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3d Civil No. C095876

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

ARIANNA HEDDING-KELTON,
et al.,

Plaintiffs and Respondents,

v.

MONICA MADRIGAL, et al.,

Defendants and Appellants.

Appeal from the Sacramento County Superior Court
Case No. 34-2017-00213129-CU-PO-GDS
Judge Steven Gevercer Presiding

APPELLANTS' OPENING BRIEF

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Court of Appeal
State of California
Third Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: C095876

Case Name: Hedding-Kelton et al. v. Madrigal et al.

Please check the applicable box:

□ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

■ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. General Insurance Company	Insurance Carrier for Appellants
2. Minh Do	Defaulted cross-defendant and potentially liable party
3.	
4.	

Please attach additional sheets with Entity or Person Information if necessary.

Signature of Attorney/Party
Submitting Form

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INTRODUCTION

A pit bull attacked Arianna Hedding-Kelton while she was visiting the home of appellants Monica and Oscar Madrigal.[1] Hedding-Kelton and her mother, Jasmine Lawson, sued Monica for pain and suffering damages. Monica invoked her rights to apportionment of fault and responsibility under Proposition 51, and she argued that her tenant and housemate, Minh Do, was responsible for the attack, both because he owned the dog and because he negligently failed to protect Hedding-Kelton. Monica asked the trial court to instruct the jury to decide whether to apportion responsibility to Do, but the court refused, ruling that there was not "substantial evidence to support an instruction" on apportionment. (Reporter's Transcript, Volume 7, p. 724 [7RT/724].)

The trial court erred. Its failure to order the jury to consider apportionment was prejudicial error, and now this Court must reverse the judgment and order a limited retrial directing the jury to apportion the existing damages award, with Do included as another tortfeasor. (*Collins v. Plant Insulation Co.* (2010) 185 Cal.App.4th 260, 275-276 (*Collins*).)

Viewing the evidence in the light most favorable to Monica (*Freeze v. Lost Isle Partners* (2002) 96 Cal.App.4th 45, 49 (*Freeze*)), a jury could apportion responsibility to Do because:

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[1] Because appellants Monica and Oscar Madrigal share the same last name, we refer to them by their first names for purposes of clarity.

1. There is substantial evidence that Do owned the dog, rendering him strictly liable for its bites under Civil Code section 3342. Among other things, there was evidence that Do: (a) purchased the dog; (b) agreed to double his rent so that the dog could live with him; (c) agreed in his lease to be "fully responsible" for the dog; and (d) kept, fed, watered, exercised, and cared for the dog. Additionally, Animal Control records listed Do as the dog's "owner" and plaintiff/respondent Lawson herself testified that he owned the dog.

2. There is also substantial evidence that Do negligently failed to control the dog. Among other things, he purchased a 70-80-pound pit bull and kept it in a home with frequent child-visitors (including nine-year-old Hedding-Kelton, who visited almost every other weekend). A jury could find that Do knew the dog was vicious and dangerous, because he took steps to formally "reintroduce" and restrain the dog around Hedding-Kelton, and because the dog is a pit bull—a breed that, according to plaintiffs' own expert, has a tendency towards violent aggression. The evidence shows that despite Do's knowledge of the risk of harm, he generally allowed the dog to have free reign on the property and did not regularly restrain the dog, inside or outside. And on the morning of the attack, Do left the dog unrestrained in a backyard where it could readily be—and indeed was—encountered by multiple young children, while Do went upstairs to sleep. Thus, substantial evidence supports a finding that Do was negligent.

In sum, Do should have been included in the apportionment analysis, under both strict-liability and negligence theories. The absence of apportionment of responsibility to a potentially responsible tortfeasor is prejudicial, as *Collins* recognized (185 Cal.App.4th at p. 276), and as any realistic review of the full record here shows.

The Court should reverse for a limited retrial—specifically, a trial limited to apportionment of the existing, fixed $297,000 total damages award, in which the jury is directed to assess both Monica Madrigal *and* Minh Do's relative contributions to plaintiffs' harm.[2]

[2] Monica does not seek a full retrial; indeed, she does not challenge the amount of the damages verdict, only the chance to try her apportionment theory to a jury and apportion the jury's existing award of damages based on normal apportionment rules and Proposition 51.

STATEMENT OF FACTS

We describe the facts "most favorably to" defendant and appellant Monica Madrigal, the party challenging the trial court's rejection of defendants' proposed jury instructions. (*Freeze*, *supra*, 96 Cal.App.4th at p. 49.) We draw "all inferences most favorable to" Monica. (*Ibid.*; *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 176 (*Godfrey*) [where appellant challenges "refusal to instruct, the reviewing court must view the evidence and all inferences that may be drawn therefrom in the light most favorable to" appellant].)

A. The Madrigals Frequently Entertain Relatives, Including Young Children, In Their Home.

Appellants Oscar and Monica Madrigal own a 1,445 square-foot home in Sacramento, where they frequently entertain many relatives, including young children. (AA/11; 3RT/170; see <https://www.zillow.com/homedetails/8937-Robbins-Rd-Sacramento-CA-95829/96041956_zpid/> (last visited Oct. 27, 2022) [1,445 square footage]; 3RT/178-179; 6RT/385-386.) The two-story home has three bedrooms and a small backyard. (*Ibid.*; 6RT/389.)

The first floor features "an open floor plan," with a living room directly behind the front door and a dining room/kitchen to the left of the living room. (3RT/186.) In the dining room/kitchen area, a sliding door leads to the backyard. (6RT/390.) A stairway to the left of the front door provides access to the second floor and bedrooms. (3RT/186.)

B. The Madrigals Agree That Do Can Keep "Munch," An Adult Male Pit Bull, In The Home.

For many years, the Madrigals leased a bedroom to tenants. (7RT/578, 581, 591-593.) In 2013, they leased the bedroom to Do. (3RT/180, 205; 5RT/303; 7RT/581-582, 594.)

A year later, Do advised them that he was considering obtaining a pit bull named "Munch," and asked whether he could bring the dog into the home. (3RT/171-172, 174-177.)

The Madrigals agreed but required Do to pay substantially increased rent. (7RT/581-582, 584-586, 595.) Specifically, Do agreed that: (a) he would pay an additional $250 per month in rent; and (b) he and his cotenant/girlfriend Shoua Her would be "fully responsible for the pet." (3RT/185; 7RT/574-575, 585-586.) The increased, pet-related rent charge meant that Do "had to pay [the Madrigals] almost double the rent for the privilege of bringing a dog into the house." (7RT/595.)

C. After Buying Munch, Do Keeps, Feeds, Waters, And Cares For Him.

Do then "bought" Munch, and the seller "dropped him off into the [Madrigals'] garage." (7RT/582, 577; 6RT/500-501.) Do, the new "owner of the dog," promptly "picked him up." (*Ibid*.)

After Munch's arrival, Do was "primarily responsible" for the dog. (RT/586.) For example:

- Do arranged to keep Munch in a kennel inside his bedroom each night. (3RT/181-182, 187-189; 7RT/576.)
- Do bought all of Munch's food, fed him, watered him, and exercised him. (7RT/576, 600, 610.)
- Do ensured that Munch could relieve himself. (7RT/610.)
- Do arranged for Munch to "get shots" on multiple occasions. (7RT/601.)

If Do could not provide food, water, or exercise to Munch, then his girlfriend/co-tenant would do so, if she "was there." (7RT/610.) Indeed, whenever either or both of them were home, "it was their responsibility" to complete these tasks. (*Ibid.*) When Do and his girlfriend were absent, Do arranged for his sister to feed, water, and walk Munch. (7RT/576.)

D. Despite His Awareness Of Munch's Potentially Vicious Nature And The Frequent Presence Of Numerous Adults And Children, Do Allows Munch To Roam Unrestrained.

1. Do recognizes that Munch's presence creates a risk of harm.

Munch was a "very dangerous" dog—an unneutered, powerfully built adult male pit bull, weighing 70-80 pounds.

(3RT/171-172, 177-178; 5RT/303-304.) His presence posed significant risks to the Madrigals and their visitors. (3RT/177-179; 6RT/385-386.) The Madrigals frequently entertained relatives and guests, including many young children, in the home (*ibid.*), and some guests, like Hedding-Kelton, visited the Madrigals "'[a]lmost every other weekend'" (*ibid.*; 6RT/501-502).

Do recognized that Munch's presence posed some risks to the Madrigals and their guests, and he took some limited precautions to minimize those risks. (3RT/180-181; 7RT/609-610.)

For example, if Do was present when a new guest visited, he was "usually" in charge of "introduc[ing] the dog" to the guest, rather than allowing Munch and the guest to encounter each other unexpectedly. (7RT/609-610.)

Consistent with this procedure, when Munch was first "introduced" to Hedding-Kelton, Do "was there" alongside Munch. (3RT/180.) And whenever Hedding-Kelton returned to the home, she "would be reintroduced to Munch" and "there would always be" an adult, "either Monica, Oscar or [Do] there," to "guide the dog over" and "hold his collar." (6RT/385-387.) If the attending adult guided Munch towards Hedding-Kelton but his behavior suggested that he did not want to approach her, then the adult—who was "usually" Do—would "tell [her] to wait until later." (*Ibid.*; 7RT/609-610.) If it appeared that Munch did not want to interact with her, "then [she] wouldn't play with him or pet him." (6RT/386.)

When Do was guiding Munch through a reintroduction with Hedding-Kelton, his practice was to prevent her from being "left alone with Munch even after the reintroduction period" and to ensure that he, Monica, or Oscar was present throughout the time that she interacted with Munch. (6RT/385-387.)

2. Nevertheless, Do generally allows Munch to roam unrestrained in the home and backyard.

Despite recognizing Munch's potential danger, Do took virtually no other precautions to prevent him from encountering and harming the Madrigals or their guests. He did not arrange for Munch to have obedience training. (3RT/180.) He did not provide the Madrigals veterinary records, or any proof regarding Munch's breeding or genetic tendencies towards aggressiveness. (R7T/583-584.) He never took any steps to restrain Munch within the home or backyard.

Instead, Do allowed the dog to have "free reign" over the home's interior and let him move unrestrained in common areas. (3RT/183-184.) Munch generally went "wherever he chose" inside and "was left unrestrained" and allowed "to roam" freely in the backyard, too. (3RT/183-184; 5RT/284.) As plaintiffs' expert put it, Munch "basically did what he wanted in the house"; "[p]retty much he was calling the shots" and "did whatever he wanted." (4RT/249, 257, 259.)

