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

OPENING BRIEF ON THE MERITS

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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ISSUE PRESENTED

The Court's order of April 16, 2014 granting review states, "The issue to be briefed and argued is limited to the following: Is a trial court's error in failing to issue a statement of decision upon a timely request reversible per se?"

INTRODUCTION

Some judicial errors "are regarded as so serious that, under any circumstances, they must be deemed prejudicial." 9 Witkin, Cal. Procedure 5th (2008), Appeal § 453, p. 508. Failure to make findings—or in the current practice, to render a statement of decision—is in this class of reversible error per se. *Id.*, § 457; see also Eisenberg, Horvitz & Wiener, Cal. Prac. Guide: Civ. App. & Writs (2013) §§ 8:25, 8:317.

This Court agrees that the failure to make findings when required """"results in prejudicial error entitling the complaining suitor to reversal."""" *Estate of Pendell* (1932) 216 Cal. 384, 386, quoting *Frascona v. Los Angeles Ry. Corp.* (1920) 48 Cal.App.135, 137. The Court repeated that the failure to make required findings "constitutes prejudicial and reversible error." *Carpenter v. Pac. Mut. Life Ins. Co. of Cal.* (1937) 10 Cal.2d 307, aff'd sub nom. *Neblett v. Carpenter* (1938) 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182. The Court has continued to hold that when a trial court does not

make required findings, "reversal is compelled." *Guardianship of Brown* (1976) 16 Cal.3d 326, 333.

There is a qualification. Omitted findings must be on a material issue that could affect the outcome. But when a court fails to render a statement of decision on a material issue, the judgment must be reversed. *Guardianship of Brown* (1976) 16 Cal.3d 326, 333.

In the present case, despite a timely request, the trial court entered judgment without rendering a statement of decision on a material issue raised in the complaint and the evidence at trial, apportionment of damages mandated by Civil Code § 1431.2. By ignoring the request, the trial court subjected appellant, Joseph Monier ("Monier"), to the very harm the statute was designed to shield against: liability for damages attributable to another and beyond those attributable to Monier himself.

The court of appeal affirmed the judgment despite the failure to render a statement of decision on such a material issue. The court of appeal's judgment should be reversed with directions to reverse the judgment of the superior court.

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment after a trial on the merits. CT 33-34, 90-93. The judgment finally disposes of all issues between the parties and is appealable under Code of Civil Procedure § 904.1(a)(1).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In February 2006, F.P. filed the present action against her cousin, defendant and appellant Joseph Monier, and his parents, Michael and Cecile Monier. F.P. alleged that Monier had sexually molested her almost 20 years before, when they were both minors. CT 1. She asserted a separate cause of action against Michael and Cecile for negligently failing to protect her from the alleged molestation. CT 3-4.[1]

Monier denied the allegations and alleged an affirmative defense that others were comparatively liable for F.P.'s injuries, and that damages should be apportioned between all those at fault. CT 18:23-25, 20:1-12.

F.P. settles with parents

Prior to trial of the case against Monier, F.P. settled with his parents' homeowner's insurance company for $275,000. CT 25-31.

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[1] A few months before F.P. filed this action, Monier's parents and other sister, Michelle Monier-Kilgore, sued F.P. after the death of Monier's other sister and F.P.'s cousin, Claudette Monier.. 1 RT 116:10-13, 2 RT 556:16-20. The lawsuit alleged that F.P. had obtained numerous benefits from Claudette, including life insurance benefits, through fraud, undue influence and other wrongful acts. While this action was pending, the jury found that F.P. had, indeed, defrauded Claudette and was unjustly enriched by her wrongful conduct. Subsequent to the judgment in this action, the court of appeal affirmed those findings. *Monier-Kilgore v. Flores*, 3 Civil No. C054502 (June 30, 2009).

Monier cites the court of appeal's decision only as a historical event, not as authority.

F.P.'s charges disputed

In the trial against Monier, F.P. testified that when she was about 10 and Monier was in his teens, she would regularly go to the Moniers' house after school to be looked after by her aunt, Monier's mother, while her father, who was her custodial parent, was at work. 1 RT 89-90, 94-98. She claimed that Jospeh molested her several times in his bedroom when she was at the Moniers' house. 1 RT 100-105.

