S216566

IN THE SUPREME COURT OF THE STATE 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. 06-AS00671)

# PLAINTIFF AND RESPONDENT'S ANSWER BRIEF ON THE MERITS

*Jeffrey L. Bleich (SBN 144340)
Hannah E. Shearer (SBN 292710)
Thomas P. Clancy (SBN 295195)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
Tel: (415) 512-4000
Fax: (415) 512-4077

John P. Henderson (SBN 125222)
LAW OFFICES OF JOHN P. HENDERSON
8150 Sierra College Blvd., Ste. 170
Roseville, CA 95661
Tel: (916) 788-1933
Fax: (916) 788-1935
Email: jphend@comcast.net

***Counsel for Plaintiff and Respondent, F.P.***

November 4, 2014

S216566

IN THE SUPREME COURT OF THE STATE 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. 06-AS00671)

# PLAINTIFF AND RESPONDENT'S ANSWER BRIEF ON THE MERITS


*Jeffrey L. Bleich (SBN 144340)
Hannah E. Shearer (SBN 292710)
Thomas P. Clancy (SBN 295195)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
Tel: (415) 512-4000
Fax: (415) 512-4077

John P. Henderson (SBN 125222)
LAW OFFICES OF JOHN P. HENDERSON
8150 Sierra College Blvd., Ste. 170
Roseville, CA 95661
Tel: (916) 788-1933
Fax: (916) 788-1935
Email: jphend@comcast.net

***Counsel for Plaintiff and Respondent, F.P.***


November 4, 2014

## TABLE OF CONTENTS


Page

ISSUE PRESENTED ..... 1

INTRODUCTION ..... 1

BACKGROUND ..... 4

ARGUMENT ..... 8

I. THE CALIFORNIA CONSTITUTION REQUIRES APPELLATE COURTS TO PERFORM HARMLESS ERROR REVIEW ..... 8

A. Article VI, Section 13 Replaced the Appellate Presumption of Prejudice With a Harmless Error Rule ..... 8

B. Appellant Offers No Meaningful Distinction to Justify Excepting The Failure to Issue a Statement of Decision from Myriad Other Errors That Must Be Reviewed for Prejudice ..... 12

1. Appellant's Precedents Are Unpersuasive Because They Do Not Even Reference Article VI, Section 13, Let Alone Justify Departing From That Precedent ..... 13

2. This Court's Precedents Establish That Errors Relating to Issuance of Statements of Decision Do Not Fall Within Any of Article VI, Section 13's Exceptions That Permit Per Se Reversal ..... 17

(a) The Ban On Per Se Reversal Applies In All Cases Except Where the Error Denies a Criminal Defendant a Fundamental Right or Where the Error Intrinsically Defies Harmless Error Review ..... 18

(b) The Exception to Article VI, Section 13 for Errors That Deny a Fundamental Right to a Criminal Defendant Does Not Apply Because this is Not A Criminal Case ..... 21

(c) The Exception for Structural Errors That Defy Review Also Does Not Apply Because The Error at Issue is Not

**TABLE OF CONTENTS**
**(continued)**

**Page**


Structural and is Readily Subject to Review ..... 23

(d) Adopting A New Exception For Failure To Render a Statement of Decision Would Serve No Purpose and Would Make No Sense In The Context of This Court's Other Precedents ..... 28

II. APPLYING A HARMLESS ERROR RULE TO A FAILURE TO RENDER A STATEMENT OF DECISION WOULD FRUSTRATE RATHER THAN ADVANCE JUDICIAL ECONOMY ..... 34

CONCLUSION ..... 37

CERTIFICATE PURSUANT TO CALIFORNIA RULE OF COURT 8.520(C) ..... 39

## TABLE OF AUTHORITIES

**Page(s)**

**FEDERAL CASES**

*Boatmen's First Nat'l Bank v. Kansas Pub. Employees Ret. Sys.*
(8th Cir. 1995) 57 F.3d 638 ..... 30

*Bollenbach v. United States*
(1946) 326 U.S. 607 [66 S.Ct. 402] ..... 11

*Burman v. Lenkin Const. Co.*
(D.C. Cir. 1945) 149 F.2d 827 ..... 31

*Chapman v. California*
(1967) 386 U.S. 18 [87 S.Ct. 824] ..... 10

*Dann v. Studebaker-Packard Corp.*
(6th Cir. 1961) 288 F.2d 201 ..... 30

*Delaware v. Van Arsdall*
(1986) 475 U.S. 673 [106 S.Ct. 1431] ..... 11

*J. I. Case Co. v. Borak*
(1964) 377 U.S. 426 ..... 31

*Kotteakos v. United States*
(1946) 328 U.S. 750 [66 S.Ct. 1239] ..... 11

*Kweskin v. Finkelstein*
(7th Cir. 1955) 223 F.2d 677 ..... 31

*Rodriguez v. Robbins*
(9th Cir. 2013) 715 F.3d 1127 ..... 30

*Rothenberg v. Security Management Co.*
(11th Cir. 1984) 736 F.2d 1470 ..... 30

*United States v. Hasting*
(1983) 461 U.S. 499 [103 S.Ct. 1974] ..... 36, 37

**STATE CASES**

*Akers v. Mortensen*
(Idaho 2009) 147 Idaho 39 ..... 32

## TABLE OF AUTHORITIES
## (continued)

**Page(s)**

*Anderson v. Allstate Ins. Co.*
(N.C. 1966) 266 N.C. 309 ..... 32

*Backlund v. Univ. of Wash.*
(Wash. 1999) 137 Wash. 2d 651 ..... 32

*Bowyer v. Burgess*
(1960) 54 Cal.2d 97 [4 Cal.Rptr. 521] ..... 14

*Carpenter v. Pac. Mut. Life Ins. Co. of Cal.*
(1937) 10 Cal.2d 307 [74 P.2d 761] ..... 13, 15

*Cassim v. Allstate Ins. Co.*
(2004) 33 Cal.4th 780 [16 Cal.Rptr.3d 374] ..... 10, 13, 22

*City of Phoenix v. Consol. Water Co.*
(Ariz. 1966) 101 Ariz. 43 ..... 32

*City of Vernon v. City of Los Angeles*
(1955) 45 Cal.2d 710 [290 P.2d 841] ..... 16

*Cmty. Bank v. U. S. Nat'l Bank of Oregon*
(Or. 1976) 276 Or. 471 ..... 32

*Colburn Biological Inst. v. De Bolt*
(1936) 6 Cal.2d 631 [59 P.2d 108] ..... 13, 14, 29

*Conservatorship of Pers. & Estate of Maria B.*
(2013) 218 Cal.App.4th 514 [160 Cal.Rptr.3d 269] ..... 24

*Cormier v. D.C. Water & Sewer Auth.*
(D.C. 2013) 84 A.3d 492 ..... 31

*Curtin v. Moroney*
(Okla. 1925) 246 P. 232 ..... 32

*Curtis v. Finneran*
(N.J. 1980) 83 N.J. 563 ..... 32

*D & R Realty v. Bender*
(Neb. 1988) 230 Neb. 301 ..... 32

## TABLE OF AUTHORITIES
**(continued)**

**Page(s)**

*Edgar v. Hitch*
(1956) 46 Cal.2d 309 [294 P.2d 3] ..... 14

*Edwards v. Louisville & N.R. Co.*
(Ala. 1918) 202 Ala. 463 ..... 32

*F.E.H., Jr. v. State of Ind.*
(Ind. Ct. App. 1999) 715 N.E.2d 1272 ..... 32

*F.P. v. Monier*
(2014) 222 Cal.App.4th 1087 [166 Cal.Rptr.3d 551] ..... passim

*Fairchild v. Raines*
(1944) 24 Cal.2d 818 [151 P.2d 260] ..... 15

*Flueling v. Blue Ribbon Auto Drivers' Ass'n*
(Mich. 1929) 247 Mich. 620 ..... 32

*Frascona v. City of Los Angeles Ry. Corp.*
(1920) 48 Cal.App. 135 [191 P. 968] ..... 13

*Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.*
(1965) 63 Cal.2d 602 [47 Cal.Rptr. 564] ..... 14, 29

*Ginsberg v. Gamson*
(2012) 205 Cal.App.4th 873 [141 Cal.Rptr.3d 62] ..... 8

*Gordon v. Nissan Motor Co.*
(2009) 170 Cal.App.4th 1103 [88 Cal.Rptr.3d 778] ..... 23