E. Munch Attacks And Bites Hedding-Kelton.

After Munch had lived in the home for a year, plaintiffs came for a Friday dinner with the Madrigals; Hedding-Kelton decided to stay at their home that night. (6RT/385, 388-389, 449-450.)

On Saturday morning, Hedding-Kelton walked downstairs into the kitchen/dining room, where she encountered Monica cooking for her; multiple other child-visitors were also "running around" in the area. (6RT/389; 3RT/193-194; 7RT/610.)

Around this time, Do decided to release Munch from his kennel. (6RT/389; 3RT/192-193.) Do accompanied Munch out of Do's upstairs bedroom, down the stairs, and across the downstairs area, and then "let" Munch into the backyard. (*Ibid.*; 3RT/192-193, 186; 6RT/389-390; 7RT/600, 610.) Once Munch was in the backyard, Do did not restrain him. (3RT/192-193, 183-184.) Instead, he left Munch unrestrained and went back upstairs to sleep. (*Ibid.*)

While Munch was in the backyard, one of the Madrigals' child-relatives, Bradley, "went out" into the backyard as well. (3RT/193; 4RT/262-264.)

Soon thereafter, Hedding-Kelton told Monica that "she wanted to go outside and play with Munch" and asked for permission to do so. (3RT/194; 6RT/389, 392, 504-505.) Monica granted permission, and commanded Munch to "stay so he didn't come into the house," because he was unrestrained. (7RT/542;

3RT/183-184; 6RT/392.) Hedding-Kelton went outside, joining Bradley in the backyard. (3RT/194; 4RT/262-264; 6RT/392-395.)

Moments later, Munch attacked and bit her. (RT/194-195; 6RT/393-398.) Her mother, plaintiff Lawson, witnessed the attack. (6RT/456-457.)

After the attack, Do came downstairs and helped to restrain Munch. (3RT/196, 198; 6RT/460.)

F. Do Signs Paperwork Releasing Munch To Animal Control; Animal Control's Bite Report Identifies Do As Munch's "Owner."

Later that day, Sacramento Animal Control officials interviewed Do. (5RT/293-295; 4RT/266-267.) Do signed the paperwork necessary to surrender Munch to Animal Control (7RT/578) and directed officials to euthanize the dog (7RT/578, 589-591).

The Animal Control "Bite Report" identifies Do as Munch's "owner." (4RT/266.)

PROCEDURAL HISTORY

A. Plaintiffs Sue The Madrigals And Do.

Hedding-Kelton sued the Madrigals and Do for negligence. (AA/15-17.) Lawson sued them for negligent infliction of emotional distress under a "bystander" theory. (AA/17-19.)

Plaintiffs also alleged that the Madrigals and Do were Munch's owners, and thus strictly liable for Hedding-Kelton's

injuries under Civil Code section 3342. (AA/13-14.)[3] Plaintiffs alleged that Do was one of Munch's owners who was liable for their injuries, and that he had "kept" Munch in the home. (AA/13-15.)

B. The Madrigals Answer, Deny Liability, And Cross-Complain Against Do.

The Madrigals denied liability. (AA/21-24.) They also cross-complained against Do, alleging that he was at least partially responsible for plaintiffs' injuries, and therefore "should be required" to "pay a share of plaintiffs['] judgment" proportional to his responsibility. (AA/25-27.)

C. Do Defaults On The Cross-Complaint.

When Do failed to answer the cross-complaint, the Madrigals requested that the trial court enter his default. (AA/29-31.) The court granted the request. (AA/246.)

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[3] Civil Code section 3342, subdivision (a) states in relevant part that: "The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness."

Undesignated statutory references are to the Civil Code.

D. Plaintiffs Send The Madrigals A Statutory Compromise Offer; The Madrigals Do Not Accept.

Months later, plaintiffs sent the Madrigals a compromise offer under Code of Civil Procedure section 998 and demanded that they "allow judgment" against them "in the sum of $300,000.00." (AA/167-169.)

The Madrigals did not accept. (AA/161, 165.)

E. Plaintiffs Dismiss Their Claims Against Do.

Plaintiffs asked the trial court to dismiss their claims against Do. (AA/32-34.)

The court agreed and dismissed the claims without prejudice. (AA/50, 52.) That left the Madrigals as the remaining defendants on plaintiffs' complaint.

F. The Trial.

1. The trial court rejects the Madrigals' proposed verdict form directing the jury to determine Do's ownership of Munch and his comparative responsibility.

Before trial, plaintiffs stated that they sought solely noneconomic damages, and they were "not seeking" economic damages. (1RT/37-38; AA/36 ["Plaintiffs' claims are limited to past and future general damages"].)

The Madrigals filed a proposed special verdict form and contended that the jury had to decide Do's comparative

responsibility for plaintiffs' noneconomic damages. (AA/64-73.) The Madrigals proposed that the jury address (1) whether "Do own[ed] the dog named Munch during the attack"; (2) whether "Do [was] negligent"; and (3) the "percentage of responsibility for Arianna Hedding-Kelton's harm" that should be assigned to Monica, on the one hand, and Do, on the other. (AA/64-68.)

The trial court discussed the verdict form and Do's inclusion with counsel and stated its impression that Do had been "dismissed" from the case entirely. (2RT/105-106.) The Madrigals' counsel clarified that while Do had been "dismissed from plaintiffs' case," the Madrigals had cross-complained against him and obtained his default on the cross-complaint. (*Ibid.*)

The court responded that because Do was in default, "he can't participate"; "in terms of putting him on the jury verdict form, I don't see why we would do that. He's not participating as a party. He hasn't asked for relief from default. So he's not participating in that fashion." (2RT/106.)

2. At trial, plaintiffs pursue a strict-liability claim against Oscar and Monica, but present no evidence regarding Oscar's purported negligence.

The case proceeded to a jury trial. (AA/57-59.)

Despite the ample evidence that Do was Munch's owner, plaintiffs argued that Oscar and Monica were Munch's owners.

(8RT/775.) They also argued that Monica's negligence caused the attack and Lawson's emotional distress. (8RT/771-773.)

Oscar testified that at the time of the attack, he was upstairs sleeping. (5RT/286-287.) Plaintiffs presented no evidence that he was responsible for taking Munch to the backyard or giving Hedding-Kelton access to Munch, and they did not argue that he was in any way negligent.

3. The trial court rejects the Madrigals' requested jury instructions regarding apportionment.

Near the end of the trial, the Madrigals again argued that the jury had to consider apportionment of responsibility to Do. They requested a modified version of CACI No. 406, addressing apportionment of responsibility. (AA/103; RT/623-625.) Their requested instruction stated that "Oscar and Monica Madrigal claim that the fault of Minh Do contributed to Plaintiffs' harm. To succeed on this claim, defendant must prove" that "Minh Do was at fault" for plaintiffs' injuries and his fault "was a substantial factor in causing" plaintiffs' harm. (*Ibid.*) The instruction further directed the jury to "decide how much responsibility" Do had for plaintiffs' injuries "by assigning percentages of responsibility to each person listed on the verdict form." (*Ibid.*)

After the trial court asked plaintiffs' counsel to address the proposed instruction, counsel replied that "this isn't the correct instruction" because "Do is not a party in this case. Plaintiffs

have dismissed him. Defendants have defaulted him, so the remedy here for defendant is to do a prove-up hearing after the trial against Mr. Do because they're seeking indemnity." (7RT/624.) According to plaintiffs' counsel, "it would cause massive confusion of the issues to this jury to now put Mr. Do on the verdict forms" because "from all the jury knows, Mr. Do is a made-up party. He doesn't exist." (*Ibid.*)

Defense counsel replied that the Madrigals' rights to seek apportionment to Do under "Proposition 51 must be preserved." (7RT/625.) Defense counsel argued: "The defendants have to know what the apportionment, the percentage Minh Do is responsible for, or else they risk overexposure to the general damages that they didn't cause. Because general[] damages is not joint and several. They're not responsible for that." (*Ibid.*)

The court responded: "That's when you have two defendants here. You have a deep pocket and you have another pocket. Here we just have two defendants. You don't have Minh Do as a defendant." (7RT/625.)

Defense counsel replied that Do was still a cross-defendant on their cross-complaint, and regardless, "the cross-complaint doesn't protect Proposition 51. We don't have to get sued, make whole a judgment and then go chase somebody for it. Proposition 51 for general damages preserves our exposure to the jury. So the jury knows when they issue their decision to the court and we get a verdict, that is what Prop 51 comes into." (7RT/626.)

Later, the trial court returned to the discussion of "joint tortfeasor and Prop 51." (7RT/720.) The court stated that its "understanding of the claims that are not strict liability is that this is—first of all, it's a claim only against Monica, not anybody else in the house. And it's particular to her behavior when she allowed [Hedding-Kelton] to go out there unsupervised in the yard, given the lack of time or the amount of time that there was before the last time that she had seen that dog. That seems to be the focus of the negligence claim." (7RT/720.) The court asked the Madrigals' counsel to explain "why you're arguing that Mr. Do would be a joint tortfeasor." (7RT/720.)

The Madrigals' counsel explained that Do could be apportioned some measure of responsibility as a negligent tortfeasor, because "Do physically brings the dog out of the kennel where the child would have been safe if he was still in the kennel. Brings the dog outside and puts it outside in the yard." "There's no way this injury occurs except that Minh Do puts the dog in the position where the bite occurred." (7RT/720-721.)

The trial court asked, "He didn't put the dog in that position when the child was in the backyard, was he?" (7RT/721.)

The Madrigals' counsel responded: "No. But the family was visiting and he knew that. And he has no ability to contradict the set of facts that Monica and Oscar have described." (7RT/721.) Counsel reiterated: "I'm not conceding liability of Monica in any way, shape or form, but this doesn't happen, the injury doesn't happen without Minh Do's activity." (7RT/724.)

The trial court rejected the proposed instruction: "I do need to look at how much evidence there is in terms of whether or not I need to give instructions. There has to be some substantial evidence to support an instruction. I don't think there's substantial evidence to support an instruction for Prop 51. So I'm not going to give it." (7RT/724.)