She testified that her father also molested her a number of times during the same period. 1 RT 105:21-22.

Monier flatly denied her accusations. 3 RT 657-659. His mother, F.P.'s aunt Cecile, testified that her brother, F.P.'s father, never asked her to care for F.P. during the week, that she watched F.P. only occasionally on weekends. 2 RT 548:3-14. F.P.'s father's former employer testified that "most of the time he [F.P.'s father] would bring her [F.P.] after school was over . . . , and she would stay at the store" where her father worked. 3 RT 684:15-17. This "went on for probably months" during the time that F.P. claimed she was staying at Monier's after school and being molested by him. 3 RT 686:2-4.

Cecile also testified that Monier would not have had an opportunity to molest F.P. undetected since his bedroom was next to the kitchen. 2 RT 529:15-28, 532:5-533:2, 535.

Dr. Wiggen: cannot differentiate between injuries caused by F.P.'s father and Monier

F.P. called only two witnesses other than herself: her treating psychologist, Dr. Laurie Wiggen, and a retained expert, Dr. Eugene Roeder. Dr. Wiggen treated F.P. from September 2005 until December 2007. 1 RT 207:24-28. She described F.P.'s injuries, which she attributed to her abuse:

> A. Ms. [F.P.] has difficulty, significant difficulty, in interpersonal relationships with regard to trust, emotional intimacy, physical intimacy; she has difficulty containing emotions, regulating her emotions. [¶] She also has difficulty being in the presence of others when she is overwhelmed by memories or intrusive thoughts related to the abuse. I think it severely impacts her interpersonal relationships.

1 RT 215:1-10.

Dr. Wiggen testified that F.P.'s psychological injuries could not be separately attributed to abuse by her father or the alleged abuse by Monier.

> A. I don't think that there is a different manifestation of symptoms from one person to the other. [¶] I think they were cumatively [*sic*] impactful in their damage emotionally to her which presented as her mental health, emotional and psychiatric symptoms.

1 RT 209:27-210:4.

Dr. Roeder agrees: not possible to differentiate

Dr. Roeder was hired by F.P.'s counsel to perform a psychological evaluation of her. 1 RT 52:2-23. He also testified that the injuries her father inflicted could not be differentiated from those Monier may have caused.

Q. Now, Ms. [F.P.] reported to you that she was molested by two individuals. [¶] Is that correct?

A. Yes.

Q. Were you able to differentiate in – in your evaluation of Ms. [F.P.] between symptoms that she was experiencing as a result of a molest from one as opposed to a molest from the other.

***

A. In terms of presentation, I would have to say that would not be able to be distinguished.

* * *

I am not able to differentiate in terms of symptoms; say this symptom is from dad and this symptom is from the cousin. That's not possible.

1 RT 63:19-64:21.

But there was a significant difference, Dr. Roeder testified: "the sexual molestation by her father was dramatically more traumatic than by her cousin. " 1 RT 64:9-12.

Tentative decision

The morning after closing argument, the judge announced his tentative decision from the bench. 4 RT 921-923. He found that Monier committed the acts F.P. alleged and that his conduct was a substantial factor in causing her injuries. 4 RT 922:15-23. He awarded damages as follows: "Special damages, medical past and future, $10,296, lost income $44,800, total special damages therefore $55,096. [¶] Court awards general damages in the amount of $250,000." 4 RT 922:25-923:3.

The judge gave no indication that he had apportioned general damages between Monier and the other tortfeasors, particularly F.P.'s father.

The judge instructed F.P.'s counsel to prepare a judgment. 3 RT 923

Timely request for statement of decision ignored

The same day the court issued its tentative decision, Monier's counsel filed a request for a written statement of decision. Augmented CT 1. The request sought, among other things, a statement explaining the factual and legal basis "upon which the Court awarded special damages, [and] the basis upon which the court awarded emotional distress damages. . . ." Id.