*Guardianship of Brown*
(1976) 16 Cal.3d 326 [128 Cal.Rptr. 10] ..... 15

*Hertel v. Emireck*
(1918) 178 Cal. 534 [174 P. 30] ..... 14, 29

*Hester v. Hester*
(La. Ct. App. 1996) 680 So.2d 1232 ..... 32

*In re Jesusa V.*
(2004) 32 Cal.4th 588 [10 Cal.Rptr.3d 205] ..... 22

## TABLE OF AUTHORITIES
**(continued)**

**Page(s)**

*In re Marriage of Davis*
(1983) 141 Cal.App.3d 71 [190 Cal.Rptr. 104] ..... 15

*In re Treatment & Care of Luckabaugh*
(S.C. 2002) 351 S.C. 122 ..... 32

*In re Wilson*
(Mass. 1977) 372 Mass. 325 ..... 32

*James v. Haley*
(1931) 212 Cal. 142 [297 P. 920] ..... 13

*Keener v. Jeld-Wen, Inc.*
(Ct. App. 2008) [75 Cal. Rptr. 3d 61] ..... 22

*Kim v. Konad USA Distribution, Inc.*
(2014) 226 Cal. App.4th 1336 [172 Cal.Rptr.3d 686] ..... 22

*Kinkella v. Baugh*
(Utah 1983) 660 P.2d 233 ..... 32

*Korsrud v. Korsrud*
(Iowa 1951) 242 Iowa 178 ..... 32

*Langford v. Thomas*
(1926) 200 Cal. 192 [252 P. 602] ..... 14, 29

*Lemon v. Commw., Dept. of Transp. Bureau of Driver Licensing*
(Pa. Commw. Ct. 2000) 763 A.2d 534 ..... 32

*Lovlace v. Copley*
(Tenn. 2013) 418 S.W.3d 1 ..... 32

*Lowery v. Lowery*
(Miss. 1995) 657 So.2d 817 ..... 32

*Mann v. Mann*
(Fla. Dist. Ct. App. 1962) 145 So.2d 886 ..... 32

*Martin v. Cnty. of Los Angeles*
(1996) 51 Cal.App.4th 688 [59 Cal.Rptr.2d 303] ..... 23

## TABLE OF AUTHORITIES
## (continued)

**Page(s)**

*Martin-Bragg v. Moore*
(2013) 219 Cal.App.4th 367[161 Cal.Rptr.3d 471] ..... 24

*Milton v. Dennis*
(N.Y. 1983) 464 N.Y.S.2d 874 ..... 32

*Miramar Hotel Corp. v Frank B. Hall & Co.*
(1985) 163 Cal.App.3d 1126 ..... 3, 4, 13, 29

*Parker v. Shell Oil Co.*
(1946) 29 Cal.2d 503 [175 P.2d 838] ..... 15

*People v. Braxton*
(2004) 34 Cal.4th 798 [22 Cal.Rptr.3d 46] ..... 22

*People v. Breverman*
(1998) 19 Cal.4th 142 [77 Cal.Rptr.2d 870] ..... 22

*People v. Cahill*
(1993) 5 Cal.4th 478 [20 Cal.Rptr.2d 582] ..... passim

*People v. Gutierrez*
(1991) 227 Cal.App.3d 1634 [278 Cal.Rptr. 748] ..... 25

*People v Jacobson,*
(1965) 63 Cal.2d 319 [46 Cal.Rptr. 515] ..... 28

*People v. O'Bryan*
(1913) 165 Cal. 55 [130 P. 1042] ..... passim

*People v. Watson*
(1956) 46 Cal.2d 818 [299 P.2d 243] ..... 9

*Podany v. Podany*
(Minn. 1978) 267 N.W.2d 500 ..... 32

*Reader v. Cassarino*
(Conn. 1998) 51 Conn. App. 292 ..... 32

*Robert v. Stanford Univ.*
(2014) 224 Cal.App.4th 67 [168 Cal.Rptr.3d 539] ..... 25

## TABLE OF AUTHORITIES
**(continued)**

**Page(s)**

*Rodman v. Super. Ct. in & for Nevada Cnty.*
(1939) 13 Cal.2d 262 [89 P.2d 109] ..... 10

*Rowell v. Kaplan*
(R.I. 1967) 103 R.I. 60 ..... 32

*S. Cal. Ch. of Associated Builders etc. Com. v. Cal. Apprenticeship Council*
(1992) 4 Cal.4th 422 [14 Cal.Rptr.2d 491] ..... 7

*Shelhamer v. Shelhamer*
(Wyo. 2006)138 P.3d 665 ..... 32

*Sierra View Local Health Care Dist. v. Sierra View Med. Plaza Associates, LP*
(2005) 126 Cal.App.4th 478 [24 Cal.Rptr.3d 210] ..... 24

*Sneil, LLC v. Tybe Learning Ctr., Inc.*
(Mo. 2012) 370 S.W.3d 562 ..... 31

*Soule v. Gen. Motors Corp.*
(1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607] ..... passim

*State ex rel. Gilbert v. Cincinnati*
(Ohio 2010) 125 Ohio St. 3d 385 ..... 32

*Stugelmayer v. Ulmer*
(S.D. 1977) 260 N.W.2d 236 ..... 32

*Tamsk v. Cont'l Oil Co.*
(Kan. 1944) 158 Kan. 747 [150 P.2d 326] ..... 32

*Taylor v. Elkins Home Show, Inc.*
(W. Va. 2001) 210 W. Va. 612 ..... 32

*Tenery v. Tenery*
(Tex. 1996) 932 S.W.2d 29 ..... 31

*Vallejo & N.R. Co. v. Reed Orchard Co.*
(1915) 169 Cal. 545 [147 P. 238] ..... 9, 10

## TABLE OF AUTHORITIES
**(continued)**

**Page(s)**

*Walber v. Walber*
(Wis. 1968) 40 Wis. 2d 313 ..... 32

*West Pico Furniture Co. v. Pac. Finance Loans*
(1970) 2 Cal.3d 594 [86 Cal.Rptr. 793] ..... 14

*Yield Dynamics, Inc. v. TEA Systems Corp.*
(2007) 154 Cal.App.4th 547 [66 Cal.Rptr.3d 1] ..... 14

**STATE STATUTES**

Code Civ. Proc. § 632 ..... passim

**FEDERAL RULES**

Fed. R. Civ. Proc. 52(a) ..... 30

**CONSTITUTIONAL PROVISIONS**

California Constitution Art. VI, § 13 ..... passim

**TREATISES**

9-52 Moore's Federal Practice Civil § 52.10 (3rd ed. 2014) ..... 30

9-52 Moore's Federal Practice Civil § 52.12 (3rd ed. 2014) ..... 30

Witkin & Epstein, CAL. CRIMINAL LAW (3d ed. 2000) Reversible Error, § 1 ..... 10

**OTHER AUTHORITIES**

Edson R. Sunderland, *The Problem of Appellate Review* (1927) 5 TEX. L. REV. 126, 147 ..... 11

## ISSUE PRESENTED

"Is a trial court's error in failing to issue a statement of decision upon a timely request reversible per se?"

## INTRODUCTION

After a bench trial, the trial court found that Appellant had sexually abused his cousin, Respondent F.P., "numerous times when she was 10 [] years [old]." (Reporter's Transcript [hereafter, "RT"] at 922.) The court expressly found that Appellant's sexual assaults caused Respondent medical and psychological treatment expenses of $10,296; lost income of $48,800, and general damages of $250,000. (*Id.* at 922-23.) Having never contested his liability for the sexual assaults, Appellant now seeks reversal of the judgment against him and a new trial on the sole ground that the trial court did not issue a statement of decision in support of its findings.

As the Court of Appeals recognized, Appellant's argument is contrary to the California Constitution. Article VI, section 13 reads, in pertinent part: "No judgment shall be set aside, or new trial granted, in any cause . . . 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." (California Constitution Article VI, section 13 (italics added).) Consistent with that constitutional mandate, this Court has rejected numerous lower court rules holding a wide range of errors to be reversible per se. Instead, it has directed the lower courts that,

absent a breach that denies a criminal defendant a fundamental right or that would somehow defy prejudice review, they must examine the evidence to see whether the error has resulted in a miscarriage of justice. (*Soule v. Gen. Motors Corp.* (1994) 8 Cal.4th 548, 579 [34 Cal.Rptr.2d 607] [hereafter, "*Soule*"].) Appellant has offered no authority that considers Article VI, section 13 and concludes that a failure to render a statement of decision is presumptively a "miscarriage of justice" warranting per se reversal.