4. The Madrigals object to Do's exclusion from instructions regarding negligence, dog ownership, and strict liability; they also restate their objections to Do's absence from the jury instructions and verdict form.

After rejecting the Madrigals' apportionment instruction, the trial court turned to plaintiffs' proposed instructions.

Plaintiffs' proposed negligence instruction, based on CACI No. 400, stated that Hedding-Kelton "claims that she was harmed by Defendant Monica Madrigal's negligence," and directed that plaintiffs must prove "Defendant Monica Madrigal was negligent." (AA/89-90; AA/54.) When the court asked if the Madrigals had "any objection" to the instruction, they replied, "[j]ust as the objection previously stated" moments earlier regarding Minh Do's status "being a defendant in the case." (7RT/729-730.) The court responded "[a]ll right" (*ibid.*) but did not alter the instruction given to the jury, which made no reference to Do (AA/89-90).

Plaintiffs also proposed an instruction based on CACI No. 463 regarding a dog owner's strict liability. (7RT/729-732; AA/91.) That instruction stated: "Plaintiff Arianna Hedding-Kelton claims that Defendants Monica Madrigal's and Oscar Madrigal's dog bit her and that Defendants are responsible for that harm." (AA/91.) The instruction did not identify Do as a potential dog owner. (*Ibid.*) When the trial court asked whether the parties had any objections, the Madrigals' counsel replied "none, other than Minh Do," again referencing the discussion of apportionment of responsibility to Do moments earlier. The court again acknowledged the objection, responding, "Right. Okay." (7RT/730-731.) But the court did not alter the instruction to mention Do. (AA/91.)

In a final pre-instruction colloquy, the court asked if counsel had reviewed the final draft of the special verdict form and instructions. The Madrigals' counsel reiterated that "we just have the same objections with regard to the individual Minh Do that we had before." (8RT/744.)

5. The jury instructions and special verdict form omit references to Do and apportionment; they also indicate that the sole theory of liability against Oscar is his supposed dog ownership.

The final instructions and special verdict form made no reference to Do or apportionment. (AA/80-100, 106-111.)

The instructions and verdict form also omitted any mention of Oscar's potential negligence liability. Instead, the verdict form directed the jury that it could only find Oscar liable for Hedding-Kelton's injuries as a strictly liable (purported) dog owner under section 3342. (AA/107-108.)

G. The Closely-Divided Jury Finds That Monica Was Negligent And Awards Plaintiffs Noneconomic Damages; The Jury Unanimously Rejects Plaintiffs' Theory That The Madrigals Owned Munch.

In two split 10-2 votes, the jury found that Monica was negligent and that her negligence was a substantial factor in causing Hedding-Kelton's harm. (9RT/851-853; AA/106-107.) The jury awarded Hedding-Kelton $273,000 in noneconomic damages. (AA/108-109.)

The jury unanimously rejected plaintiffs' strict-liability claim, finding that Oscar and Monica were *not* Munch's owners. (AA/107-108; 9RT/857-858.) Because the trial court had rejected defendants' request that the jury decide whether Do owned Munch, the jury had no chance to decide whether he, rather than the Madrigals, owned the dog. Because the trial court had rejected defendants' requests regarding references to and instructions on Do's independent negligence, the jury had no chance to decide whether Do was negligent and whether his negligence contributed to plaintiffs' harms.

The jury found for Lawson on her claim for negligent infliction of emotional distress and awarded $24,000 in noneconomic damages. (AA/111.)

H. The Trial Court Enters An Initial Judgment Against Monica And Oscar; They Appeal.

The trial court entered a judgment (Initial Judgment), but the Initial Judgment contained multiple errors and inconsistencies with the verdict's terms. (AA/112-119.) The Initial Judgment's filed-endorsement bears an inaccurate date, stating that it was entered in 2021. (See fn. 6, *post*; AA/112.) The Initial Judgment imposes liability on Monica *and* Oscar, despite the jury's rejection of the sole claim tendered against Oscar. (AA/119, 107.) And the Initial Judgment directs that plaintiffs shall jointly recover $297,000, despite the jury's separate damages awards. (AA/119.)

The Madrigals appealed the Initial Judgment. (AA/193-206.)

I. The Trial Court Enters A Corrected And Amended Judgment Against Monica And Awards Costs, Including Section 3291 Interest; Monica Appeals.

After the Initial Judgment's entry, plaintiffs filed a costs memorandum listing more than $33,000 in costs. (AA/172.) The costs memorandum claimed that plaintiffs could also recover

more than $100,000 in interest under section 3291. (AA/159-164, 179.)[4]

In their accompanying briefing, plaintiffs claimed they were entitled to recover the interest because: (1) the Madrigals had not accepted their $300,000 statutory compromise offer; and (2) the sum of plaintiffs' damages and standard trial costs exceeded $300,000. (AA/159-164.) Therefore, plaintiffs claimed, section 3291 allowed them to recover lump-sum accrued interest on the judgment between the date of their compromise offer and entry of judgment. (*Ibid.*)

After the Madrigals moved to tax costs (AA/183), the court entered an order: (1) partially granting the motion; (2) awarding plaintiffs the accrued interest under section 3291; and (3) directing entry of a new judgment against Monica alone. (AA/208-210). The new judgment (Corrected and Amended Judgment) reflected revised damages awards recoverable by each plaintiff separately, as well as costs and section 3291 interest. (AA/211-213.)

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[4] Section 3291's second paragraph reads in its entirety: "If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment."

Monica appealed the Corrected and Amended Judgment and costs order. (AA/214-224.)[5]

STATEMENT OF APPEALABILITY

A. The Corrected And Amended Judgment Is The Sole Appealable Judgment.

As a threshold matter, the Initial Judgment is void, because the Corrected and Amended Judgment superseded it.

Where a trial court enters an original judgment and an amended judgment, only one is the true appealable judgment under Code of Civil Procedure section 904.1, subdivision (a). Where the amended judgment makes alterations to the original that "materially affect[] the rights of the parties" (*Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 765 (*Sanchez*)), the "amended judgment supersedes the original" (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222 (*Torres*), internal quotation marks omitted).

Here, the Corrected and Amended Judgment made multiple material alterations to the Initial Judgment:

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[5] The Corrected and Amended Judgment directs judgment in Oscar's favor (AA/212), and the order awarding costs and section 3291 interest permits recovery against Monica only (AA/209-210). Therefore, Oscar is not aggrieved by the Corrected and Amended Judgment or costs order, and lacks standing to appeal them. (*Francis v. City of Los Angeles* (2022) 81 Cal.App.5th 532, 541.) Oscar has only appealed the Initial Judgment, to the extent that judgment retains validity. (See Statement of Appealability, § A, *post*.)

- The Initial Judgment directed that Oscar was liable for damages (AA/119), but the Corrected and Amended Judgment directs entry of judgment for Oscar and against plaintiffs (AA/212).
- The Initial Judgment directed that plaintiffs could *jointly* recover $297,000 in damages (AA/119), but the Corrected and Amended Judgment instead directs that Hedding-Kelton recovers $273,000, and Lawson separately recovers $24,000 (AA/212).

These changes "materially affected the rights of the parties." (*Sanchez*, *supra*, 200 Cal.App.4th at p. 765.)

Indeed, the Corrected and Amended Judgment changed the identity of the "losing party" on plaintiffs' strict-liability dog-owner claim from *Oscar* to *plaintiffs*, and altering "the identity of the losing party" *is* a material alteration. (*CC-California Plaza Assocs. v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042, 1048-1049 ["we cannot imagine a more substantial or material change in the form of a judgment than in the identity of the losing party"].)

The Corrected and Amended Judgment also altered the amount of each plaintiff's recovery, changing that recovery from a joint $297,000 award to two separate awards of $273,000 and $24,000. (AA/119, 212.) In reducing Hedding-Kelton's recovery by $24,000, and reducing Lawson's recovery by $273,000, the

Corrected and Amended Judgment worked more than "a trivial or de minimis change in the amount" awarded, and under *Sanchez*, such a non-trivial change also constitutes an alteration that "materially alter[s]" and "materially affect[s]" the parties' rights. (200 Cal.App.4th at pp. 766-767.)

Accordingly, the Corrected and Amended Judgment "supersedes the original and becomes the appealable judgment." (*Torres*, *supra*, 154 Cal.App.4th at p. 222, internal quotation marks omitted.)

B. Regardless, All Appeals Are Timely.

In any case, all appeals are timely.

Assuming arguendo that the Initial Judgment is appealable, appellants noticed their appeal on March 3, 2022—less than 60 days after the clerk's January 7, 2022 service of notice of entry. (AA/120, 236, 193.)[6] The appeal is therefore timely. (Cal. Rules of Court, rule 8.104(a)(1)(A).)

If, as the Madrigals contend, the Corrected and Amended Judgment is the true final judgment, then the appeal from that judgment is also timely. (Cal. Rules of Court, rule 8.104(a)(1)(C).)

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[6] Although the Initial Judgment and the related notice of entry bear filed-endorsements indicating they were entered on January 7, 2021, the endorsements are an apparent clerical error occurring soon after the new year. There is no question that the jury rendered its verdict on January 7, 2022; the trial court's January 7, 2022 trailing minute order (AA/79) and register of actions (AA/236) confirm the verdict's announcement on that date. There is likewise no question that the Initial Judgment's true entry date is January 7, 2022. (AA/236.)

Monica noticed her appeal from the Corrected and Amended Judgment on May 4, 2022—just one day after entry. (AA/211 [entered May 3, 2022]; AA/214-215 [May 4, 2022 Notice of Appeal].)

Monica noticed her appeal from the trial court's appealable costs order on May 4, 2022—one day after its entry. (Code Civ. Proc., § 904.1, subd. (a)(2); *Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1016; AA/208-210 [May 3, 2022 order]; AA/214-215 [May 4, 2022 Notice of Appeal].) That appeal is also timely. (Cal. Rules of Court, rule 8.104(a)(1)(C).)

STANDARDS OF REVIEW

Where the appellant challenges a trial court's rejection of jury instructions, the reviewing court "must assume the jury might have believed appellant's evidence and, if properly instructed, might have decided in appellant's favor." (*Krotin v. Porsche Cars North America* (1995) 38 Cal.App.4th 294, 298 (*Krotin*), internal quotation marks omitted.)