The trial court, however, did not respond to the request. Instead, on May 1, 2009—just two days after delivering the oral tentative decision and the filing by Monier's counsel of the request for a statement of decision—the court, without rendering a statement of decision, entered judgment awarding F.P. $55,096 in special damages and $250,000 in general damages, for a total judgment of $305,096, plus costs. CT 33-34.

Monier filed a timely notice of appeal on June 30, 2009. CT 66.

Proceedings in the
Third District Court of Appeal

The court of appeal, Third Appellate District, affirmed. *F.P. v. Monier*, 222 Cal.App.4th 1087, review granted. The court agreed that the trial court's failure to render a statement of decision "[c]learly" was error. *Id.* at 558. But, the court rejected Monier's argument that, under an unbroken series of court of appeal decisions, including a recent decision of the Third Appellate District itself, hold that failure to render a statement of decision on timely request is reversible error per se. *Id.* at 558-562. The court did not reverse the judgment, however, because in the court's view, the failure to render a statement of decision was not prejudicial within the meaning of article VI, § 13 of the California Constitution. *Id.* at 562-564.

ARGUMENT

I
A WRITTEN STATEMENT OF THE FACTS SUPPORTING THE TRIAL COURT'S DECISION IS NECESSARY FOR MEANINGFUL APPELATE REVIEW AND EXERCISE OF THE RIGHT TO APPEAL

A. The Court has consistently held that failure to make findings of fact requires reversal.

The Court held in its earliest decisions that a trial judge's findings are intended to "be the basis of the judgment in the same manner as the verdict of a jury; and it follows that without such decision the judgment cannot stand." *Russel v. Armador* (1852) 2 Cal. 305. Chief Justice Field echoed that, in a bench trial, the court, "besides performing its peculiar and appropriate duty of deciding the law, also discharges the functions of a jury, and passes upon the facts." *Breeze v. Doyle* (1861) 19 Cal. 101, 104; see also *Garfield v. Knight's Ferry & Table Mountain Water Co.* (1861) 17 Cal. 510, 512 (finding "is in the nature of a special verdict."); *Jones v. Block* (1866) 30 Cal. 227, 229 ("The finding takes the place of a verdict."); *Murphy v. Bennett* (1886) 68 Cal. 528, 536 ("the finding of facts by a court is, in substance, a special verdict. . . .").

The Court held in *Pendell* that ""the right to findings [under Code of Civil Procedure § 632] is a substantial right, as inviolate, under the statute, as that of trial by jury under the Constitution."" *Id.*, 216 Cal. at 386 (internal citations omitted). Therefore, as noted in the Introduction, the

failure to make findings when required """results in prejudicial error entitling the complaining suitor to reversal."""" *Id.*; see also *Carpenter*, 10 Cal.2d at 326.

B. A statement of decision serves important policies to the benefit of the appellate courts and the parties.

1. A statement of decision allows a litigant to meaningfully exercise his or her right to appellate review.

The Court has held that in California, "'litigants have a constitutionally guaranteed right of appeal in all litigated matters within the express jurisdiction of appellate courts.'" *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 103, quoting *In re Sutter–Butte By–Pass Assessment* (1923) 190 Cal. 532, 536. If a proceeding is within the class of cases over which the appellate courts have jurisdiction under the Constitution, "'the appellants have a constitutionally guaranteed right of appeal of which they cannot be deprived.'" *Powers* at 103, quoting *Sutter-Butte* at 537.

The Legislature may regulate the right of appeal, designating those orders and judgments that may be reviewed by direct appeal and those that must be reviewed by extraordinary writ. *Id.* at 115. The judgment here is a final judgment directly appealable under Code of Civil Procedure § 904.1(a)(1).

A statement of decision helps the losing party exercise his or her constitutional right to appellate review. The trial court's "careful issue iden-

tification and delineation," for example, are often "vitally important to the litigants in framing the issues, if any, that need to be considered or reviewed on appeal." *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1129. A statement of decision furnishes litigants "the means, in many instances, of having their cause reviewed without great expense. . . ." *Frascona*, 48 Cal.App. at 137-138. It may also "render obvious the futility of an appeal." *Miramar*, 163 Cal.App.3d at 1129.