Appellant's argument is also contrary to the purposes of Article VI, section 13 of the California Constitution and section 632 of the Code of Civil Procedure. The legislature enacted section 13 to promote judicial economy and the finality of judgments. Section 13 ensures that a trial—in which the parties present their case and the trier of fact renders a judgment—is the "main event," instead of a dry run from which litigants use non-material mistakes to secure a new trial. Ironically, Appellant concedes that the purpose of section 632's requirement of a statement of decision is also to improve judicial economy. (AOB 10-12.)[1] However, mandating reversal for all violations of section 632 would frustrate that purpose and contravene section 13's wisdom by subjecting the court and faultless litigants to new trials years later in instances where, as here, an appellate court can see from the record that the judge's technical violation

[1] "AOB" refers to Appellant's Opening Brief on the Merits.

caused no prejudice to the complaining party.

The particular error Appellant complains of further demonstrates why a per se rule of reversal when a trial court fails to prepare a statement of decision is inappropriate. As he did before the Court of Appeal, Appellant does not claim any error in the finding that he is liable for repeatedly sexually abusing Respondent. Rather, he seeks review only as to *apportionment* of damages—an issue he failed to preserve or even mention at trial. Failure to prepare a statement of decision noting that a party neglected to properly preserve an argument is exactly the sort of harmless, technical error the legislature contemplated should *not* warrant reversal post-section 13. Unless the complaining party suffered prejudice, section 13 forbids appellate courts from sending innocent parties back through the ordeal of a trial merely so that a formality like this one can be observed.

In addition to being irreconcilable with the California Constitution, Appellant's argument is also contrary to the teachings of other courts. The fact that the federal government and dozens of states also forbid per se reversal for failure to render a statement of decision (*see infra* at 28-34) debunks Appellant's "floodgates" claim that, without a per se rule, California's trial courts would systematically disregard their obligation to prepare statements of decision under section 632, with "far-reaching and burdensome effects." (AOB 11-12 [citing *Miramar Hotel Corp. v Frank B.*

*Hall & Co.* (1985) 163 Cal.App.3d 1126, 1130-1131 (conc. opn. of Spencer, P.J.)].)

Ultimately, Appellant's position collapses to the argument that the failure of some lower courts—in decisions that fail to even address Article VI, section 13— to repudiate pre-Article VI, section 13 precedents requires that those precedents must continue to be followed. (E.g. AOB 11-14.) The mere fact that some lower courts have rotely followed outdated precedent without acknowledging Article VI, section 13 does not require this Court to do so as well. On the contrary, the Court's decision to grant review in this case provides the valuable opportunity once and for all to bring the lower appellate courts into line with the California Constitution, this Court's precedents, and the important goals of ensuring finality and promoting judicial economy that gave rise to both Article VI, section 13 and the statement of decision rule.

## BACKGROUND

In 1990 and 1991, Appellant Joseph Monier molested Respondent F.P., his ten-year-old cousin, by committing various acts of sexual battery, including sodomizing F.P. and forcing her to orally copulate him. (*F.P. v. Monier* (2014) 222 Cal.App.4th 1087, 1091 [166 Cal.Rptr.3d 551].) F.P. filed suit against Appellant Monier and his parents in 2006, seeking damages for the harm inflicted on her by Appellant's repeated sexual assaults. (*F.P. v. Monier, supra*, 222 Cal.App.4th at p. 1092; Clerk's

Transcript [hereafter, "CT"] at 1-8.)

The case was tried by a visiting judge, Honorable Robert Ahern (now deceased). (*F.P. v. Monier, supra*, 222 Cal.App.4th at p. 1093.) On April 29, 2009, the court announced its decision in favor of F.P. The court found that Appellant molested F.P., that his conduct was "outrageous," and that his acts were a substantial factor in causing F.P.'s injuries. The court awarded total damages of roughly $305,000, of which $250,000 represented general noneconomic damages.

On appeal from the trial court's judgment, Appellant did not contest that he molested and sexually assaulted F.P., or otherwise argue his innocence. Nor did he contest that, as F.P.'s treating psychologist testified, F.P. suffered from post-traumatic stress disorder caused by Appellant's sexual assaults. (*F.P. v. Monier, supra*, 222 Cal.App.4th at p. 1092.) Instead, Appellant's central argument on appeal was that the trial court committed per se reversible error in failing to render a written statement of decision pursuant to California Code of Civil Procedure section 632.[2]

---

[2] Through a series of miscommunications, F.P. did not receive notice that such a request had been filed and was unable to make contact with Appellant Monier's counsel prior to submitting the Judgment Following Court Trial. (*See* Respondent's Answering Brief to the Court of Appeal at 2-3; CT 33-37.) There is no record that the trial court ever took notice of Appellant's request for a statement of decision, either (*F.P. v. Monier, supra*, 222 Cal.App.4th at pp. 1093-94); instead, it seems the visiting judge entered judgment without seeing the request for a statement of decision, then left town. (*Ibid.*)

Appellant argued that this error denied him the opportunity to request apportionment of damages between himself and F.P.'s father, who also molested F.P. (*Id.* at p. 1100.) In addition, Appellant argued that the trial court erred by failing to offset damages awarded in a settlement with his parents and by awarding lost income that was unsupported by substantial evidence. (*Id.* at p. 1091; Appellant's Opening Brief to the Court of Appeal at i-ii.)

The Court of Appeal rejected Appellant's argument that the trial court's inadvertent failure to prepare a statement of decision was reversible per se, reasoning that Article VI, section 13 of the California Constitution required Appellant to show prejudice. Appellant was not prejudiced because the court was able to resolve all of his arguments about damages as a matter of law or on the existing record, to no detriment to Appellant. The court concluded Appellant was not entitled to apportionment because he "never raised the issue . . . 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[, or] argue how they should be apportioned." (*F.P. v. Monier, supra*, 222 Cal.App.4th at p. 1101.) As such, the Court of Appeal concluded that no prejudice resulted from the failure to render a statement of decision because, "[h]aving failed to raise the issue of apportionment at trial or in his request for a statement of decision, [Appellant] 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." (*Id.* at p. 1101.)

The Court of Appeal further determined that it could modify the damages award to offset the settlement with Appellant's parents and exclude lost income that was not supported by substantial evidence (*id.* at pp. 1103-04, 1107); accordingly, any harm caused by the court's failure to issue a statement of decision was to F.P., not Appellant. (*Id.* at pp. 1103-04.)

On petition to this Court, Appellant presented two issues for review: (1) whether the failure to issue a statement of decision when required was reversible error per se; and (2) whether, given the events at trial, Appellant had forfeited his right to a statement of decision on apportionment. (Petition for Review at 1.) This Court granted Appellant's petition for review only as to the question of per se error, leaving undisturbed the Court of Appeal's finding that Appellant was not prejudiced by the failure to render a statement of decision because he had waived any right to a finding on apportionment. (*S. Cal. Ch. of Associated Builders etc. Com. v. Cal. Apprenticeship Council* (1992) 4 Cal.4th 422, 431 n.3 [14 Cal.Rptr.2d 491] ["This court need not address all of the issues addressed by the Court of Appeal."].)

Because Appellant has never contested the finding of liability, this

Court's determination of whether a failure to render a statement of decision is per se reversible error concerns at most whether this case should be remanded for a new trial on damages. (*Ginsberg v. Gamson* (2012) 205 Cal.App.4th 873, 904-05 [141 Cal.Rptr.3d 62], *reh'g den.* (May 24, 2012), *review den.* (Aug. 8, 2012) ["The reviewing court will avoid ordering a retrial of all issues when some can 'be determined separately without prejudice to any party . . . [in order] to respect and preserve the results of a trial on issues as to which the appellant has not shown error.'"].)

For the reasons set forth below, however, no retrial on damages is warranted. The California Constitution, this Court's precedents, and the policies of judicial economy that underlie those precedents all support the decision below that the trial court's judgment should not be disturbed where, as here, a trial court's failure to issue a statement of decision was harmless.

## ARGUMENT

### I. THE CALIFORNIA CONSTITUTION REQUIRES APPELLATE COURTS TO PERFORM HARMLESS ERROR REVIEW

#### A. Article VI, Section 13 Replaced the Appellate Presumption of Prejudice With a Harmless Error Rule

Over 100 years ago, California enacted Article VI, section 13 of the state Constitution, establishing that California appellate courts could not set aside a trial court judgment absent a showing that the trial court's errors "resulted in a miscarriage of justice." (See *People v. Cahill* (1993) 5

Cal.4th 478, 488 [20 Cal.Rptr.2d 582] [hereafter, "*Cahill*"].) Prior to that time, California appellate courts could review trial court findings only for errors, but not to determine whether such errors were prejudicial. (*Vallejo & N.R. Co. v. Reed Orchard Co.* (1915) 169 Cal. 545, 554-55 [147 P. 238].) Under that former regime:

> It sometimes became necessary for the courts of appeal and for this court to grant new trials to defendants on account of technical errors or omissions, even though a review of the evidence, if such review could legally have been undertaken, would have shown that the guilt of the accused had been established beyond question and by means of a procedure which was substantially fair and just.