Thus, in "testing the propriety of the court's refusal to instruct, the reviewing court must view the evidence and all inferences that may be drawn therefrom in the light most favorable" to the appellant. (*Godfrey*, *supra*, 128 Cal.App.3d at p. 176; *Sills v. L.A. Transit Lines* (1953) 40 Cal.2d 630, 633 [assessing whether "trial court erred in refusing an instruction" and "[v]iewing the evidence in the light most favorable to the [appellant's] contention" that the instruction should have been given, internal quotation marks omitted].) The "standard of

review in this regard is *the opposite* of the traditional substantial evidence test," and requires viewing the record and all inferences in appellant's favor. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 304, italics added, internal quotation marks omitted.)

The appellant must show that instructional error was prejudicial, in light of the "entire record." (*Soule v. Gen. Motors Corp.* (1994) 8 Cal.4th 548, 573-574, 580 (*Soule*).) Reviewing courts have found prejudice well-established where, as here, an error in refusing apportionment to a potentially liable tortfeasor occurred. (*Collins v. Plant Insulation Co.* (2010) 185 Cal.App.4th 260, 275-276 (*Collins*).) In the apportionment context, the *same* showing of substantial evidence supporting the giving of an apportionment instruction will *also* support a prejudice finding from the instruction's refusal. (*Ibid.*) This is because if the evidence is "sufficient to support an apportionment" to an alleged tortfeasor, but no apportionment instruction regarding that tortfeasor is given, then the refusal of apportionment has been held "prejudicial, requiring reversal of the judgment." (*Ibid.*)

ARGUMENT

I. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO ALLOW THE JURY TO APPORTION RESPONSIBILITY TO MINH DO.

Substantial evidence supports a finding that Monica was *not* the sole tortfeasor causing plaintiffs' harm—and that Do was *another* responsible tortfeasor, either as a strictly liable dog-owner under section 3342, as a negligent tortfeasor, or both. The trial court prejudicially erred in barring defendants from seeking apportionment of responsibility to Do.

The error requires reversal, with directions to conduct a retrial of apportionment alone. (*Collins*, *supra*, 186 Cal.App.4th at p. 276 [where trial court erred in failing to permit apportionment of fault to one potential joint tortfeasor, "retrial can properly be limited to the issue of apportionment"].)[7]

[7] Appellant does not challenge the amount of damages. She seeks only a retrial of apportionment, allowing her to argue that Do and any other potentially liable tortfeasors should bear some share of responsibility and become severally and proportionally liable for a portion of the existing damages award, with her own liability reduced proportionally.

A. Monica Was Entitled To Instructions Permitting Apportionment Of Responsibility To Do If Substantial Evidence Showed That He Was Another Potentially Responsible Tortfeasor.

Under Proposition 51, an individual defendant's "potential liability" for "noneconomic damages" is limited "to a proportion commensurate with that defendant's fault." (*Collins*, *supra*, 185 Cal.App.4th at pp. 266-267, internal quotation marks omitted; see § 1431.2.) Where two or more potential tortfeasors contributed to a plaintiff's injury, the "finder of fact *must* [] consider all others," besides the defendant, "whose conduct contributed to the plaintiff's injury." (*Collins*, at p. 267, italics added.)

Where, as here, plaintiffs seek recovery of noneconomic damages, a defendant "may reduce its own comparative fault" and its liability for those damages "by pointing the finger at other tortfeasors, including those who are not party to the case." (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 202.)

If the defendant presents substantial evidence that another tortfeasor is responsible for the plaintiff's claimed harm, then the trial court *must* give an apportionment instruction allowing the jury to assign some responsibility to that alleged tortfeasor. (*Blevin v. Coastal Surgical Institute* (2015) 232 Cal.App.4th 1321, 1329 (*Blevin*) ["a party is entitled to" an apportionment instruction where there is "[s]ubstantial evidence" presented that "could establish the elements of the theory presented," internal

quotation marks omitted]; *Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 785 (*Scott*) ["damages can be apportioned to" nonparty tortfeasor where there is "substantial evidence that [the] nonparty is at fault"].) Moreover, a party is entitled upon request to "correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule*, *supra*, 8 Cal.4th at p. 572.)

Given these well-established rules, the core question in this appeal is straightforward: Did Monica present substantial evidence that Do was another potentially responsible tortfeasor?

The answer is yes.

As we now show, there was substantial evidence that Do was Munch's owner—and thus, that he was strictly liable for Hedding-Kelton's injuries. (See § 3342.) There was also substantial evidence that Do was negligent and that his negligence caused Hedding-Kelton's harm. For these two independent reasons, he should have been included on the special verdict form and instructions. The jury should have had the chance to apportion responsibility to him.

B. Substantial Evidence Establishes That Do Is Munch's Owner—And Therefore A Strict Liability Tortfeasor Under Section 3342.

Failing to instruct the jury and permit apportionment of responsibility to Do was error, because substantial evidence would have permitted the jury to find that Do owned Munch—a finding that would have rendered Do a strictly liable tortfeasor,

whose relative responsibility *had to be* assessed alongside Monica's.

1. There is substantial evidence that Do owned Munch.

Whether an individual owned certain property is a question of fact. (*Campbell v. Fong Wan* (1943) 60 Cal.App.2d 553, 559.) Ownership may be established by testimony that the individual owned or possessed the property, as well as by testimony regarding his "dominion and control" over the property. (*People v. Clifton* (1985) 171 Cal.App.3d 195, 201 (*Clifton*) [witness's testimony that "he was the owner" of a vehicle, purchased and paid for the vehicle, and received title supported "finding of ownership"].)

In the dog-ownership context, evidence that: (1) a person "purchased" a dog; (2) his name appeared in government-issued dog license records; and (3) he gave the dog "personal care and attention" by feeding and walking it, has been held "ample to support the finding that he was the owner." (*Ellsworth v. Elite Dry Cleaners, Dyers & Laundry* (1954) 127 Cal.App.2d 479, 481-483 (*Ellsworth*); *O'Rourke v. Finch* (1908) 9 Cal.App. 324, 325-326 (*O'Rourke*) [ownership shown by evidence that appellant "bought and paid for" dog, "paid the license tax," gave dog collar with appellant's name, and appellant "was seen daily upon his walks and rides" with dog "and was very attached to him"].)

Here, there is a veritable mountain of evidence that Do owned Munch. Oscar's testimony that Do "was the owner of the

dog" (7RT/577) is *alone* substantial evidence that Do owned Munch (see *Clifton*, *supra*, 171 Cal.App.3d at p. 201). Lawson's testimony that Do "bought the dog" (6RT/500-501), and that she regarded Do and his girlfriend as "the owners of the dog" (6RT/507-508) is likewise substantial evidence of Do's ownership (see *Clifton*, at p. 201; *Ellsworth*, *supra*, 127 Cal.App.2d at p. 483; *O'Rourke*, *supra*, 9 Cal.App. at pp. 325-326). Oscar's testimony that Do took possession of Munch, "pick[ing] him up" when his prior owner released him (7RT/582), further supports the finding that Do was Munch's owner (see *Clifton*, at p. 201; *Ellsworth*, at p. 483).

And there's more. The record reflects that: (a) Do fed, watered, and walked Munch; (b) Do bought Munch's food; (c) Do signed a lease in which he agreed to be "fully responsible" for Munch; (d) Do agreed to pay nearly double his monthly rent in order to gain the right to bring Munch into his rented space; (e) Do arranged for, and transported Munch to, vaccinations; (f) Do bought Munch a leash and collar; (g) Do restrained Munch after the attack; (h) Do was listed as Munch's owner on the Animal Control bite report; and (i) Do both directed, and consented to, Munch's release to Animal Control after the attack. (See 3RT/181-182, 185, 198; 4RT/266-267; 5RT/294-295; 6RT/460, 500-501; 7RT/574-578, 582, 585-586, 589-591, 595, 600-601, 610.)

These are just *some* of the indicia of Do's ownership and "personal care and attention" to Munch. (See *Ellsworth*, *supra*, 127 Cal.App.2d at pp. 481-483.) And when all inferences are taken in Monica's favor, the evidence amply supports a finding

that Do owned Munch. (*Clifton*, *supra*, 171 Cal.App.3d at p. 201; *Ellsworth*, at pp. 481-483; *O'Rourke*, *supra*, 9 Cal.App. at pp. 325-326.)

And at this point, plaintiffs cannot tenably argue that anyone *but* Do owned Munch. From the outset, plaintiffs identified just *three* potential dog-owners: (1) Oscar, (2) Monica, and (3) Do. (AA/14.) The jury unanimously rejected plaintiffs' theory that Oscar and Monica were Munch's owners. (AA/107; RT/857-858.) The verdict and judgment against plaintiffs on their dog-ownership claim against Oscar and Monica are now *final*, because plaintiffs did not cross-appeal and the time to do so has run out. (AA/107-108; RT/857-858; see AA/211-213; AA/214, 217-219, 224; Cal. Rules of Court, rules 8.104(a)(1)(B), 8.104(a)(1)(C).)

With Monica and Oscar unanimously, unquestionably, and irreversibly eliminated as potential dog-owners, that leaves just one remaining candidate: Do, the man who bought, kept, fed, watered, walked, and slept with Munch, and who paid almost double his prior monthly rent in order to bring Munch into his room. By the complaint's plain terms and the process of elimination, Do is the only putative owner left.

Thus, substantial evidence supports a finding that Do owned Munch. And as we now show, this alone means that the jury should have had the opportunity to apportion responsibility to him.

2. Do's ownership of Munch renders him strictly liable for Hedding-Kelton's injuries as a matter of law, and requires the jury to apportion responsibility to him.

Section 3342 "imposes strict liability on dog owners based on an expressed policy preference to require them to compensate innocent bite victims." (*City of Huntington Beach v. City of Westminster* (1997) 57 Cal.App.4th 220, 222, 226 [after police dog bit robbery victim, he was entitled to invoke dog-bite statute, which imposes strict liability on dog owners]; *Delfino v. Sloan* (1993) 20 Cal.App.4th 1429, 1437 [section 3342 "establishes a dog owner's liability for the injuries inflicted by the owner's dog, without a showing of willfulness"] *People v. Berry* (1991) 1 Cal.App.4th 778, 787 [statute allows damages recovery "without having to show fault, i.e., under strict liability"].)