2. A statement of facts found is necessary for practical reasons.

Miramar exemplifies a practical reason why the failure to issue a required statement of decision should be reversible error per se. There, after a trial, the court filed a minute order denominated, "MEMORANDUM OF DECISION AND STATEMENT OF DECISION." Despite a timely, proper request for a statement of decision, the court entered judgment without rendering a formal statement of decision. Presiding Justice Spencer reluctantly concurred in reversing the judgment for lack of a statement of decision. Though she disfavored any rule of reversibility per se, she concluded that the lower court's failure to make findings impaired the administration of justice.

> [It] now appears the practice in the trial courts of issuing minute orders, such as that utilized in the case at bar, in lieu of complying with the requirements of section 632 is on the in-

crease. The far-reaching and burdensome effects of that practice mandate that it end immediately. Since I perceive no means of effecting that result other than per se reversal, I join with the majority.

Miramar, 163 Cal.App.3d at 1130-1131 (conc. opn. of Spencer, P.J.)

3. A statement of decision promotes efficient appellate review and promotes due administration of justice in the trial courts.

A statement of decision "facilitate[s] appellate review." *Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 661. It gives the trial court "an opportunity to place upon record, in definite written form, its views of the facts and the law of the case . . . ." *In re Marriage of Davis* (1983) 141 Cal.App.3d 71, 74-75, quoting *Frascona*, 48 Cal.App. at 137-138. The court's resolution of facts and its legal analysis "make the case easily reviewable on appeal by exhibiting the exact grounds upon which the judgment rests." *Davis*, 141 Cal.App.3d at 75.[2]

The necessity for findings is especially acute in reviewing a trial court's judgment based on an exercise discretion. "'It is apparent, however, that each exercise of discretion will occur under a different set of facts, and

[2] The statement of decisions also provides a basis for the losing party's new trial motion; he or she is "entitled to know the precise facts found by the court before proceeding. . ., in order that he [or she] may be able to point out with precision the errors of the court in matters either of fact or law." *Frascona*, 48 Cal.App. at 138.

that each case must, of necessity, be decided in light of those particular facts.'" *Britt v. Superior Court* (1978) 20 Cal.3d 844, 867, quoting *Greyhound Corp. v. Superior Court* (1961) (court's regulation of discovery); see also, e.g., *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 523 (apportionment of pension in division of community property). Absent a statement of the factual basis for the court's exercise of discretion, appellant is relegated to the nigh overwhelming burden of convincing the appellate court to find an abuse of discretion. *Goodstein v. Superior Court* (1996) 42 Cal.App.4th 1635, 1638 (granting writ of mandate to compel further proceedings where trial court did not make necessary factual findings to support its exercise of discretion).

Furthermore, an exercise of discretion must comport with the law applicable to the facts of the case. *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298. Without a statement of the factual basis for the court's exercise of discretion, an appellate court cannot effectively review the decision.

Without a statement of decision, an appeal is inevitably reduced to a claim challenging the sufficiency of the evidence. *Miramar* at 1130. Such challenges are burdensome. *Id.* They are nearly impossible to win; the judgment is "effectively insulated from review by the substantial evidence

rule." Wegner, Fairbank and Epstein, Cal. Prac. Guide: Civ. Trials & Ev. (The Rutter Group 2014), § 16:96.

As Justice Thornton of this Court wrote, the failure to make adequate findings "deprives parties of substantial rights on appeal." *Murphy v. Bennett* (1886) 68 Cal. 528, 538 (dis. opn. of Thornton, J.)

> If the facts are properly found, they are before this court, and it can then determine on them whether the proper legal conclusion has been reached. This is very important to a litigant in a court of error or appeal. The correctness of the judgment of the court below cannot be determined by this court where the right as determined, and the facts on which it is based, are not set forth in the findings. In such case the right secured by statute to a litigant is ignored. In fact he is virtually deprived of it.

Id.