(*People v. O'Bryan* (1913) 165 Cal. 55, 64 [130 P. 1042] [hereafter, "*O'Bryan*"].)

To eliminate the needless retrial of matters that had no effect on the judgment, California amended the Constitution in 1911 to add Article VI, § 4 1/2 (later renumbered as section 13) to require appellate courts to also rule "upon the result of the error." (*O'Bryan*, 165 Cal. at p. 66; see also *People v. Watson* (1956) 46 Cal.2d 818, 834-35 [299 P.2d 243].) Article VI, section 13 reads:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or 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.

(California Constitution Article VI, section 13.) This section "eliminate[ed] any presumption of injury from error, and . . . require[d] that the appellate court examine the evidence to determine whether the error did in fact prejudice the defendant." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [16 Cal.Rptr.3d 374] [citing Witkin & Epstein, CAL. CRIMINAL LAW (3d ed. 2000) Reversible Error, § 1, p. 443].)

As this Court recognized, section 13 reflected California's "desire and policy . . . to disregard unimportant and unsubstantial errors appearing in the record and to reverse causes only for reasons affecting the merits of the case and the substantial rights of the parties." (*Vallejo & N.R. Co., supra*, 169 Cal. at p. 554.) The Constitution's harmless error rule gave teeth to the principle that, "in the administration of justice, substance, rather than mere form, should be regarded." (*Rodman v. Super. Ct. in & for Nevada Cnty.* (1939) 13 Cal.2d 262, 265 [89 P.2d 109].)

In the years following California's adoption of a harmless error rule, every other state and federal court that still prohibited appellate courts from determining harmlessness amended their procedures[3] to ensure that

---

[3] By 1967, all fifty states and the United States had adopted harmless error rules or prejudice requirements (*Chapman v. California* (1967) 386 U.S. 18, 22 [87 S.Ct. 824]), and a number of states adopted such requirements (footnote continued)

appellate courts would no longer overturn trial court judgments based on "deviations from formal correctness." (*Bollenbach v. United States* (1946) 326 U.S. 607, 615 [66 S.Ct. 402] [describing the enactment of the federal harmless error rule].) As the U.S. Supreme Court explained, this movement reflected a conviction by legislators and jurists that appellate courts should "substitute judgment for automatic application of rules" and reflected society's demand of appellate courts: "'Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.'" (*Kotteakos v. United States* (1946) 328 U.S. 750, 759-60 [66 S.Ct. 1239].)

The harmless error rule had the added benefit of focusing the parties in litigation on the trial itself and not the appeal, promoting public confidence in the judicial system. (*E.g.*, *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431] [harmless error rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error"].) Article VI, section 13 thus reflected a purposeful effort by the State of California to improve judicial efficiency and fairness by forbidding the per se reversal of judgments where errors at trial had not affected the

---

after repealing old rules directing appellate courts to presume prejudice from trial error. (Edson R. Sunderland, *The Problem of Appellate Review* (1927) 5 TEX. L. REV. 126, 147.)

outcome or prejudiced the parties.

In the proceedings below, the Court of Appeal correctly applied Article VI, section 13, finding that the failure to issue a statement of decision is not itself a miscarriage of justice, and its result—in this case, the absence of a statement on apportionment of damages—was not prejudicial to Appellant because he failed to raise and preserve that issue at trial.

### B. Appellant Offers No Meaningful Distinction to Justify Excepting The Failure to Issue a Statement of Decision from Myriad Other Errors That Must Be Reviewed for Prejudice

Although Appellant acknowledges the relevance of Article VI, section 13 to this case, he nowhere explains why it is not dispositive. His principal argument is that some (though not all) lower courts have appeared to use a per se rule in reversing a trial court's failure to render a statement of decision even after Article VI, section 13 was enacted. (AOB 10-17.) However, as noted below, the lower court cases upon which Appellant relies do not even reference, let alone apply, Article VI, section 13 before granting a new trial. Likewise, Appellant offers no meaningful basis for reconciling those cases with this Court's long and robust line of precedents which *do* address Article VI, section 13, and consistently reject per se rules of reversal for technical procedural errors.

### 1. Appellant's Precedents Are Unpersuasive Because They Do Not Even Reference Article VI, Section 13, Let Alone Justify Departing From That Precedent

Appellant's position rests principally on decisions after 1911 in which the lower courts failed to apply a harmless error analysis to cases in which the trial court failed to render a statement of decision. (AOB 11-12). He contends that because these courts applied a per se reversal rule even after the constitutional harmless error rule was enacted, it must be the case that Article VI, section 13 did not affect pre-1911 precedent regarding statements of decision. (AOB 18.)

The case law upon which Appellant relies, however, offers no basis at all for assessing the application of Article VI, section 13. Not a single authority Appellant cites for the proposition that violation of section 632 is per se error even *mentions* Article VI, section 13, much less analyzes its application.[4] (See, e.g., *Frascona v. City of Los Angeles Ry. Corp.* (1920) 48 Cal.App. 135 [191 P. 968]; *James v. Haley* (1931) 212 Cal. 142, 147 [297 P. 920]; *Carpenter v. Pac. Mut. Life Ins. Co. of Cal.* (1937) 10 Cal.2d 307 [74 P.2d 761]; *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985)

[4] The only two cases in Appellant's entire brief to mention Article VI, section 13 (or section 4 1 /2) are *Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal. 4th 780 and *Colburn Biological Inst. v. De Bolt* (1936) 6 Cal.2d 631, both of which faithfully apply Article VI, section 13 to perform harmless error review. As Appellant concedes, in *Colburn*, the Court did not reverse the lower court's failure to provide a statement of decision (AOB 21-22), and in upholding the verdict, the court specifically invoked Article VI, section 4 1/2 (*Colburn Biological Inst. v. De Bolt*, *supra*, 6 Cal.2d at 644).

163 Cal.App.3d 1126 [210 Cal.Rptr. 114]; *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547 [66 Cal.Rptr.3d 1].) At most, these decisions appear merely to have rotely applied out-of-date precedents without any consideration of Article VI, section 13.

Appellant's selective reliance on these cases also neglects to explain the fact that other appellate court decisions issued after 1911, including decisions of this Court, *did* apply a prejudice test when reviewing the trial court's failure to issue a statement of decision on a material issue. (See *Bowyer v. Burgess* (1960) 54 Cal.2d 97, 101 [4 Cal.Rptr. 521] [holding that "[t]he failure to make a finding on a material issue [was] harmless" because "had a finding been made on such issue" it would not have supported the appellant]; see also *West Pico Furniture Co. v. Pac. Finance Loans* (1970) 2 Cal.3d 594, 613 [86 Cal.Rptr. 793] [same]; *Edgar v. Hitch* (1956) 46 Cal.2d 309, 312-13 [294 P.2d 3] [examining the record to determine whether omitted finding was material before finding reversible error].)[5]

---

[5] Appellant's brief also appears to concede the existence of a long line of precedent where courts review the record in order to determine whether the error of failing to issue a statement of decision was prejudicial—precisely the review contemplated by Article VI, section 13. (AOB 21-22 [citing *Langford v. Thomas* (1926) 200 Cal. 192, 199-200 [252 P. 602]; *Hertel v. Emireck* (1918) 178 Cal. 534, 535 [174 P. 30], and other cases for the proposition that "when the findings made require the judgment rendered, the judgment will not be reversed for an absence of finding on other issues that would not affect the outcome"]; *id.* [citing *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.* (1965) 63 Cal.2d 602, 605 [47 Cal.Rptr. 564]; *Colburn Biological Institute v. De Bolt* (1936) 6 Cal.2d 631, 643 [59 P.2d
(footnote continued)