Therefore, the evidence of Do's dog ownership alone means that Monica was entitled to instructions directing the jury that (a) it could determine that Do owned Munch, and (b) it could apportion responsibility to him. Indeed, an allegedly negligent tortfeasor (like Monica) is entitled to seek apportionment of responsibility to an alleged strict liability tortfeasor (like Do). (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 325 [where "one responsible party is liable under a negligence theory" and another "is liable at least in part under a strict liability theory," comparative responsibility assessment is appropriate]; Haning et al., Cal. Practice Guide: Personal Injury (The Rutter

Group 2022) ¶ 3:1007 [collecting cases; damages "are apportionable between a party found negligent and a party held liable on a strict liability theory"].)

In fact, on these facts, if a jury found that Do was Munch's owner, then it arguably would *have to* apportion at least some liability to him. *Ortega v. Pajaro Valley Unified School District* (1998) 64 Cal.App.4th 1023 (*Ortega*), makes clear that where causation of a plaintiff's harm necessarily flows through one tortfeasor's conduct, then that tortfeasor must be apportioned some responsibility. (64 Cal.App.4th at pp. 1056-1058.)

In *Ortega*, a teacher molested a student, who then sued the school district for negligent hiring, supervision, and retention. (64 Cal.App.4th at pp. 1030, 1042, 1057.) The jury apportioned 100 percent of the fault for plaintiff's harm to the school district and zero fault to the molester. (*Id.* at p. 1056.) The Court of Appeal reversed the fault allocation, holding that it was "not supported by the evidence." (*Ibid.*) The Court held that the molester's tortious conduct was a *necessary component* of plaintiff's injuries—indeed, the school district could never have been liable at all, absent the molester's conduct. (*Id.* at pp. 1056-1057.) The district's "negligent acts would not, and could not, have caused any injury to [plaintiffs] but for [the molester's] act of sexual molestation. [The molester] was the actor; the District was the facilitator. It took the two together to cause [plaintiff's] injuries." (*Ibid.*) "The District acting alone could not have been responsible for all" of the damages. (*Ibid.*)

The Court of Appeal therefore remanded "for a new trial on fault allocation." (*Id.* at p. 1058.)

Here, too, if Do is Munch's owner, then Monica necessarily is not, and cannot be, "responsible for all" of plaintiffs' damages. (*Ortega*, *supra*, 64 Cal.App.4th at p. 1057.) The dog owner must have some responsibility, since without the dog's presence on site, there's no possibility of harm. It necessarily takes "the two" actors "together," the dog owner and any other tortfeasor, to cause the plaintiff's harm. (*Ibid.*) Thus, if the jury found that Do was Munch's owner, then Do necessarily must have responsibility for *some* harm.

And regardless of whether the jury absolutely had to apportion some responsibility to Do, the evidence of Do's dog ownership means that the jury should *at least* have had the chance to decide whether to apportion responsibility to him as a strictly-liable dog owner under section 3342. The trial court's refusal to give the jury a chance to even consider whether to apportion responsibility to Do was error.

C. Substantial Evidence Establishes Do's Negligence.

Quite separately from section 3342's operation, jury instructions allowing apportionment to Do were required for another reason: There was substantial evidence that Do was negligent—that is, that he failed to take reasonable steps to protect plaintiffs from the foreseeable risk that the dog could cause injury. For this reason, too, the trial court erred.

1. Anyone who owns or controls a dog must exercise reasonable care to prevent that dog from harming others.

A claim that a defendant negligently failed to prevent a dog from injuring another turns on "whether [the dog] posed a risk of harm to others; whether that risk was reasonably foreseeable; and if so," whether the alleged negligent tortfeasor "failed to exercise ordinary care to avert that risk." (*Drake v. Dean* (1993) 15 Cal.App.4th 915, 931 (*Drake*); *Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412-417 (*Salinas*) [negligence claim against landowner who permitted pit bull to "run loose in the yard" where it attacked plaintiff].)

2. Substantial evidence establishes that Munch's presence in the home posed a significant risk of harm to others.

Here, substantial evidence supports a finding that Munch's presence in the Madrigals' home "posed a risk of harm to others" (*Drake*, *supra*, 15 Cal.App.4th at p. 931), including Hedding-Kelton and the other frequent child-visitors:

- Munch was an adult, unneutered, muscular, male pit bull, weighing approximately 70-80 pounds. (3RT/171-172, 177-178; 5RT/303-304.)
- Plaintiffs' own canine behavior expert testified that he "would be" concerned about bringing an unneutered male pit bull into a home without

knowing its entire history, because a "lot of incidents happen" when such a dog is adopted into a home. (4RT/246.)

- Plaintiffs' expert testified regarding the inborn aggression of pit bulls, which in his view is "left over in the dog's genetic history," because "pit bulls in general" were "originally bull-baiting dogs, in which their whole purpose was to bring down a bull by biting it and never letting go, then later on they became bred for pit fighting with other dogs. They had certain qualities such as gameness which is the desire to fight and the resistance to quitting. They won't stop. They're very strong, very powerful. They have a very high pain tolerance." (4RT/240-241.) According to the expert, "I don't know any other breeds that -- that engage in th[e] way" pit bulls do, and "when they do bite, they tend to create more serious injuries and are involved in more fatal attacks." (4RT/241.)

- The expert further noted that Munch was an adult, unneutered male, and "those are the ones that are usually involved in the -- in the more serious incidents" because "[u]nneutered males statistically bite three times as many people as neutered males." (4RT/241, 256.)

- The expert testified that pit bulls are "much more dangerous" than other dog breeds (4RT/253); "they are unusual" in "how often they bite and how seriously they bite and how often they're involved in fatal incidents," and they cause "more serious injuries, longer hospital stays, more extensive medical treatment and more fatalities" than other dogs (4RT/254-255).

- The expert underscored the particular danger in keeping a pit bull around children: "I mean, with children they're more vulnerable because of their size, and dogs can get more excited with children because children put off like a different behavioral energy in the way they move" so bringing the dog around visiting children "should be done in a careful manner, watching the dog's behavior to make sure the dog's comfortable." (4RT/244.)

This evidence supports a finding that when Do brought Munch to live in the Madrigals' home, he created "a risk of harm to others." (*Drake*, *supra*, 15 Cal.App.4th at p. 931.)

And logic and common sense lead to the same conclusion. Bringing *any* large dog into a home creates some risk of injury to others. And that's particularly true where, as here, the dog is an adult male pit bull—a breed that plaintiffs themselves have claimed has tendencies towards aggression—and the pit bull is

going to live near multiple residents, and their adult and child guests, in a limited, 1,445-square foot space and small backyard.

3. Substantial evidence establishes that the risk of harm to others was reasonably foreseeable—and indeed, that Do himself was subjectively aware of that risk.

There was also substantial evidence that the risk of Munch attacking or otherwise injuring someone in the Madrigals' home was "reasonably foreseeable"—and that Do himself was aware of that risk. (*Drake*, *supra*, 15 Cal.App.4th at p. 931.)

Foreseeability of harm can be inferred from evidence that the dog's owner was aware of its potential danger. (*Drake*, *supra*, 15 Cal.App.4th at p. 931.)

Moreover, both the "vicious propensities and dangerous character of a dog" and the owner's knowledge of the dog's viciousness and dangerousness may be inferred from his prior restraining of the dog and the dog's "size and breed." (*Frederickson v. Kepner* (1947) 82 Cal.App.2d 905, 908-909 (*Frederickson*) [owner restrained 75-pound German police dog and allowed dog "to be unfettered only in the evenings and when accompanied by someone"; jury could infer "the dog had a dangerous nature" and owner knew it]; *Radoff v. Hunter* (1958) 158 Cal.App.2d 770, 773-774 (*Radoff*) [citing *Frederickson*; defendants kept 80-100 pound German Shepherd on chain; "evidence was sufficient to support the finding that defendants should have anticipated an attack by the dog"]; *Davis v. Mene*

(1921) 52 Cal.App. 368, 369 [rejecting claim that "there was no evidence to justify the finding that appellants knew of the vicious propensities of the dog" because the "animal was a bulldog" and was muzzled and chained; "[a]ll of these matters were properly to be considered in determining the knowledge of appellants as to the proclivities of the animal"].)

Here, there was substantial evidence that Munch was a large, strong, adult pit bull weighing 70-80 pounds—and plaintiffs' own expert explained that Munch's breeding, genetic history, and unneutered status created a risk that he would be violent and aggressive. (See pp. 19-21, 49-51, *ante*.)

There was also substantial evidence that Do himself was highly aware of the risk of Munch attacking someone in the Madrigals' home. Indeed, Do's own conduct demonstrates that Do foresaw the possibility of harm:

(1) Do "usually" managed the process of formally reintroducing Munch to Hedding-Kelton (5RT/303-304; 3RT/180; 7RT/609-610; 6RT/385-387);

(2) Do made efforts to "guide the dog over" and "*hold his collar*" during reintroductions (6RT/385-387, italics added);

(3) Do told Hedding-Kelton to "wait" and not interact with Munch if he was reluctant to approach her during a reintroduction (*Ibid.*; 7RT/609-610); and

(4) Do ensured that Hedding-Kelton was *never* "left alone with Munch even after the reintroduction period" (6RT/387).

If Munch presented no risk of harm, there would have been no need for Do take such repeated, adult-monitored and chaperoned re-introductory efforts "'almost every other weekend'" when Hedding-Kelton visited. (6RT/501-503.) If Munch presented no danger, there would have been no need to restrain Munch by "hold[ing]" his collar; there would have been no need to monitor his behavior and delay interaction based on that behavior; and there would have been no need to ensure an adult was present when Hedding-Kelton and Munch interacted. (6RT/385-387.) All of the evidence regarding how Do managed "reintroductions," with a protective, restraining hand on Munch's collar, fully supports a finding that Do *knew* Munch's presence endangered others. (*Drake*, *supra*, 15 Cal.App.4th at p. 931.)

In addition, much of that same evidence supports an inference that Munch had dangerous and "vicious propensities" and that Do himself was aware of them. (See *Frederickson*, *supra*, 82 Cal.App.2d at p. 908.) Munch was a pit bull and the evidence shows Do restrained him, holding his collar—and both the breed and restraint support a finding that Do *knew* Munch was vicious and dangerous. (*Id.* at pp. 908-909.) And because the jury could infer that Do *knew* Munch might injure others, it could further infer that the risk of Munch causing injury was "reasonably foreseeable." (See *Drake*, *supra*, 15 Cal.App.4th at p. 931.)