II
THE COURT HAS REPEATEDLY HELD THAT FAILURE TO STATE FINDINGS THAT SUPPORT THE JUDGMENT IS REVERSIBLE ERROR

The first California statute governing the conduct of a trial by the court did not require the court to make findings. Stats. 1850, ch. 142, §§ 160-171, pp. 428, 442-443. The following year, the Legislature enacted The Civil Practice Act, Stats. 1851, ch. 5, pp. 51-153. Section 180 provid-

ed in relevant part, "Upon the trial of an issue of fact by the Court, its decision shall be given in writing. . . . In giving its decision, the facts found, and the conclusion of law, shall be separately stated."

Less than a year after the statute became effective the Court held in three cases that without findings, "the judgment cannot stand." *Russel v. Armador* (1852) 2 Cal. 305; *Bowers and Gumbert v. Johns and Barker* (1852) 2 Cal. 419; *Hoagland v. Clary* (1852) 2 Cal. 474, 475. Other decisions to the same effect followed. *Breeze v. Doyle* (1861) 19 Cal. 101, 104; *Garfield v. Knight's Ferry & Table Mountain Water Co.* (1861) 17 Cal. 510, 512; *Jones v. Block* (1866) 30 Cal. 227, 229.

When the Code of Civil Procedure was adopted in 1872, § 632 restated former § 180 of the Practice Act almost verbatim, except that "shall" in the first sentence became "must." The Court continued to hold that the failure to make findings mandated reversal. *People v. Forbes* (1877) 51 Cal. 628, 628-629 (failure to make findings on affirmative defenses); *Billings v. Everett* (1878) 52 Cal. 661, 663-664 (same); *Baggs, et al. v. Smith* (1878) 53 Cal. 88, 89 (no findings on counter-claim); (*Estate of Burton* (1883) 63 Cal. 36; *Warring v. Freear* (1883) 64 Cal. 54, 56 (in equity action, jury verdict does not finally determine issues and "the judgment must be reversed for a failure of the court to find upon such issues."); *Learned v. Castle* (1885) 67 Cal. 41, 43 (same, citing *Warren*); *cf.*, *Haight*

v. Tryon (1896) 112 Cal. 4, 6 (failure to find on all material issues is ground for new trial as "'a decision against law.'")

By the early 20th Century it was "well settled that where the court fails to find upon a material issue, the judgment is unsupported and will be reversed upon appeal." *Kusel v. Kusel* (1905) 147 Cal. 52, 57. The Court has restated the rule in numerous cases since. See, e.g., *J.F. Lucey Co. v. McMullen* (1918) 178 Cal. 425, 434 (judgment could not be sustained where trial court did not find the value, if any, of corporate stock transferred to defendant or what consideration, if any, he gave for it); *Taylor v. Taylor* (1923) 192 Cal. 71, 81 (trial court made no finding whether stipulated judgment in prior action procured by fraud); *Krum v. Malloy* (1943) 22 Cal.2d 132, 136 (wrongful death action against automobile owner for imputed liability; failure to find whether driver of car that caused accident was driving with defendant's permission).

In 1968, the Legislature amended § 632; findings were no longer required in every case, but were required on the request of a party. Stats. 1968, ch. 716, § 1. As noted in the Introduction, the Court continued to hold that when a trial court fails to make required findings, "reversal is compelled." *Brown*, 16 Cal.3d at 333.

In 1981, the Legislature rewrote § 632 to its current form, which now provides for "a statement of decision explaining the factual and legal

basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." Stats. 1981, ch. 900, § 1. The change was of more form than substance. "The substitution of a 'statement of decision' for 'findings of fact' under the 1977 [sic] amendment of Code of Civil Procedure section 632 works no significant change. . . ." *Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792. Or, as Division 1 of the Fourth Appellate District put it, "The labels may have changed but the game is the same." *R.E. Folcka Const., Inc. v. Medallion Home Loan Co.* (1987) 191 Cal.App.3d 50, 54.

III
UNDER THE CONSTITUTIONAL HARMLESS ERROR RULE, FAILURE TO STATE MATERIAL FACTS SUPPORTING A DECISION REMAINS REVERSIBLE ERROR

A. Under the harmless error rule, Court has repeatedly held that, when findings are required, failure to render findings on material facts compels reversal.

