaffirmed this long-standing rule in a published decision just four months before its decision in this case.[1] Nevertheless, the court now repudiates its own precedent and those of every other California appellate court, including this Court.

The case does not present unique facts distinguishing it from prior cases on point. The court of appeal simply chose to abrogate the long-standing precedents.

The Court of appeal also held that, notwithstanding the express purpose and directives of Proposition 51, Monier "forfeited" his right to apportionment of damages "by failing to raise the issue at trial." Slip Op. at 14. This Court, however, has repeatedly held that, under Code of Civil Procedure § 632, a party is entitled to findings on all controverted, material issues raised by the pleadings and the evidence. *James v. Haley* (1931) 212 Cal. 142, 147; *Fairchild v. Raines* (1944) 24 Cal.2d 818, 830 (citing *James*).

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[1] *Wallis v. PHL Associates, Inc.*, 220 Cal.App.4th 814 (Filed October 17, 2013), reh'g denied (Nov. 12, 2013), review denied (Jan. 29, 2014).

Monier's answer affirmatively asserted his right to apportionment. F. P.'s own evidence at trial was that her own father's detestably wrongful acts were a substantial cause of her injury and had a more traumatic effect than what the trial judge found Monier did. One cannot deny—and F. P. does not—that the issue was squarely raised by the pleadings and evidence.

When Monier timely and properly requested a statement of decision explaining the factual and legal basis 'upon which the court awarded emotional distress damages'" (Slip op. at 5), he should have been entitled to a statement decision in which the court set forth the basis for finding that the emotional damages awarded against him were in the amount for which he could properly be held liable under Proposition 51.

ARGUMENT

I
THIS CASE SQUARELY PRESENTS THE ISSUE WHETHER FAILURE TO RENDER A STATEMENT OF DECISION ON TIMELY REQUEST IS REVERSIBLE ERROR PER SE

A. Monier did not waive his right to a statement of decision on apportionment of damages; his request for a statement of decision on damages required the court to address allocation in explaining the amount of damages awarded against him.

Monier does not dispute the basic rule that the failure to specify a particular issue in a request for statement of decision waives the lack of a finding on that issue. What the request is to specify, however, are "principal controverted issues at trial" as to which a statement of decision is

requested. Code Civ. Proc. § 632. A request is sufficient if it asks the trial court for a statement on disputed material issues, on ultimate facts, since those are the facts the court is required to explain. *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1125

Unlike the appellants in the cases F. P. cites, Monier did not fail to request a statement of decision on the relevant ultimate fact. His request was for a statement of decision explaining, among other things, "'the basis upon which the Court awarded special damages, the basis upon which the court awarded emotional distress damages. . . .'" Slip op. at 5. A request for statement of decision on damages is sufficient. *Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, 167-168, superseded by statute on another point as stated in *In re Marriage of Gray* (2002) 103 Cal.App.4th 974, 978–979 (reversing judgment where trial was solely on general and special damages and trial judge refused to issue statement of decision apportioning lump sum damages between general and special on timely request).

Although Monier's request for statement of decision did not say that he was requesting a statement of decision on *apportionment* of damages, the court necessarily had to address the issue in explaining the factual and legal basis for the damage award. Had it done so, it would have to state whether the amount was F. P.'s total damages or the percentage allocated to him based on his comparative fault. Monier raised apportionment in his answer. Slip op. at 4, 15. Supporting evidence was presented at trial

through F. P.'s own testimony detailing her father's sexual abuse at the same time that, she claimed, Monier molested her (Slip op. at 23; see also 1 RT 105:21-22), and the testimony of her expert that the abuse by her father had a "'dramatically more traumatic'" effect on her emotional state and psychological condition than anything she claimed Monier did (Slip op. at 4).

Had the trial court, in response to Monier's request, complied with Code of Civil Procedure § 632 and California Rules of Court, rule 3.1590(f), it could have designated Monier's counsel to draft a proposed statement of decision in which he could have provided a statement as to damages and, in particular, apportionment.

Alternatively, if the court had elected to prepare the proposed statement of decision itself or designated F. P.'s attorney to draft it, Monier would have had the opportunity to object if it did not address apportionment. The very purpose of objections to a proposed statement of decision is to pinpoint deficiencies in the statement, allowing the court to focus on facts the objecting party contends the statement does not resolve. *Ermoian v. Desert Hosp.* (2007) 152 Cal.App.4th 475, 498, citing and quoting *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380.

The court of appeal's holding – that a party requesting apportionment based on comparative fault must request that an allocation

be made – rests on cases tried to a jury where there was no evidence supporting allocation, no request for a special verdict on the issue, or both. *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1398–1399; *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 444–445. By failing to ask the jury to make a finding on the issue in deciding the facts, the party seeking allocation necessarily waives an express decision on the issue.

In a bench trial, however, where a statement of decision is timely and properly requested, the case is not decided until the court issues its statement of decision. See *Ruiz v. Ruiz* (1980) 104 Cal.App.3d 374, 378. Even then, as discussed in the petition for review, the court may amend or change his or her findings at any time before judgment is entered. *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1100; *Phillips v. Phillips* (1953) 41 Cal.2d 869, 874.