Drake is analogous. There, the defendant knew that his pit bull "had a habit of jumping on people," yet kept him in his front yard, tethered to a long chain that allowed him to access the driveway. (15 Cal.App.4th at pp. 919-920.) When the plaintiff entered the driveway, the dog ran towards her, jumped on her, and injured her. (*Ibid.*) She sued for negligence and presented evidence that (a) pit bulls are aggressive by nature; and (b) the defendant knew his pit bull "'had a habit of jumping on people.'" (*Ibid.*) This Court held that, based on the defendant's knowledge of the dog's tendency to jump on people, "an inference could be drawn that such conduct was reasonably foreseeable" and a jury could find that the defendant could "have anticipated either the event or the harm that resulted." (*Id.* at p. 931.)

Here, too, the evidence of Do's own conduct, Munch's breed, and Do's (limited) efforts to restrain him supports a finding that Do knew Munch could harm others. And here, too, "an inference could be drawn that [the dog's] conduct was reasonably foreseeable" and that Do could have "anticipated either the event or the harm that resulted," based on the evidence that Do knew Munch was potentially dangerous. (*Drake*, *supra*, 15 Cal.App.4th at p. 931.)

Salinas is likewise instructive. There, the defendant-property owner believed a third party's pit bull was "'ferocious looking' and 'dangerous'" and expressed "concern" that an "attack on someone may result" from the dog running loose on the defendant's property. (166 Cal.App.4th at p. 415.) When an attack did happen, the defendant argued that he could not be

sued for negligence. (*Id.* at pp. 409, 413, 415-416.) The Court of Appeal disagreed: "the evidence" just discussed "demonstrate[d]" that defendant "must be charged with awareness of the risk." (*Id.* at p. 415.) The Court also explained that it "is reasonably foreseeable that a 'guard dog' kept in an area open to others may injure someone." (*Id.* at p. 416.)

The same is true here. Do's actions in restraining, reintroducing, and monitoring Munch, and Munch's size and breed (*Frederickson*, *supra*, 82 Cal.App.2d at p. 908), support a finding that Do knew "an attack" might "result" from Munch's presence on site (*Salinas*, *supra*, 166 Cal.App.4th at pp. 415-416). And, it is "reasonably foreseeable" that an adult male pit bull—the same dangerous breed as in *Drake* and *Salinas*—"may injure someone" when left unrestrained and allowed to encounter other adults and children. (See *Salinas*, at pp. 415-416; *Drake*, *supra*, 15 Cal.App.4th at pp. 920-921, 931.)

4. Plaintiffs themselves argued extensively that Munch's presence in the Madrigals' home presented a reasonably foreseeable risk of harm to others.

Once again, plaintiffs cannot tenably claim otherwise. After all, they have argued repeatedly that Munch's attack was *entirely* reasonably foreseeable.

Before trial, plaintiffs argued in motions in limine that "there are characteristics that are particular to Pitbulls, such as their jaw power and how game they are when they do attack,"

and "it is the capacity for major damage that is the concern with a [pit bull] dog like Munch"; the "*breed of the dog does make a difference* in that the *size and breed gives notice* to the capacity for damage that an individual dog is capable of." (AA/42-43.) Plaintiffs also cited *Radoff*, *supra*, 158 Cal.App.2d 770, for the proposition that "the size and breed" of a dog and the "fact that the animal was kept restrained" would support a finding that the dog had "dangerous propensities" and that the owner had "knowledge of such propensities." (*Ibid*.)

Plaintiffs repeatedly reiterated the reasonably-foreseeable harm theme in their closing argument. They argued that the attack on Hedding-Kelton was "not an accident folks." (8RT/769.) There was a "danger of bringing an adult, male pit bull to live in the[] home." (8RT/773.)

Plaintiffs responded to the defense argument that Munch had never attacked anyone before Hedding-Kelton, by stating that Monica "should have" been aware that "the dog was a danger." (8RT/831.) Counsel analogized the attack to a bridge collapse, stating that even when a bridge hasn't previously collapsed, if there is a collapse at one point, then "[w]hat happens? Can the corporation or the company that built the bridge and runs the bridge, handles the bridge, takes care of the bridge, can they say, it's not our fault? . . . . It doesn't work that way. The *signs are there. The people who manage that bridge have the obligation to know the signs, to check for the signs*. It's the *same thing with dogs*. The people that own, house and take care of animals like Munch, they have an obligation to train

themselves to learn" about pit bull behavior. (8RT/770, italics added.)

Although these arguments were aimed at tagging Monica with negligence liability, they apply with equal force to Do's negligence. Substantial evidence shows that Do was one of the people who knew Munch well and frequently interacted with him. Substantial evidence shows that Do was "run[ning]" Munch's life and "tak[ing] care of Munch." (8RT/770.) Substantial evidence shows that the "signs" were "there" and Munch's viciousness was well known to Do. (8RT/770.) Substantial evidence supports a finding that Do "should have" (8RT/831) anticipated the risk of an attack.

Therefore, by plaintiffs' own logic, the person "who manage[d]" Munch's life and took care of him, had an "obligation" to watch him carefully and restrain him, and cannot say "it's not [my] fault" when the dog eventually attacked. (8RT/770.) That person is *Do*.

5. Substantial evidence establishes that Do failed to exercise reasonable care to prevent Munch from harming others.

Because there is substantial evidence showing that Munch's presence in the Madrigals' home presented a risk of harm to others (pp. 49-52, *ante*), and that risk was reasonably foreseeable (pp. 52-56, *ante*), the remaining question is whether there is substantial evidence that Do "failed to exercise ordinary care to avert that risk." (*Drake*, *supra*, 15 Cal.App.4th at p. 931.)

Again, the answer is yes. Rather than staying downstairs in close range to control the unrestrained, unattended, "very dangerous" (5RT/304) pit bull, who was in the vicinity of multiple small children, Do went back upstairs to go to sleep. A jury could readily find that this conduct was negligent.

Generally, breach of duty is "a fact issue for the jury" (*Hernandez v. Jensen* (2021) 61 Cal.App.5th 1056, 1068-1069), and "if the circumstances permit a reasonable doubt whether the [actor's] conduct violates the standard of due care, the doubt must be resolved by the jury" (*Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 207 (*Constance B.*), internal quotation marks omitted).

Construing the evidence in Monica's favor, there is far more than a "reasonable doubt" (*Constance B.*, *supra*, 178 Cal.App.3d at p. 207) about whether Do failed to exercise ordinary care to avert the risk of Munch attacking or harming Hedding-Kelton.

Despite the evidence that (1) Do was aware of the risk that Munch was vicious and dangerous, and could attack anyone, including children, and (2) Do sometimes took steps to monitor and reintroduce Munch when child-guests were present, Do generally made *no* effort to limit Munch's ability to encounter houseguests (or the Madrigals) on a daily basis. Instead, he allowed Munch to have "free roam" of the home, and generally made no effort to restrain him, inside or outside. (3RT/183-184; 5RT/284; 4RT/249, 257, 259.) Munch went "wherever he chose," and "was left unrestrained." (3RT/183-184; 5RT/284.)

And, on the morning of the attack, Do once again did virtually nothing to protect Hedding-Kelton or any of the other houseguests, including multiple young children. Do could have kept Munch in his upstairs room and kennel, safely away from the Madrigals and the guests downstairs. Do could have restrained Munch once he entered the backyard, so as to prevent him from freely encountering any of the children present, including Bradley and Hedding-Kelton (substantial evidence shows that they both went into the backyard where Munch was running unrestrained). Do could have instructed Monica, Oscar, or any of the other adults and children present that nobody should enter the backyard area while Munch was there. But he did none of those things. A jury could find that Do's failures to restrain Munch or implement any of these costless, realistic safeguards against an attack fell well short of "ordinary care to avert th[e] risk" of harm to Hedding-Kelton and the other frequent guests in the Madrigals' home. (*Drake*, *supra*, 15 Cal.App.4th at p. 931.)

Case law confirms that substantial evidence supported sending the issue of Do's "ordinary care" (or lack thereof) to the jury. (*Drake*, *supra*, 15 Cal.App.4th at p. 931; *Salinas*, *supra*, 166 Cal.App.4th at pp. 415-416.)

For example, in *Drake*, the defendant-dog owner knew his pit bull had jumped on him previously, but still kept the dog on such a long leash that the dog could access a driveway and visitors to his home. After the plaintiff entered the driveway, the pit bull jumped on her and the defendant quickly "emerged from

his house" when she sought help. (15 Cal.App.4th at pp. 919-920, 931.) This Court held that the fact that the pit bull "was on a leash" when he jumped on the plaintiff did not mean that the defendant wasn't negligent; indeed, "the radius of the tether" still "gave him access to defendants' driveway on which visitors to defendants' house approached." (15 Cal.App.4th at p. 931.) And this Court held that the evidence "presented *a question for the jury on the issue of breach*, i.e., whether defendants, knowing of [the dog's] potential to do harm, exercised ordinary care to avert that harm by adequately controlling him." (*Ibid.*, italics added.)

Here, substantial evidence shows that Do did even less to "adequately control[]" Munch than the defendant in *Drake*. (15 Cal.App.4th at p. 931.) While the *Drake* owner at least tethered his dog, Do made no effort to restrain Munch *at all* on the morning of the attack. Indeed, on the date of the attack itself, pit bull Munch was left unrestrained, where he could (and did) readily encounter multiple children, including Hedding-Kelton. (3RT/183-184, 193-194; 4RT/263; 6RT/389, 392-394, 505; 7RT/542, 652-653.) Substantial evidence also establishes that unlike the owner in *Drake* (who was at least alert and nearby the dog's tether) (15 Cal.App.4th at p. 920), Do left Munch untethered in the backyard and went upstairs to sleep, leaving Do entirely absent and unable to even attempt to control the dog before the attack (3RT/183-184, 192-193, 5RT/284; 7RT/542).