Under article VI, § 13 of the California Constitution, the "harmless error" rule, a judgment may not be set aside for procedural or other specified types of error "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error has resulted in a miscarriage of justice." A miscarriage of justice occurs when "'it is reasonably probable that a result more favorable to the appealing party

would have been reached in the absence of error.'" *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.

The constitutional provision has its roots in statutes, primarily Code of Civil Procedure § 475. See also Pen. Code §§ 1258, 1404. As originally enacted in the 1872, § 475 provided, "The Court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." West's Ann. Calif. Code Civ. Proc. § 475, Historical and Statutory Notes. Section 475 was amended to its current form in 1897. Stats.1897, c. 47, § 1.

In 1914, article VI, § 4 ½ of the California Constitution was adopted, essentially restating § 475.[3] It became present article VI, § 13 in the constitutional revision of 1966.

Yet, as the cases in the preceding section show, even since the original adoption of the harmless error rule in § 473 in 1872, the Court has continued to hold that the failure to make findings mandates reversal. Indeed, 17 years after the harmless error rule was adopted in article VI, § 4 ½ of the California Constitution, the Court said, "Ever since the adoption of the

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[3] Under § 4 ½ as originally adopted, the harmless error rule applied only in criminal cases. Cal. Const. art. VI, § 4 ½ (1911). The 1914 amendment elaborated the statement of the rule and made it applicable in all judicial proceedings. Cal. Const., art. VI, § 4 ½ (1914). The provision was renumbered as article VI, § 13 in a constitutional revision in 1966.

Codes, it has been the rule that findings are required on all material issues raised by the pleadings and evidence, unless they are waived, and, if the court renders judgment without making findings on all material issues, the case must be reversed." *James v. Haley* (1931) 212 Cal. 142, 147.

It was soon after that the Court held in *Carpenter* that it "is undoubtedly the law" that the failure to make findings "constitutes prejudicial and reversible error." *Id.*, 10 Cal.2d at 326. The Court continued to state that undoubted rule. *Fairchild v. Raines* (1944) 24 Cal.2d 818 (quoting and following *James*). The Court ; *Parker v. Shell Oil Co.* (1946) 29 Cal.2d 503, 512 (quoting and following *Fairchild*); *De Burgh v. DeBurgh* (1952) 39 Cal.2d 858, 873 (following *Fairchild* and *Raines*); *City of Vernon v. City of Los Angeles* (1955) 45 Cal.2d 710, 727; *Brown*, 16 Cal.3d at 333 ("reversal is compelled.").

B. The lack of findings is not reversible error when they are not required.

The lack of findings or a statement of decision is not always reversible error, or error at all. Section 632 requires a statement of decision after a court "trial," so a court does not err in failing to issue a statement of decision on determining a motion. *Beckett v. Kaynar Mfg. Co.* (1958) 49 Cal.2d 695, 699; but see *Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 660–661 (statement of decision required on granting motion to join party as alter ego after entry of judgment).

The court does not err in failing to render findings or a statement of decision when a request is untimely. *In re Marriage of Gray* (2002) 103 Cal.App.4th 974, 980.

Section 632 makes a statement of decision available only "upon the trial of a question of fact by the court." There is no error, therefore, in failing to render a statement of decision where the only issue before the court is a question of law. *Enterprise Ins. Co. v. Mulleague* (1987) 196 Cal.App.3d 528, 541.

And, as § 632 provides for a statement of decision as to the "principal controverted issues," a court is not required to provide a statement of decision when there is no factual dispute. *Id.*; *Taylor v. George* (1949) 34 Cal.2d 552, 556 (findings unnecessary where case submitted on stipulated facts).

Furthermore, the "principal controverted issues at trial" that a statement of decision must address are the ultimate facts and material issues in a case, such as an essential element of a claim or defense. *Central Valley General Hosp. v. Smith* (2008) 162 Cal.App.4th 501, 513; *Yield Dynamics, Inc. v. TEA Systems Corp* (2007) 154 Cal.App.4th 547, 559. A court does not err in refusing a party's request for a statement of evidentiary facts—i.e., detailed findings of evidence on which the court relied. *People v Dollar Rent-A-Car Systems, Inc.* (1989) 211 Cal.App.3d 119, 128.