B. There is manifest need for this Court to resolve conflicting appellate decisions on the important question whether failure to render a statement of decision is reversible *per se*.

F. P. does not dispute that this case creates a conflict between the appellate districts, and conflicts as well with decisions of this Court, on whether failure to render a statement of decision is reversible error *per se*. Nor does F. P. deny that the issue is important as it affects every civil case tried to a judge, rather than a jury.

Instead, F. P. argues that this Court has "confirmed" that a failure to render findings "does not invariably require reversal." Answer to petition

for review at 11 (Answer). F. P. ignores the long history of decisions from this Court, particularly since the adoption of article VI, § 13 (previously § 4 ½) of the California Constitution, in which the Court has consistently held that, if the trial court renders judgment without making findings on all material issues raised by the pleadings and the evidence, "the case *must* be reversed." *James*, 212 Cal. at 147 (emphasis added); and see cases collected at Petition for Review, pp. 3-4 and 12-14.

The cases on which F. P. relies are not to the contrary. In *West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, one of appellant's claims was that respondent had structured financing transactions to evade statutory restrictions and charge usurious interest. The trial court made no finding on the point, although it stated in its decision that there was no evidence that respondent's purpose had been to evade the statute. *Id.* at 612-613. Appellant, however, did not claim that the trial court failed to make a finding on a material issue. *Id.* at 613. The Court, in dictum, commented that, "in any event [appellant] could not complain since the evidence is such that had a finding been made it would have been adverse to [appellant]." *Id.* Nowhere in *West Pico* did the court mention article VI, § 13 or use the terms "prejudicial" or "harmless."

Candidly, the Court did cite an earlier case, *Bowyer v. Burgess* (1960) 54 Cal.2d 97, in which it affirmed a judgment despite the trial court's failure to make findings on a material issue, holding that such a

failure "is harmless where the evidence is such that 'had a finding been made on such issue it would have been adverse to the contentions advanced by the appellant.'" *Id.* at 101, quoting *Miller v. Ambassador Park Syndicate* (1932) 121 Cal.App. 92, 97. *Miller*, in turn, cited several cases from this Court and the courts of appeal to the same effect. *Id.* at 97.

The evidence here, however, would not compel a finding adverse to Monier on the issue of apportionment of damages. To the contrary, the evidence is that F. P.'s father's acts of sexual abuse were not only a cause of her emotional distress, the only injury for which she sought general damages, but were "'dramatically'" more traumatic to her. Slip op. at p. 4. That evidence not only supports a finding that damages should be apportioned, but a finding that the greatest portion of her damages should be allocated to her father and that Monier is liable for only a lesser percentage. In these circumstances particularly, every court has agreed that, unless waived, the failure to make a finding when required is reversible *per se*. *James*, 212 Cal. at 147; *Hubbard v. San Diego Elec. Ry. Co.* (1927) 201 Cal. 53, 56; *Fairchild v. Raines* (1944) 24 Cal.2d 818, 830 (quoting *James*; "'findings are required on all material issues raised by the pleadings and evidence'").

F. P., as did the court of appeal (Slip op. at 12) also teases out a rule, that failure to make a finding is reversible only if it can be shown to be prejudicial, from this Court's statement that "failure to find on a material

issue will ordinarily constitute reversible error." *Guardianship of Brown* (1976) 16 Cal.3d 326, 333. But the Court went on to hold, "Where the complaining party has introduced substantial evidence to support a finding in his favor on such an issue, *reversal is compelled.*" *Id.* (emphasis added). Again, in the present case there is clear and direct evidence from F. P. and her retained expert supporting apportionment of damages with a corresponding, and significant, reduction in Monier's liability.

To the extent that *West Pico Furniture*, *Brown* or other decisions of this Court suggest that the failure to make findings is subject to a prejudicial error analysis under the *Watson* standard adopted in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580, those cases only create further conflict with this Court's decisions collected at pages 3-4 and 12-14 of the petition for review, which consistently hold that the failure to find on a material issue compels reversal. The need for this Court to resolve the resulting confusion arising from these conflicting decisions is manifest.

C. To the extent a showing of prejudice is required, the record shows that the failure to render a statement of decision on allocation of damages was prejudicial.

F. P.'s argument that Monier was not prejudiced by the failure to render a statement of decision addressing allocation is a variation on her argument that Monier waived a statement of decision on the issue by not specifying it in his request. She argues that Monier could not "surface" the issue for the first time in the course of obtaining a statement of decision

because Monier did not raise it earlier. Answer at 15-16. She relies on inapposite authority.

In *Colony Ins. Co. v. Crusader Ins. Co.* (2010) 188 Cal.App.4th 743, as F. P. acknowledges (Answer at p. 16), appellant forfeited the right to a statement of decision on waiver or estoppel by not presenting the issues at any time prior to objecting to the proposed statement of decision. *Id.* at 750-751. Appellant was not entitled to a statement of decision on issues not "litigated in the case." *Id.* at 750.