Moreover, despite Do's prior efforts to *at least* hold Munch's collar and reintroduce Munch to Hedding-Kelton on prior visits

(7RT/609-610; 6RT/385-387), Do made *no* re-introductory efforts on the date of the attack. A reasonable juror could conclude that, even measured by Do's own prior practice of (limited) precautions, he fell well short of the mark, and abjectly failed to exercise "ordinary care" to prevent Munch from causing harm. (*Drake*, *supra*, 15 Cal.App.4th at pp. 930-931.)

Salinas is equally instructive. There, the Court of Appeal held that a defendant-property owner could be liable in negligence for permitting pit bulls to run freely on his property; the Court explained that the defendant "had the unfettered ability to prevent the dangerous condition," including the ability to prevent the pit bulls from entering the property, and that he could either "restrain or remove dogs from the premises." (166 Cal.App.4th at pp. 408, 415-416.) And, the amount of ordinary care required to prevent an attack was minimal. Reasonable precautions would have included directing the dog's owners to restrain the dogs or "effectively contain them," or warning the plaintiff "to be aware of" the dogs. (*Id.* at pp. 415-416.) "None of the precautions [he] could have taken to effectively reduce or eliminate the risk of harm were at all burdensome to him." (*Id.* at p. 416.) Thus, while the "responsibility of the dog owners for the attack upon appellant may be primary," the defendant-property owner could also be found negligent. (*Id.* at p. 416.)

Here, substantial evidence shows that Do *is* the dog-owner, so his "responsibility" for "the attack" on Hedding-Kelton should "be primary" in relation to Monica's. (*Salinas*, *supra*, 166

Cal.App.4th at p. 416.) Plus, Do could have taken simple precautions—including keeping Munch upstairs in his room; restraining Munch in the backyard to prevent him from freely encountering any backyard visitors; or simply warning others of Munch's presence, among many other potential precautions. Thus, just as there was evidence supporting negligence liability for the property-owner in *Salinas*, there is ample evidence supporting negligence liability for Do here. Do should have been on the verdict form and in the instructions, allowing the jury to apportion responsibility to him. His exclusion was erroneous.

D. The Trial Court's Supposition That There Must Be A "Deep Pocket" Tortfeasor To Permit Apportionment Is Incorrect.

In rejecting apportionment instructions, the trial court stated its belief that Proposition 51's principles would not apply unless there were multiple defendants "here" with one having "a deep pocket." (7RT/625.)

To the extent that the court believed Proposition 51's principles only apply where there is a disparity of wealth between defendants and just one has a "deep pocket," the court was wrong. (7RT/625.) The apportionment rules require factfinders to "consider *all* others whose conduct contributed to the plaintiff's injury, whether or not they are named as defendants and *regardless of their economic circumstances*." (*Collins*, *supra*, 185 Cal.App.4th at p. 267, italics added; *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 602 (*DaFonte*) [section 1431.2 "shields every

'defendant' from any share of noneconomic damages beyond that attributable to his or her own comparative fault"].)

Proposition 51's application does not depend on "the status of the defendant" and instead comparative responsibility and noneconomic damages "must be apportioned among *the universe* of tortfeasors" potentially responsible for the harm. (*Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1196, italics added, internal quotation marks omitted.) There is no deep-pocket prerequisite to invoking Proposition 51, and no way to save the trial court's erroneous rejection of apportionment on that basis.

E. Plaintiffs Wrongly Claimed That Do's Dismissal From Their Suit Prevents Apportionment.

We anticipate that plaintiffs may try to support the trial court's ruling by reviving their argument below that it was not "appropriate" to apportion responsibility to Do because he "is not a party in this case. Plaintiffs have dismissed him." (7RT/624.) That's wrong, too.

First, Do *is* a party to the case, because he is still a cross-defendant on the Madrigals' cross-complaint. Plaintiffs' late-stage dismissal of Do from their own complaint doesn't, and can't, eliminate him from the case entirely.

Second, even if Do were not a party, that wouldn't change the fact that his relative responsibility must be assessed. Under Proposition 51's principles, the factfinder must "consider *all* others whose conduct contributed to the plaintiff's injury, *whether*

or not they are named as defendants." (*Collins*, *supra*, 185 Cal.App.4th at p. 267, italics added.) That means a defendant (like Monica) is entitled to "attempt to reduce" her "share of liability for noneconomic damages by seeking to add *nonparty joint tortfeasors*" (like plaintiffs' claimed "nonparty" Do) to the apportionment analysis. (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 367, italics added.)

"[T]he only reasonable construction of section 1431.2 is that 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." (*DaFonte*, *supra*, 2 Cal.4th at p. 603, original italics, internal alterations and quotation marks omitted; *Scott*, *supra*, 231 Cal.App.4th at p. 785 ["a defendant may attempt to reduce its share of liability for noneconomic damages by seeking to add nonparty joint tortfeasors"].)

Thus, plaintiffs' decision to dismiss Do from their complaint before trial does not limit Monica's ability to seek apportionment to him under Proposition 51. The trial court should have rejected plaintiffs' argument and ordered apportionment among defendants and Do when the Madrigals (repeatedly) asked it to.

*****

There can be no doubt: The trial court erred. Substantial evidence supports apportioning some measure of responsibility to Do under both section 3342's strict liability principles (§I.B, *ante*) and negligence principles (§ I.C, *ante*). The court erroneously

refused to let the jury decide Do's comparative responsibility. The only remaining question is whether that error was prejudicial.

As we now show, it was.

II. THE REFUSAL OF APPORTIONMENT WAS PREJUDICIAL, UNDER BOTH *COLLINS* AND ANY REALISTIC REVIEW OF THE ENTIRE RECORD.

"Prejudice" exists where the appellant establishes a "reasonable probability" of a different result absent the error. (*Soule*, *supra*, 8 Cal.4th at pp. 570-571.) "'[P]robability' in this context does not mean more likely than not, but merely *a reasonable chance,* more than an *abstract possibility*" of a different result absent the error. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 (*College Hospital*), citations omitted, original italics; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Here, there is *far* more than an "abstract possibility" of a different result for Monica, absent the trial court's failure to allow the jury to consider Do's potential liability. (*College Hospital*, at p. 715.)

A. Under *Collins*, The Refusal To Permit Apportionment Of Responsibility To A Potentially Liable Tortfeasor Is Prejudicial And Requires Reversal.

Collins makes clear that where: (1) there is substantial evidence that a potential tortfeasor contributed to a plaintiff's injury and resulting noneconomic damages; and (2) the trial court

erroneously refuses to allow the jury to assess that tortfeasor's comparative responsibility, then there is prejudice from the error.

In *Collins*, plaintiffs sued a manufacturer of asbestos-containing products after their relative died of mesothelioma. (185 Cal.App.4th at p. 264.) At trial, the parties identified numerous tortfeasors that allegedly contributed to the plaintiffs' damages (including noneconomic damages), and "the special verdict form" ultimately listed "17 entities, including" the manufacturer. (*Ibid.*) The manufacturer argued that "there was sufficient evidence to include the" U.S. Navy as another entity "to which the jury could allocate fault," but the trial court found the Navy was immune from liability and refused to permit allocation "to the service pursuant to Proposition 51." (*Ibid.*) The manufacturer appealed and argued that the apportionment refusal was error. (*Id.* at pp. 263-264.)

The Court of Appeal agreed, holding that "fault may be allocated to the Navy under Proposition 51" and "the evidence was sufficient to support an apportionment" to the Navy. (*Collins*, *supra*, 185 Cal.App.4th at pp. 273, 276.) And the Court readily found prejudice from the apportionment error, writing in just two sentences of analysis that: "We thus conclude the trial court erred in excluding the Navy from the list of entities as to which the jury could apportion fault pursuant to Proposition 51. Since *the evidence was sufficient to support* an apportionment of fault to the Navy, *the error was prejudicial*, requiring reversal of the judgment." (*Id.* at p. 276, italics added.) In other words,

leaving a potentially liable tortfeasor out of the apportionment analysis *is* prejudicial.

Here, too, the "evidence was sufficient to support an apportionment of fault" and responsibility to Do. (*Collins*, *supra*, 185 Cal.App.4th at p. 276.) And here, too, the Court should follow *Collins*'s lead and readily conclude that "the error was prejudicial." (*Ibid.*) And doing so makes sense. Where a potentially responsible tortfeasor is *eliminated*, and the jury never even had a chance to consider that tortfeasor's comparative contribution, then there is *certainly* a "reasonable chance," and more than an "abstract possibility," that the remaining defendants might have obtained a different result—i.e., that the jury might have assigned *some* liability to the absent tortfeasor, if he had been included. (*College Hospital*, *supra*, 8 Cal.4th at p. 715.) That's what happened here, and that's exactly why the trial court's erroneous refusal to permit apportionment of responsibility to Do was palpably prejudicial.

B. The Entire Record, Including Plaintiffs' Arguments And The Close Verdicts, Amply Demonstrates Prejudice Here.

Even if this Court ignored *Collins*'s laser-focused, on-point analysis, and instead analyzed prejudice on a blank slate, the prejudice from the trial court's errors is still well-established.

The factors for assessing prejudicial instructional error are: (1) the verdicts' closeness; (2) the effect of other instructions in remedying the error; (3) the effect of counsel's arguments; and

(4) the evidence's weight and conflict on critical issues. (*Soule*, *supra*, 8 Cal.4th at pp. 570-571, 580-581; *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 152; *People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1024, fn. 6 (*Vasquez*); *Downing v. Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 519, 525 (*Downing*).)

Here, *all* of these factors demonstrate prejudice:

Close verdicts. Multiple verdicts were close (*Soule*, *supra*, 8 Cal.4th at pp. 570-571), and a "'close verdict is a key indication that the jury was misled'" (*Veronese v. Lucasfilm, Ltd.* (2012) 212 Cal.App.4th 1, 32 (*Veronese*)). *Two* of the jury's key special verdicts—regarding whether Monica was negligent and whether her negligence was a substantial factor causing Hedding-Kelton's harm—were 10-2 votes. (*Veronese*, at p. 32 [10-2 verdict "was close"]; *Whiteley v. Phillip Morris* (2004) 117 Cal.App.4th 635, 665 (*Whiteley*) [same]; 9RT/851-853; AA/106-107.)