C. A court does not reversibly err in failing to provide a statement of decision on immaterial facts or facts that are not and cannot be disputed.

The trial court's charge under § 632 has always been to provide a statement of decisions on *material* issues. *Kusel*, 147 Cal. at 57; *James*, 212 Cal. at 147; *Baggs*, 53 Cal. at 89. *A fortiori*, the Court has held in numerous cases that a trial court does not err in failing to make findings or render a statement of decision on immaterial issues.

So, when the findings made require the judgment rendered, the judgment will not be reversed for an absence of findings on other issues that would not affect the outcome. E.g., *Langford v. Thomas* (1926) 200 Cal. 192, 199-200 (finding that realty agent secretly owned ranch sold to plaintiffs and made undisclosed profit rendered immaterial findings on agent's alleged misrepresentations as to acreage and personal property on ranch); see also *Hertel v. Emireck* (1918) 178 Cal. 534, 535; *Robarts v. Haley* (1884) 65 Cal. 397, 402; *Malone v. Del Norte Cnty.*, 77 Cal. 217 (1888); *Robinson v. Placerville & S.V.R. Co.* (1884) 65 Cal. 263, 266; *Porter v. Woodward* (1881) 57 Cal. 535, 539-40 (ejectment; finding that plaintiff had no title when action commenced rendered findings on statute of limitations defense immaterial).

An issue is also immaterial, and the court does not err in failing make findings on it, when there is no evidence on the issue or the evidence

compels a finding against appellant. *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.* (1965) 63 Cal.2d 602, 605); *Colburn Biological Institute v. De Bolt* (1936) 6 Cal.2d 631, 643; *Reiniger v. Hassell* (1932) 216 Cal. 209, 211-12 *Hubbard v. San Diego Elec. Ry. Co.* (1927) 201 Cal. 53, 56 and cases cited there.

Although the failure to render findings or a statement of decision on immaterial facts is not error, the Court has occasionally held the non-error to be non-prejudicial. See, e.g., *Hutchings v. Castle* (1874) 48 Cal. 152, 156 (omission of finding did not prejudice defendant where no evidence justified finding); *McCourtney v. Fortune* (1881) 57 Cal. 617, 619 (trial court found in ejectment action that plaintiff did not own or have right to possession of property; failure to find on affirmative defenses "mere irregularity, from which no possible injury could result to appellants. . . ."); *Leonard v. Fallas* (1959) 51 Cal.2d 649, 653 (trial court found that plaintiff diligently performed each condition of contract; although court should also have found whether plaintiff abandoned or performed all conditions, failure to do so not reversible); *Murphy v. Bennett* (1886) 68 Cal. 528, 530 (conversion; trial court found that plaintiff was not owner or in possession of allegedly converted goods; failure to find on affirmative defenses "is in no way prejudicial to the appellant."). *Diefendorff v. Hopkins* (1892) 95 Cal. 343, 347 (trial court found in conversion action that plaintiff not damaged;

failure to find on value of subject goods, "an issue which has thus become immaterial is not error, or, at least, that it is not a prejudicial error."); *Morrison v. Stone* (1894) 103 Cal. 94, 97 (citing *Diefendorff*; where findings in favor of appellant would not affect judgment, "a failure to find thereon, if erroneous, is not prejudicial."); *Hooker v. Thomas* (1890) 86 Cal. 176, 178 (failure to find on immaterial issues "was not prejudicial to the appellant, and for that reason is not cause for reversal).[4]

D. In this case the issue of comparative fault was raised by the pleadings and evidence; it is a material issue and the trial court's failure to render a statement of decision is reversible error.

A material issue is one raised by the pleadings and evidence. *Brown*, 16 Cal.3d at 333; *James*, 212 Cal. at 147. Monier raised comparative fault his answer, alleging as an affirmative defense that others were comparatively liable for P. F.'s injuries, and that damages should be apportioned between all those at fault. CT 20:1-12. He requested a statement of decision on "the factual and legal basis upon which the Court awarded special damages, [and] the basis upon which the court awarded emotional distress damages. . . ." Augmented CT 1.