Appellant also cites several post-1911 decisions of this Court, purportedly ones "stat[ing] that undoubted rule" that the failure to make requested findings is reversible error. (AOB 19.) None of these cases discuss Article VI, section 13. And far from stating an undoubted rule, these decisions show that the Court undertook a prejudice or materiality analysis before reversing on the basis of a trial court's failure to prepare a statement of decision. (E.g., *Fairchild v. Raines* (1944) 24 Cal.2d 818, 830 [151 P.2d 260] [reversing after concluding that "[t]he failure of the trial court to specifically find on the issues raised by the third affirmative defense [was] material"]; *Parker v. Shell Oil Co.* (1946) 29 Cal.2d 503, 512 [175 P.2d 838] ["[T]he failure to find on all *material* issues raised by the pleadings and evidence is ground for reversal" (italics added)]; *Guardianship of Brown* (1976) 16 Cal.3d 326, 333 [128 Cal.Rptr. 10] ["failure to find on a *material* issue will *ordinarily* constitute reversible error" (italics added)]; *Carpenter v. Pac. Mut. Life Ins. Co. of Cal.* (1937) 10 Cal.2d 307, 326 [failure to make findings "constitutes prejudicial and

---

108], and other cases for the proposition that "[a]n 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."]; see also *In re Marriage of Davis* (1983) 141 Cal.App.3d 71, 75 [190 Cal.Rptr. 104] ["Where findings are requested in a proceeding in which a litigant is entitled to findings, the court's failure to make findings on *all material issues* amounts to reversible error." (italics added)].)

reversible error . . . *if such findings are necessary*" (italics added)].)[6]

Lower courts' past failures to consider Article VI, section 13 obviously does not permit (let alone compel) this Court to ignore the Constitution's requirement now. Indeed, in *Soule*, 8 Cal.4th 548, this Court rejected an identical argument. (*Id.* at p. 579.) There, the appellant relied on a line of post-1911 cases that concluded Article VI, section 13 did not apply to instruction errors in civil trials. (*Ibid.*) The Court recognized that the per se rule advanced by the appellant was backed by "a substantial body of California decisions." (*Id.* at pp. 574-75.) Nonetheless, this Court refused to rely on those decisions, reasoning that cases "automatically appl[ying]" an assumption of prejudice to all civil instructional error "without reference to the actual record" had "'lost sight of the principal purpose and significance of . . . California's constitutional provision explicitly addressing the matter of reversible error.'" (*Id.* at p. 579.) The decisions the Court refused to rely on in *Soule* were, as here, "decades old," "not unbroken," and often relied on older cases "recit[ing]" the same rule without providing any justification. (*Id.* at pp. 574-575; AOB 19 [citing cases dating from 1944 to 1976, several "quoting and following" one another as in *Soule*].)

---

[6] In addition, one of the opinions Appellant cites in support of his "undoubted rule" is a dissent. (*City of Vernon v. City of Los Angeles* (1955) 45 Cal.2d 710, 727 [290 P.2d 841] [cited at AOB 19].)

Likewise, in *Cahill*, 5 Cal.4th 478, the Court observed that Article VI, section 13 required it to overturn well-established precedent and hold that admission of an involuntary confession was not reversible per se. This Court recognized that retaining the per se rule on the basis of stare decisis "would fail to give proper recognition to the important public policies underlying the reversible error provision set forth in California's Constitution." (5 Cal.4th at p. 508.)

In sum, the cases cited by Appellant are neither persuasive nor authoritative, and Appellant has offered this Court no justification for adhering to a set of decisions that did not even consider Article VI, section 13. Appellant's reliance on those cases simply confirms that there is utterly no reasoned authority that supports Appellant's position following California's adoption of the Constitutional harmless error rule.

### 2. This Court's Precedents Establish That Errors Relating to Issuance of Statements of Decision Do Not Fall Within Any of Article VI, Section 13's Exceptions That Permit Per Se Reversal

The error at issue in this matter—a now-deceased trial judge's failure to issue a statement of decision after announcing his judgment—does not fall within either of the two exceptions to the general rule that a trial court error may not be reversed absent actual prejudice.

### (a) The Ban On Per Se Reversal Applies In All Cases Except Where the Error Denies a Criminal Defendant a Fundamental Right or Where the Error Intrinsically Defies Harmless Error Review

Since the time Article VI, section 13 was enacted, this Court has consistently held that per se reversal is no longer permitted except in extraordinary cases. Thus, in *O'Bryan*, 165 Cal. 55, this Court rejected the defendant's contention that the erroneous admission at trial of incriminating grand jury testimony was per se reversible error. (*Id.* at p. 61.) Although the testimony "should not have been admitted," (*ibid.*), this Court held that such error did not justify reversal per se. (*Id.* at p. 63.) The Court noted that such per se rules were generally prohibited because of "section 4 1/2 of article VI, added to the constitution . . . in 1911." (*Ibid.*)

The *O'Bryan* Court recognized, however, that even under the requirement of then-section 4 1/2 (now section 13), a limited category of serious errors could still be per se reversible. (*O'Bryan*, 165 Cal. at p. 63.) The Court noted that, while "[not] every invasion of even a constitutional right necessarily requires a reversal," a per se rule may apply to egregious errors affecting "certain fundamental rights" guaranteed to criminal defendants "regardless of the state of the evidence, such as the right to a jury trial and the right to protection under the plea of once in jeopardy."[7]

---

[7] The *Soule* Court added the following additional examples of per se reversible error: "improper denial of the right to separate counsel [citation], (footnote continued)

(*Cahill,* 5 Cal.4th at p. 492 [discussing *O'Bryan*].)

The Court subsequently elaborated on the limited nature of this exception in *Cahill*, 5 Cal.4th 478. There the Court explained that for an error to warrant per se reversal it must be such a profound and structural defect that in every circumstance affirming the judgment would result in a miscarriage of justice:

> [The issue is whether] the admission at trial of a coerced confession is the kind of error, such as the denial of a jury trial, that results in a 'miscarriage of justice' under article VI, section 13, without regard to the nature and strength of the additional evidence presented at trial, or whether, like most trial errors (including constitutional errors), the question whether the erroneous admission of such a confession warrants reversal under article VI, section 13, properly must be determined with due regard to all of the evidence received at trial.

(*Id.* at p. 493.) The Court ultimately concluded that admission of a coerced confession, even if a constitutional error, did not create the structural defect in the criminal judicial proceedings necessary to justify automatic treatment of such an error as a miscarriage of justice. (*Id.* at pp. 505-06.)

Finally, in *Soule,* 8 Cal.4th 548, this Court offered a dispositive statement about the scope of the exception that permits per se reversal.

---

conflict of interest on the part of counsel [citation], ineffectual waiver of right to jury trial [citation], and discrimination in jury selection [citation]." (*Soule v. Gen. Motors Corp.*, 8 Cal.4th at p. 577.)

There the Court considered whether an erroneous refusal to give a jury instruction on a central theory of a party's civil case was reversible per se.

The *Soule* Court held first that Article VI, section 13 applies with at least equal force to civil trials: "[T]he constitutional requirement of actual prejudice cannot apply any less stringently to a civil judgment than to a criminal conviction, in which the rights of an accused threatened with deprivation of liberty are at stake." (*Soule,* 8 Cal.4th at p. 578.) In addition, applying the same analysis as in *Cahill,* the Court found that civil instructional errors, while potentially or even likely prejudicial, were not per se reversible.

> Erroneous civil instructional omissions, like the criminal evidentiary error at issue in *Cahill*, may be more or less likely to cause actual prejudice, depending on their nature and context. Particularly serious forms of error might 'almost invariably' prove prejudicial in fact. But it does not follow that courts may 'automatically and monolithically' treat a particular category of civil instructional error as reversible per se.

(*Id.* at p. 580.)

Second, the *Soule* Court clarified and expanded on the specific situations in which a trial error could require per se reversal. Specifically, it held that per se reversal was appropriate where either: (1) the errors involved a "fundamental denial of the orderly legal procedure due to a criminal accused," or (2) constituted "structural [defects] in the trial

mechanism" that "def[y] evaluation for harmlessness." (*Soule*, 8 Cal.4th at p. 579 [citation].)

A failure to render a statement of decision plainly does not meet either exception.