Citing *Del Cerro Mobile Estates v. Proffer* (2001) 87 Cal.App.4th 943, the court below claimed that Monier "never raised the issue of apportionment at trial," and therefore "forfeited any right he may have had to apportionment." Slip Op. at 15, citing *Del Cerro*, 87 Cal.App.4th at 951. The court in *Del* Cerro merely held only that the failure to raise apportionment at trial waives the right to argue it on appeal. *Id.* Monier did not try to raise allocation for the first time after judgment had been rendered.

Monier, rahter, raised allocation at the very outset as an affirmative defense in his answer. Slip op. at 4, 15. F. P.'s testimony and that of her expert witness on her father's sexual abuse presented the question at trial. And, again, the request for a statement of decision on damages necessarily required the court to address allocation in explaining "the factual and legal

basis for its decision" determining the amount of damages for which Monier alone was liable.

II
MONIER DID NOT WAIT UNTIL AFTER TRIAL TO SEEK APPORTIONMENT

The prior discussion has already dealt with F. P.'s incorrect claim that Monier waited until the last second to put the allocation issue before the court in the preparation of a statement of decision.

F. P. contends that, although Monier pleaded allocation as an affirmative defense in his answer, he also had to "raise" it at trial. Answer at p. 17; see also Slip op. at 15. She does not cite any authority for the proposition nor does she suggest just how and when an affirmative defense might be "raised" at trial. Monier is unaware of authority holding that a defendant who pleads a particular affirmative defense must, for instance, announce at some point during trial, "[The affirmative defense] is an issue in this case."

The way a party seeking allocation raises the issue at trial is through evidence from which the trier of fact may find that others are also at fault for plaintiff's injuries. As the court of appeal put it, the party who pleads allocation "must also *prove* the comparative fault of others, and *request* that an allocation be made." Slip op. at 15, citing *Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 366-369; *Kitzig*, 81 Cal.App.4th at 1398-1399; *Conrad*, 24 Cal.App.4th at 444-445; Evid. Code, § 500 (court of appeal's italics).

At the risk of undue repetition, the evidence here proved that F. P.'s father was also greatly at fault for her indivisible psychological injury.

This does not mean that there must also be evidence, such as expert testimony, on the percentage of fault that can be attributed to each tortfeasor at fault for plaintiff's injury. The issue is determined by the trier of fact in considering the nature of each tortfeasor's act. As this Court has held, comparative fault

> is a flexible, commonsense concept, under which a [trier of fact] properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an 'equitable apportionment or allocation of loss.'" *Knight v. Jewett* (1992) 3 Cal.4th 296, 314. Comparative fault does not lend itself to "the exact measurements of a micrometer-caliper. . . ."

Daly v. General Motors Corp. (1978) 20 Cal.3d 725, 736 (rejecting argument that a jury is unable to apportion fault among different classes of tortfeasors); see also *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1233-34 (quoting *Daly*; apportionment of fault between negligent and intentional tortfeasors was issue for jury to determine from facts of the case).

CONCLUSION

F. P. does not overcome the showing in the petition for review that this case justifies review to resolve conflicting appellate decisions and decide important issues. She does not deny that the Third Appellate District's opinion directly conflicts with opinions of every other appellate district and this Court's opinions repeatedly holding that failure to render findings when required is reversible error. Nor does she dispute the absence of any authority on when and how apportionment must be requested in a bench trial, an issue that can arise in any case tried to a judge.

This Court's review is necessary "to maximize the clarity and guidance" with respect to these issues of importance to the trial courts, the courts of appeal, and the attorneys who practice before them.

The petition for review should be granted.

Dated: March 19, 2014

JAY-ALLEN EISEN LAW CORPORATION

By: _____
JAY-ALLEN EISEN,
Attorneys for Defendant and Appellant,
Joseph Monier

CERTIFICATION

I certify, pursuant to rule 8.504, Subdivision (d)(1), California Rules of Court, that the attached **REPLY TO ANSWER TO PETITION FOR REVIEW** contains 2,850 words, as measured by the word count of the computer program used to prepare this brief.

Dated: March 21, 2014

JAY-ALLEN EISEN LAW CORPORATION

By:_____
JAY-ALLEN EISEN

PROOF OF SERVICE
(CCP Sections 1013a, 2015.5)

I, Michelle Micciche, declare:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is 2431 Capitol Avenue, Sacramento, California 95816.

On Friday, March 21, 2014, I served the within **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in said action by depositing true copies, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail addressed as follows:

John P. Henderson **Law Offices of John P. Henderson** **8150 Sierra College Blvd., Suite 170** **Roseville, CA 95661** **[Attorneys for Plaintiff and Respondent: F.P.]**	**Aimee Feinberg** **California Supreme Court Clinic** **UC Davis School of Law** **400 Mrak Hall Drive** **Davis, CA 95616** **[Attorney for Plaintiff and Respondent: F.P.]**
Clerk **Sacramento County Superior Court** **720 9th Street** **Sacramento, CA 95814**	**Clerk** **Third District Court of Appeal** **914 Capitol Mall, 4th Floor** **Sacramento, CA 95814**

There is delivery by United States mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 21, 2014 at Sacramento, California.

Michelle Micciche

MICHELLE MICCICHE