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[4] In *Robinson v. Placerville & S.V.R. Co.* (1884) 65 Cal. 263, 266, the Court did not say "prejudice," "harm," or any variant, but held that "no injury was done" to appellant by the failure to find on an immaterial issue. In *Amador Gold Mine, Limited, v. Amador Gold Mine* (1896) 114 Cal. 346, 349 the Court used similar terminology in holding was that appellants "could not have been injured" by lack of findings on an immaterial issue.

F.P. herself introduced evidence supporting the allocation of damages based on comparative fault of another. She testified that her father molested her during the same time she alleged that Monier molested her. 1 RT 105:21-22. Her injury was indivisible; her experts could not attribute some symptoms to her father, others to Monier. 1 RT 209:27-210:4. But Dr. Roeder, her retained expert, was unequivocal that "the sexual molestation by her father was dramatically more traumatic than by her cousin." 1 RT 64:9-12.

The issue of apportionment of damages is a particularly material issue under Civil Code § 1431.2, adopted by the voters as Proposition 51 in 1986. Prior to the statute, this Court had held that concurrent tortfeasors, even if not acting in concert, are to be treated as co-tortfeasors where the plaintiff's injury is indivisible. See *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 586-590; 5 Witkin, *Summary of Cal. Law,* 10th ed. (2005), Torts, §§ 49-50, pp. 116-118. Proposition 51 requires apportionment of non-economic damages between them. Under § 1431.2,

> a defendant['s] liability for noneconomic damages cannot exceed his or her proportionate share of fault *as compared with all fault responsible for the plaintiff's injuries*, not merely that of defendants present in the lawsuit. . . . [Proposition 51] 'quite clearly is simply intended to limit the potential liability

of an individual defendant for noneconomic damages to a proportion commensurate with that defendant's fault.'

DaFonte v. Up-Right, Inc. (1992) 2 Cal.4th 593, 603, quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1204 (Court's italics added in *DaFonte*).

Proposition 51's very purpose is "'to limit the potential liability of an individual defendant for noneconomic damages to a proportion commensurate with that defendant's personal share of fault.'" *DaFonte*, 2 Cal.4th at 603, quoting *Evangelatos*, 44 Cal.3d at 1204.

Civil Code § 1431.2, "plainly attacks the issue of joint liability for noneconomic tort damages root and branch. In *every* case, it limits the joint liability of *every* defendant to economic damages, and it shields *every* defendant from any share of noneconomic damages beyond that attributable to his or her own comparative fault." *DaFonte*, 2 Cal.4th at 602 (emphasis added).

The issue of comparative fault was presented in this case by the pleadings and the evidence. It was a material issue directly affecting Monier's right to apportionment and liability for damages. The trial court's failure to render a statement of decision on the basis of its determination of F.P.'s non-economic damages is reversible error.

CONCLUSION

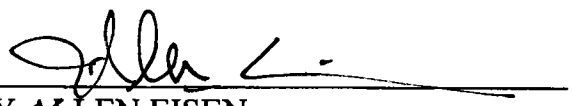
The court of appeal erred in holding that the failure to render a statement of decision on the basis of its award of non-economic damages was not reversible error. The pleadings and evidence at trial squarely put the issue of apportionment of damages before the trial court. That issue highly material. Without a statement of decision addressing whether damages have been apportioned, the judgment, contrary to the mandate of Proposition 51 and the strong policy supporting it, may hold Joseph liable for substantial damages that are not attributable to him.

The record would not require a finding against Joseph or in favor of F.P. on the issue. Evidence produced by F.P. herself supports findings that could significantly affect the judgment.

The court of appeal's decision is erroneous and should be reversed.

Dated: August 5, 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 **OPENING BRIEF ON THE MERITS** contains 5,863 words, as measured by the word count of the computer program used to prepare this brief.

Dated: August 5, 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 Tuesday, August 05, 2014, I served the within **OPENING BRIEF ON THE MERITS** 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 August 5, 2014 at Sacramento, California.

Michelle Micciche

MICHELLE MICCICHE