**(b) The Exception to Article VI, Section 13 for Errors That Deny a Fundamental Right to a Criminal Defendant Does Not Apply Because this is Not A Criminal Case**

The exception allowing per se reversal for errors that implicate a "criminal defendant's right to an orderly legal proceeding" manifestly does not apply, because this is not a criminal proceeding. This appeal arose from a civil bench trial, and Appellant's request for a statement of decision is under section 632 of the Code of Civil Procedure. The Court's language in *Soule,* a civil case, was not accidental, as the Court's decision specifically concerned whether the rules for review in criminal cases also applied to civil cases. The Court clearly sought to distinguish the fundamental rights guaranteed by the Constitution to criminal defendants from other rights—even constitutional ones—afforded to civil litigants. (*Soule*, 8 Cal.4th at p. 580 ["No form of civil trial error justifies reversal and retrial, with its attendant expense and possible loss of witnesses, where in light of the entire record, there was no actual prejudice to the appealing party."]; see also *id.* at p. 576 ["*O'Bryan* spoke particularly of criminal law

errors . . ."].) This reasoning was reaffirmed in *Cassim v. Allstate Ins. Co. supra*, 33 Cal.4th 780. (*Id.* at pp. 801-02.)[8]

Even in the criminal context, courts have rejected attempts to apply per se reversal rules to errors far more disruptive than a failure to render a statement of decision. (See, e.g., *O'Bryan*, 165 Cal. 55 [improper inclusion of incriminating grand jury testimony not error per se]; *Cahill,* 5 Cal.4th at p. 488 [erroneous admission of a coerced confession not reversible per se]; *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870] [failure to instruct on lesser included offenses not reversible per se]; *see also People v. Braxton* (2004) 34 Cal.4th 798, 805 [22 Cal.Rptr.3d 46] [trial court's error in refusing to entertain a defendant's oral motion for a new trial, despite statutory language mandating a new trial, did not trump Constitution and was subject to review for harmless error]; *In re Jesusa V.* (2004) 32 Cal.4th 588, 624-25 [10 Cal.Rptr.3d 205] [denial of right to be present at juvenile trial not reversible per se].)

In sum, the first *Soule* exception offers Appellant no relief because that exception applies only to criminal defendants, and in any event requires denial of the type of fundamental right not at issue in this case.

---

[8] Appellate courts have followed the California Supreme Court's lead and declared per se rules not applicable to civil suits. (*See, e.g., Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1352 [172 Cal.Rptr.3d 686]; *Keener v. Jeld-Wen, Inc.* (Ct. App. 2008) 75 Cal.Rptr. 3d 61, 72 *review granted and opinion superseded on other grounds,* (2008)186 P.3d 394 and *rev'd,* (2009) 46 Cal.4th 247.)

### (c) The Exception for Structural Errors That Defy Review Also Does Not Apply Because The Error at Issue is Not Structural and is Readily Subject to Review

The second *Soule* exception—for a "structural [defect] in the trial mechanism that defies evaluation for harmlessness"—is equally inapplicable. Arguably, this exception to Article VI, section 13's mandate could apply to both criminal and civil trials, and certain lower courts have found structural error in civil trials, where an error infected the entire proceeding. (*See, e.g.*, *Martin v. Cnty. of Los Angeles* (1996) 51 Cal.App.4th 688, 698 [59 Cal.Rptr.2d 303] *as modified on denial of reh'g* (Jan. 13, 1997) ["The denial of the right to jury trial is reversible error per se."]; *Gordon v. Nissan Motor Co.* (2009) 170 Cal.App.4th 1103, 1114-15 [88 Cal.Rptr.3d 778, 787] ["[W]hen a trial court erroneously denies *all* evidence relating to a claim, or *essential* expert testimony without which a claim cannot be proven, the error is reversible per se . . . ."] [italics in original].)

However, the *Soule* Court made clear that the structural error does not apply, and thus no per se reversal rule exists, "if a civil litigant was permitted to introduce evidence, cross-examine witnesses, and present argument before a fairly selected jury that rendered its honest verdict on the

trial record . . . ." (*Soule*, 8 Cal.4th at p. 579.)[9]

In the instant case, there was no structural error. To begin with, the failure to render a statement of decision is not a structural defect in the trial mechanism. The error complained of here did not even occur until *after* trial and in no way interfered with Appellant's ability to put on evidence, cross-examine witnesses, present argument to a neutral trier of fact, and receive a fairly rendered judgment.

Moreover, contrary to Appellant's assertion (AOB 13-14) there is no plausible argument that the error in this case intrinsically defies appellate review. As noted *supra*, numerous lower courts in California—including the court below—have reviewed and easily determined from the trial record whether the failure to issue a statement of decision harmed the appellant. Here the Court of Appeal reasonably concluded that no harm was possible because the appellant had not preserved his request for apportionment, and thus a statement of decision would not have affected that issue in any way. Indeed, there are a variety of analogous circumstances in which failure to

---

[9] Courts routinely deny per se reversal status to far more harmful civil errors than what is at issue here. (*Martin-Bragg v. Moore* (2013) 219 Cal.App.4th 367, 394-95[161 Cal.Rptr.3d 471] [erroneous use of summary procedures that denied party substantial procedural rights not reversible per se]; *Conservatorship of Pers. & Estate of Maria B.* (2013) 218 Cal.App.4th 514, 532 [160 Cal.Rptr.3d 269] [use of incorrect standard of review to deny petition not reversible per se]; *Sierra View Local Health Care Dist. v. Sierra View Med. Plaza Associates, LP* (2005) 126 Cal.App.4th 478, 484 [24 Cal.Rptr.3d 210 *as modified* (Feb. 3, 2005)] [jury misconduct, while giving rise to presumption of prejudice, is not reversible per se].)

reduce a decision to writing has been found to be reviewable for error and not reversible per se. (E.g., *Robert v. Stanford Univ.* (2014) 224 Cal.App.4th 67 [168 Cal.Rptr.3d 539 *reh'g denied* (Mar. 20, 2014)] [failure to make findings on a post-trial motion for attorney's fees was not reversible per se].) Even in the context of a criminal post-trial error, it has been determined that a failure to render a statement of reasons explaining sentencing choices is not reversible per se. (*People v. Gutierrez* (1991) 227 Cal.App.3d 1634, 1638-1639 [278 Cal.Rptr. 748].)

Further, ironically, Appellant Monier himself offers at least six conceivable circumstances in which reversal would *not be* required in connection with the failure to issue a statement of decision, and thus a per se rule would not make sense. Specifically, he admits:[10]

- "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." (AOB 20.)
- "[A] court is not required to provide a statement of decision when there is no factual dispute." (AOB 20.)
- "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." (AOB 20.)

[10] Although Appellant styles these instances "exceptions" to the per se rule, such exceptions swallow the rule, and, in practice, require the court to perform the review that is set forth by Article VI, section 13 of the California Constitution.

- "A court does not reversibly err in failing to provide a statement of decision on immaterial facts or fact that are not and cannot be disputed." (AOB 21.)

- "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." (AOB 20-21).

- "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." (AOB 22.).[11]

The fact that so many situations exist in which the failure to render a statement of decision would not prejudice the parties, proves the point. The

---

[11] After admitting that there exist exceptions to the per se rule, Appellant then attempts to argue that the apportionment issue here does not fall into one of those exceptions. (AOB 23.) However, the Court of Appeal already rejected Appellant's arguments on this score, and this Court has declined to review those findings. The Court of Appeal found:

> Defendant, however, 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. By failing to do so, defendant forfeited any right he may have had to apportionment.

(*F.P. v. Monier*, *supra*, 222 Cal.App.4th at p. 1101.) As such, the Court of Appeal concluded that no prejudice resulted from the failure to render a statement of decision because, "[h]aving 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.*) While Appellant asked this Court to review that holding, (*see* Petition for Review at 1, 18-23), the Court declined review, meaning the Court of Appeal's rejection of Appellant's arguments stands.

*Cahill* case provides an instructive comparison. There, the Court refused to treat erroneous admission of a criminal confession as prejudicial per se even after recognizing "that confessions 'as a class' '[a]lmost invariably' will provide persuasive evidence of a defendant's guilt," operating "as a kind of evidentiary bombshell which shatters the defense." (*Cahill,* 5 Cal.4th at p. 503.) Despite concluding that "the improper admission of a confession is likely to be prejudicial in many cases," the Court held that this did not "justify the judicial adoption of a state-law rule that automatically and monolithically treats *all* improperly admitted confessions as requiring reversal of the defendant's conviction; the California constitutional reversible-error provision was adopted for the specific purpose of eliminating just such a prophylactic approach to reversible error." (*Ibid.*, italics in original.)

The Court relied on the fact that there were multiple scenarios in which admission of an involuntary confession might be harmless to conclude that no per se rule was warranted. The Court explained that such examples "suggest . . . [that] in many instances it will be possible for an appellate court to determine with confidence that there is no reasonable probability that the exclusion of the confession would have affected the result." (*Cahill*, 5 Cal.4th at p. 505.)

Given this analysis, the Court determined that "a refusal to inquire into the impact, if any, of the confession on the verdict would result in

complete abandonment of article VI [§13], of the California Constitution." (*Cahill*, 5 Cal.4th at p. 505 [citing *People v Jacobson*, 63 Cal.2d 319, 33].) Here too, to insist on a per se rule in the face of multiple examples in which prejudice would not occur, "would result in complete abandonment" of Article VI, section 13 of the California Constitution.

Although a trial court's failure to issue a statement of decision may at times require reversal in order for the appellate court to effectively perform a review of the material issues, it is impossible to imagine that omission of a statement of decision in the average case is likely to be so prejudicial that it operates like a "bombshell" that affects the entire defense and renders fair review of the record impossible. Presented with a record untainted by structural error, Courts of Appeal are more than capable of determining whether the failure to render a statement of decision was prejudicial or harmless, as when the only arguments advanced on appeal are legal in nature (or, as here, were not preserved at trial).

**(d) Adopting A New Exception For Failure To Render a Statement of Decision Would Serve No Purpose and Would Make No Sense In The Context of This Court's Other Precedents**

Appellant appears to argue that some special exception should be crafted for the error of failing to issue a statement of decision in order to discourage lower courts from abandoning that responsibility en masse, thus complicating the work of reviewing courts. (AOB 12-13.) This is part of

Appellant's argument that a per se reversal rule for a failure to render a statement of decision is necessary to preserve judicial economy. (*Ibid.*) Appellant implies that, absent such a rule, trial courts may shirk their duties to render statements of decision under section 632 to "far-reaching and burdensome effects." (AOB 11-12 [citing *Miramar*, *supra,* 163 Cal.App.3d at pp. 1130-31 (conc. opn. of Spencer, P.J.)].)

Appellant's assertions about the necessity of a per se reversal rule for the sake of judicial efficiency are belied by California's experience, by federal practice, and by the practice of sister state courts.

First, several California appellate courts already apply harmless error review to trial courts' failure to render a statement of decision, and that practice has not precipitated a wave of trial courts refusing to issue statements of decision. (*Langford v. Thomas* (1926) 200 Cal. 192, 199-200 [252 P. 602]; *Hertel v. Emireck* (1918) 178 Cal. 534, 535 [174 P. 30]; *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.* (1965) 63 Cal.2d 602, 605 [47 Cal.Rptr. 564]; *Colburn Biological Inst. v. De Bolt* (1936) 6 Cal.2d 631, 643 [59 P.2d 108].)

California's experience is not unique. For many years, federal courts have held that the failure to issue a required statement of decision is subject to harmless error review. Federal Rule of Civil Procedure 52(a) requires that, at the close of evidence in matters tried without a jury, district courts state findings of facts and conclusions of law on the record or in a

memorandum of decision. (Fed. R. Civ. P. 52(a).) This requirement, like section 632, is mandatory. (See 9-52 Moore's Federal Practice Civil § 52.10 (3rd ed. 2014).) Nonetheless, federal courts reject a reversible per se rule for violations of Rule 52(a), recognizing that the erroneous failure to prepare findings may be harmless in cases where "the appellate court can discern enough solid facts from the record as a whole to enable it to render a decision." (*Id* at § 52.12; see, e.g., *Rodriguez v. Robbins* (9th Cir. 2013) 715 F.3d 1127, 1133 n.6 ["failure to comply with Rule 52(a) does not require reversal unless a full understanding of the question is not possible without the aid of separate findings" [Citation]]; *Boatmen's First Nat'l Bank v. Kansas Pub. Employees Ret. Sys.* (8th Cir. 1995) 57 F.3d 638, 640 n.5 [Rule 52(a) error not reversible when "the record itself sufficiently informs the court of the basis for the trial court's decision on the material issues"]; *Rothenberg v. Security Management Co.* (11th Cir. 1984) 736 F.2d 1470 [same].)

There is no evidence that this harmless error rule has inspired federal district courts to shirk their obligation to issue decisions or resulted in any of the "far-reaching and burdensome effects" Appellant predicts. (AOB 11-12.) To the contrary, several Circuits have recognized that a harmless error rule serves the purposes of Rule 52(a), including its goal of promoting judicial economy. (*Dann v. Studebaker-Packard Corp.* (6th Cir. 1961) 288 F.2d 201, 205-06 & n.7 ["in the interests of judicial economy," court would

decide appeal despite trial court's failure to issue a statement of reasons] [collecting cases] [disapproved of on other grounds by *J. I. Case Co. v. Borak* (1964) 377 U.S. 426, 434]; *Kweskin v. Finkelstein* (7th Cir. 1955) 223 F.2d 677, 679 [court would, in the right case, "consider the failure to make adequate findings of fact non-reversible" because a remand "involve[s] a delay and additional expense"]; *Burman v. Lenkin Const. Co.* (D.C. Cir. 1945) 149 F.2d 827, 828 [in light of "record considered as a whole . . . it would be both a waste of time and a needless expense to send the case back to the District Court for special findings of fact"].)

Appellant's claim that there will be judicial gridlock without a per se rule is further undercut by the fact that many states employ a harmless error rule rather than a per se reversal rule when reviewing cases unaccompanied by required findings of fact. At least 27 states have explicitly held that the failure to prepare a statement of decision is not reversible per se, and courts in at least three other states have implicitly done so, by relying on a finding of prejudice before reversing.[12] Thus, although Appellant would have this

---

[12] (*Cormier v. D.C. Water & Sewer Auth.* (D.C. 2013) 84 A.3d 492, 498 n.9 ["deficiency in factual findings" will not be reversed "where the trial court's decision is clearly supported by the record" [Citations]]; *Sneil, LLC v. Tybe Learning Ctr., Inc.* (Mo. 2012) 370 S.W.3d 562, 573-74 (en banc) ["[T]he failure of a circuit court to make findings of fact that were requested properly does not automatically mandate reversal."]; *Tenery v. Tenery* (Tex. 1996) (per curiam) 932 S.W.2d 29, 30 ["A trial court's failure to make findings is not harmful error if the record before the appellate court affirmatively shows that the complaining party suffered no injury
(footnote continued)

[citations]]; see also *Lovlace v. Copley* (Tenn. 2013) 418 S.W.3d 1, 36; *State ex rel. Gilbert v. Cincinnati* (Ohio 2010) 125 Ohio St. 3d 385, 393; *Akers v. Mortensen* (Idaho 2009) 147 Idaho 39, 44-45; *Shelhamer v. Shelhamer* (Wyo. 2006) 138 P.3d 665, 674-75; *Taylor v. Elkins Home Show, Inc.* (W. Va. 2001) 210 W. Va. 612, 618; *Lemon v. Commw., Dept. of Transp. Bureau of Driver Licensing* (Pa. Commw. Ct. 2000) 763 A.2d 534, 537-38 & n.2; *Backlund v. Univ. of Wash.* (Wash. 1999) 137 Wash. 2d 651, 657; *F.E.H., Jr. v. State of Ind.* (Ind. Ct. App. 1999) 715 N.E.2d 1272, 1275; *Lowery v. Lowery* (Miss. 1995) 657 So.2d 817, 819; *D & R Realty v. Bender* (Neb. 1988) 230 Neb. 301, 306-07; *Milton v. Dennis* (N.Y. 1983) 464 N.Y.S.2d 874, 874-75; *Kinkella v. Baugh* (Utah 1983) 660 P.2d 233, 236; *Podany v. Podany* (Minn. 1978) 267 N.W.2d 500, 502-03; *In re Wilson* (Mass. 1977) 372 Mass. 325, 330; *Stugelmayer v. Ulmer* (S.D. 1977) 260 N.W.2d 236, 240; *Walber v. Walber* (Wis. 1968) 40 Wis. 2d 313, 319; *Rowell v. Kaplan* (R.I. 1967) 103 R.I. 60, 70; *City of Phoenix v. Consol. Water Co.* (Ariz. 1966) 101 Ariz. 43, 45; *Anderson v. Allstate Ins. Co.* (N.C. 1966) 266 N.C. 309, 313; *Mann v. Mann* (Fla. Dist. Ct. App. 1962) (per curiam) 145 So. 2d 886, 886-87; *Tamsk v. Cont'l Oil Co.* (Kan. 1944) 158 Kan. 747 [150 P.2d 326]; *Flueling v. Blue Ribbon Auto Drivers' Ass'n* (Mich. 1929) 247 Mich. 620, 622-23; *Curtin v. Moroney* (Okla. 1925) 246 P. 232, 236; *Edwards v. Louisville & N.R. Co.* (Ala. 1918) 202 Ala. 463, 465-66.) Three other states have not explicitly endorsed a harmless error rule using one of these formulations, but have seemed to rely on a finding of prejudice. (*In re Treatment & Care of Luckabaugh* (S.C. 2002) 351 S.C. 122, 133 [remanding for failure to comply with South Carolina's Rule 52(a) when appellate court's "review of the record cannot save the order from its deficiencies"]; *Curtis v. Finneran* (N.J. 1980) 83 N.J. 563, 569-71 [remand necessary when trial court failed to enter findings but issued statement containing "several mistakes that may have contributed to" the outcome]; *Cmty. Bank v. U. S. Nat'l Bank of Oregon* (Or. 1976) 276 Or. 471, 478-79 [remand necessary when it was impossible to determine whether ruling was based on rejection of evidence or a legal conclusion].) Other states appear to have had no occasion to decide between a per se or harmless error rule because state procedure requires appellants to remedy a judge's failure to issue findings of fact through various statutory mechanisms before appeal is permitted. (E.g., *Reader v. Cassarino* (Conn. 1998) 51 Conn. App. 292, 296; *Hester v. Hester* (La. Ct. App. 1996) 680 So.2d 1232, 1236; *Korsrud v. Korsrud* (Iowa 1951) 242 Iowa 178, 183.)

Court believe that to reject a per se rule for failure to render a statement of decision would plunge appellate courts into a hopeless abyss of inefficiency, in actuality, such a decision would align California with the majority of state and federal courts. These courts have found that employment of a harmless error review actually furthers judicial efficiency because it prevents needless and undeserved retrials years removed from pertinent facts and witnesses.

Moreover, a special new rule for the failure to render a statement of decision would create confusion in the lower courts because it would be impossible to reconcile with this Court's other precedents regarding harmless error review. Appellant offers no rational theory by which treating the technical, and often non-prejudicial, failure to render a statement of decision as per se reversible error can be squared with this Court's mandate that Article VI, section 13 applies even in situations where the error at issue is far more likely to result in actual prejudice, such as in *O'Bryan, Cahill*, and *Soule*. Here, the error complained of did not even occur during trial, and could not have affected the trial's outcome or called into question the essential fairness of the proceeding. Departure from *O'Bryan, Cahill,* and *Soule*'s clear rejection of per se error rules absent exigent circumstances would send a message to the lower courts and enterprising appellants that Article VI, section 13 of the California Constitution does not mean what it says, and that there exist broad

categories of technical, non-structural errors that may justify per se rules of reversal.

In sum, this Court's precedents make clear that neither of the narrow exceptions to the bar on per se reversal apply to a failure to render a statement of decision, and no basis exists to establish a new exception.

## II. APPLYING A HARMLESS ERROR RULE TO A FAILURE TO RENDER A STATEMENT OF DECISION WOULD FRUSTRATE RATHER THAN ADVANCE JUDICIAL ECONOMY

Finally, Appellant's proposed rule not only undermines the purpose of Article VI, section 13, but it would also undermine the purpose of section 632. As Appellant acknowledges, the requirement of a statement of decision is designed to improve judicial efficiency by facilitating appellate review. (AOB 12-14.) While issuance of a statement of decision should indeed facilitate simpler appellate review, forcing the system to retry every case where that requirement is breached would impose disproportionately greater drag on the judicial system.

Where it is clear no prejudice has occurred, per se reversal necessarily creates the judicial inefficiencies that Article VI, section 13 was promulgated to eradicate, and that section 632 never intended. As this Court noted in *O'Bryan*, prior to the passage of section 13's predecessor, section 4 1/2, appellate courts were not permitted to weigh evidence and could not therefore review the record to determine whether the error

complained of had "worked injury." (*O'Bryan*, 165 Cal. at pp. 63-64.) This was unsatisfactory because it "hamper[ed] the state in its efforts for a prompt and effective enforcement of the prohibitions and penalties of its penal laws." (*Id.* at p. 64.) The prohibition on harmless error review created inefficiencies and decreased confidence in the judicial system because it sometimes required granting new trials "to defendants on account of technical errors or omissions" even in situations where the error was harmless and the judgment resulted from "a procedure which was substantially fair and just." (*Ibid.*) To alleviate such inefficiencies, *O'Bryan* reasoned section 4 1/2 (now section 13) of Article VI "must be given at least the effect of abrogating the old rule that prejudice is presumed from any error of law." (*Id.* at p. 65.)

*Cahill* is in accord, describing the public policy considerations behind section 13 as preserving the efficiency and efficacy of the system. In *Cahill,* the Court noted the problems attendant with per se reversal:

> When a defendant has received a fair trial, and a review of the record reveals that, although some evidence improperly was admitted at trial, there was also an overwhelming amount of additional, properly admitted evidence clearly establishing the defendant's guilt, reversal of the judgment will result either in a superfluous retrial in which the outcome is a foregone conclusion or, even more unfortunately, in a new trial whose result is altered by the loss of essential witnesses or testimony through the passage of time. In either event, public

> confidence in the operation of the criminal justice system is diminished.

(*Cahill,* 5 Cal.4th at p. 509.)

Application of a per se rule for a failure to render a statement of decision would work the same inefficiencies in this case. Appellant received a fair trial and was given an opportunity to present his own evidence; he could have presented—but chose not to present—evidence and argument on the issues he later raised in his request for a statement of decision, including apportionment. (*F.P. v. Monier, supra*, 222 Cal.App.4th at p. 1101.) Retrial would be an arid exercise because, despite the absence of a statement of decision on the issues that Appellant later pursued on appeal, the Court of Appeal was able to decide each of those issues as a matter of law or based on clear record evidence.

Moreover, a new trial on damages would be inevitably altered by the passage of time. Such a trial would be at least 25 years removed from the sexual assaults and seven years from the past trial. Requiring a new trial to determine appropriate damages arising from assaults that occurred 25 years ago, even though an appellate court has already determined that rendering a statement of decision would not have affected the damages awarded or Appellant's entitlement to apportionment, would do nothing but further clog the court system, decrease public faith in the institution, and create a tremendous burden for a sexual assault victim. (Cf. *United States v.*

*Hasting* (1983) 461 U.S. 499, 507 [103 S.Ct. 1974] [before declining to apply usual harmless-error rule, appellate court should have "consider[ed] the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past" and "the practical problems of retrying these sensitive issues more than four years after the events"].)

Although Appellant grounds his advocacy for a per se rule in the name of judicial efficiency, this Court has made clear that per se rules actually result in greater inefficiencies. The Court of Appeal is capable of undertaking review to determine when a failure to render a decision was harmless or not. To strip them of that power, and require that all failures result in automatic reversal, no matter how immaterial the issues presented, would result in unnecessary, delayed, and unjust trials.

## CONCLUSION

The Court of Appeal properly rejected the rule Appellant seeks. California constitutional law and this Court's precedents forbid applying a per se reversal rule for a trial court's failure to render a statement of decision. Moreover, adopting such a rule would not advance the State's interest in judicial economy, and would only burden California courts and fault-free litigants such as Respondent F.P. with needless and costly relitigation. For these and the aforementioned reasons, Respondent F.P. respectfully requests that this Court determine that a failure to enter a

statement of decision is not per se reversible.

DATED:

November 4, 2014

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: /s/ Jeffrey L. Bleich

Jeffrey L. Bleich

*Counsel for Plaintiff and Respondent, F.P*

**CERTIFICATE PURSUANT TO CALIFORNIA RULE OF COURT 8.520(C)**

Pursuant to Rule 8.520(C)(1) of the California Rules of Court, I certify that the attached ANSWER BRIEF ON THE MERITS contains 11,220 words, as measured by the word count of the computer program used to prepare this brief.

DATED: November 4, 2014

*/s/* Jeffrey L. Bleich
Jeffrey L. Bleich

*F.P. v. Monier, Case No.: S216566*
California Supreme Court

PROOF OF SERVICE

I, Angela Balestrieri, declare:

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, Suite 2700, San Francisco, CA 94105.

On November 4, 2014, I served true copies of the following document described as:

**PLAINTIFF AND RESPONDENT'S ANSWER BRIEF ON THE MERITS**

on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST:**

**BY FEDEX:** I enclosed said document in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on November 4, 2014, at San Francisco, California.

Angela Balestrieri

**SERVICE LIST**

Jay-Allen Eisen, Esq.
Aaron S. McKinney, Esq.
Jay-Allen Eisen Law Corporation
2431 Capitol Avenue
Sacramento, CA 95816

*Attorneys for Defendant and Appellant Joseph Monier*

John P. Henderson, Esq.
Law Offices of John P. Henderson
8150 Sierra College Blvd., Ste. 170
Roseville, CA 95661

*Co-Counsel for Plaintiff and Respondent F.P.*

Clerk
Third District Court of Appeal
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Clerk
Sacramento County Superior Court
720 9th Street
Sacramento, CA 95814