Thus, even *absent* any ability to apportion responsibility to Do, multiple jurors already determined that Monica was not even negligent *at all*. There is far more than an "abstract possibility" (*College Hospital*, *supra*, 8 Cal.4th at p. 715) that in a retrial with Do included as another tortfeasor, a properly-instructed jury might find Do's respective contribution to plaintiffs' harm (under either strict liability or negligence principles) to be far greater than Monica's. Two jurors in *this trial* were already willing to apportion *zero* fault and zero responsibility to her.

No other instructions. No instructions cured the prejudice resulting from Do's omission (*Soule*, *supra*, 8 Cal.4th at pp. 570-571), because there "were no other instructions informing the jury" that it could apportion responsibility to him (*Whiteley*, *supra*, 117 Cal.App.4th at p. 660 ["No other instruction lessened the prejudice of the court's instructional error. There were no other instructions informing the jury" regarding defendants' partial immunity]).

Counsel's prejudicial arguments. Plaintiffs' counsel's arguments exacerbated the prejudice from the lack of apportionment. Counsel argued repeatedly that the Madrigals were *entirely* liable, and had to be held fully responsible based on Monica's negligence and their supposed strict liability as dog-owners:

- Plaintiff's counsel argued that the "people who manage [a] bridge have the obligation to know the signs, to look for them, to check for the signs. It's the same thing with dogs. The people that own, house and take care of animals like Munch" must learn about dog behavior and in failing to do so "the Madrigals created a dangerous condition." (8RT/770-771.) The Madrigals were unable to defend themselves by arguing that Do should also bear some or all responsibility for the condition and urging the jury to apportion responsibility and liability to him.

- Counsel emphasized that if Monica "is not negligent, and the Madrigals are not owners, there's no damages to award. Plaintiffs get zero." (8RT/776.) That argument is palpably prejudicial. The whole point of apportionment is to allow defendants to argue that recovery is not all-or-nothing, and the jury *can* decide that some defendants are partially responsible, while *still* assigning some responsibility *to other actors*.

- Counsel discussed a substantial-factor instruction and emphasized that "[t]here is no other factor in this case. There is no other reason this attack occurred," besides "Monica Madrigal's conduct." (8RT/780.) Again, instructional error prevented the defense from arguing that there *were* other reasons the attack occurred; that Do's dog-ownership and negligent failure to control Munch *were* "other reason[s]" (*ibid.*) supporting apportionment to Do; and that he should bear some responsibility and liability.

- In rebuttal, just before the jury's deliberations, counsel urged that "defendants' whole case is Minh Do, Minh Do. It's not our fault. We're innocent. Let's blame someone else" (8RT/834-835), insinuating that the Madrigals

> were trying to evade responsibility for harm that they alone caused (8RT/780). But Proposition 51 specifically directs and permits shifting responsibility to Do where, as here, plaintiffs claim noneconomic damages.

These comments emphasize that plaintiffs exploited the error, urging the jury to either (1) hold Monica or both Madrigals liable; or else (2) leave plaintiffs with nothing. The defense wasn't allowed to point at Do—another potential tortfeasor erroneously kept out of the room. That's prejudicial.

The state of the evidence. The "weight of the evidence" (*Vasquez*, *supra*, 14 Cal.App.5th at p. 1024, fn. 6) likewise shows prejudice.

Where "[t]he evidence" supporting the appellant claiming prejudicial error "was strong" and the opponent's evidence was "debatable," prejudice is readily established. (*Downing*, *supra*, 38 Cal.App.3d at p. 525.)

Here, the evidence that *Do* was Munch's true owner was incredibly strong—so strong that the jury *unanimously* found that the Madrigals were *not* Munch's owners. (AA/107; 9RT/857-858.) The evidence supporting the Madrigals' ownership of Munch was comparatively weak, as even plaintiffs' counsel grudgingly conceded. (8RT/776-778, 795, 791 [referring to negligence as "the stronger cause of action" and stating "we think the negligence case here is a lot stronger" than the dog-ownership claim].)

Moreover, given that Munch's only other potential owner besides the Madrigals was Do, there is far more than an "abstract possibility" (*College Hospital*, *supra*, 8 Cal.4th at p. 715) that if the jury could have addressed whether Do owned the dog and apportioned responsibility to him (§ 3342), it would have done so.

Further, there was a conflict in the evidence regarding Monica's negligence and responsibility for the attack, as opposed to the evidence of Do's negligence and responsibility. (*Soule*, *supra*, 8 Cal.4th at pp. 570-571.) Defendants made a very strong case, even absent the legally-required apportionment instructions, that Do was the dog's owner and that Do was negligent. (*Downing*, *supra*, 30 Cal.App.3d at p. 525.) They showed that Do owned Munch; that he made no efforts to restrain Munch either before or on the day of the attack; that he knew Munch was a potentially vicious and violent dog, yet left Munch in close range of multiple children; and that he totally failed to monitor Munch, instead going back upstairs to sleep. (See pp. 42-63, *ante*.) While there was some evidence of Monica's negligence, there was considerable evidence demonstrating Do's comparative responsibility on multiple grounds.

Given that the parties presented: (1) sharply conflicting expert testimony (RT/648-655 [defense expert Polsky]; compare RT/242-245 [plaintiffs' expert Berman]); and (2) entirely conflicting testimony regarding some of the underlying events, there is much more than an "abstract possibility" (*College Hospital*, *supra*, 8 Cal.4th at p. 715) that a properly instructed jury would apportion some responsibility to Do, either as

a strict-liability owner, a negligent actor, or both. There was far more than "substantial evidence," and certainly "realistic evidence" that Do made a significant contribution to plaintiffs' harm, and therefore the failure to permit apportionment was prejudicial. (*People v. Hendrix* (2022) 13 Cal.5th 933, 939, 950 [applying *Watson* standard; prejudice found where there is "substantial evidence" or "realistic evidence" supporting a "different answer" from jury absent instructional error].)

As plaintiffs put it, "defendants' whole case is Minh Do, Minh Do. It's not our fault. We're innocent. Let's blame someone else." (8RT/834.) That's exactly right—and that's exactly why instructions allowing the defense to point the finger at Do and shift responsibility and several liability to him, were required and appropriate. Rejecting those instructions was prejudicial error, mandating reversal.

III. THIS COURT SHOULD REVERSE THE JUDGMENT AND REMAND FOR A RETRIAL LIMITED TO APPORTIONMENT.

Upon reversal, the required retrial must be a *limited* trial of apportionment alone.

Once again, *Collins* charts the course. After finding prejudicial error in the trial court's failure to permit apportionment to one potential tortfeasor, *Collins* held that "retrial should be limited to apportionment of fault." (185 Cal.App.4th at p. 276.) *Collins* reasoned that, because "[t]here has been no challenge to the jury's liability verdict,"

a "retrial can properly be limited to the issue of apportionment of fault without causing 'confusion or uncertainty.'" (*Ibid.*)
A "retrial limited to apportionment" including both the original defendant and the erroneously-excluded additional tortfeasor was ordered. (*Id*. at p. 277.) This should be the result here.

Schelbauer v. Butler Manufacturing Company (1984) 35 Cal.3d 442 (*Schelbauer*) is to the same effect. There, the trial court found that the "jury's apportionment of damages [was] erroneous" and "the damage award is incorrect only to the extent that it reflects an improper apportionment of liability." (35 Cal.3d at p. 457.) *Schelbauer* held that the error on apportionment required a retrial, but only "apportionment of liability" should be retried. (*Ibid*.)

O'Kelly v. Willig Freight Lines (1977) 66 Cal.App.3d 578 (*O'Kelly*), is likewise in accord. There, too, the Court of Appeal held that after an apportionment error, "granting a new trial limited to the issue of apportionment" was appropriate. (66 Cal.App.3d at p. 583.) The Court directed that on remand, jurors could hear "the evidence dealing with the conduct of the parties" but should be instructed that: (1) "they must proceed on the assumption that the total damage" was the amount in the initial verdict; and (2) "their sole function is to apportion that total damage." (*Ibid.*)

Here, Monica is not challenging the verdict finding her negligent or the amount of damages, and plaintiffs aren't either. (*Collins*, *supra*, 185 Cal.App.4th at p. 276.) The sole error raised is "improper apportionment of liability" based on the refusal to

permit apportionment of responsibility to Do. (*Schelbauer*, *supra*, 35 Cal.3d at p. 457.) Here, too, the judgment must be reversed and the retrial limited to apportionment, with the jury instructed that the prior damages award is fixed, and its sole duty is to "apportion that total damage" among all potentially responsible tortfeasors. (*O'Kelly*, *supra*, 66 Cal.App.3d at p. 583.)

IV. UPON REVERSAL OF THE JUDGMENT, THE COSTS/INTEREST ORDER MUST LIKEWISE BE REVERSED.

Because the judgment must be reversed, the order awarding plaintiffs costs and section 3291 interest (which is itself an item of costs) must likewise be reversed. (See AA/121 [Item 16]; AA/172 [Item 16]; AA/208-210; *Bodell Const. Co v. Trustees of Cal. State Univ.* (1998) 62 Cal.App.4th 1508, 1525, fn. 14 [section 3291 interest "is an item of costs"]; *Wagy v. Brown* (1994) 24 Cal.App.4th 1, 8 [same].)

"An order awarding costs falls with a reversal of the judgment on which it is based." (*Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402; *Aljabbian v. Fontana Indoor Swap Meet, Inc.* (2020) 54 Cal.App.5th 482, 513-514 [same].)

V. ASSUMING ARGUENDO THAT THE INITIAL JUDGMENT SOMEHOW RETAINS VALIDITY, IT MUST BE REVERSED WITH DIRECTIONS TO ENTER JUDGMENT IN OSCAR'S FAVOR.

Appellants' position is that the Corrected and Amended Judgment (against Monica alone) fully superseded the erroneous Initial Judgment (against Monica and Oscar). Under the Corrected and Amended Judgment's terms, judgment was correctly entered for Oscar and against plaintiffs.

However, if this Court disagrees and believes that the Initial Judgment is somehow still controlling, then the portion of that Initial Judgment entered against Oscar must be reversed with directions to enter a new judgment in Oscar's favor.

The special verdict finds that Oscar has *no liability* and unanimously rejects the sole basis for liability tendered against him—i.e., that he was a purported dog-owner. (AA/107-108.) Accordingly, the Initial Judgment holding Oscar liable for plaintiffs' damages and permitting them to collect from him is unsupported by *any* jury findings. Where judgment is entered against a defendant, but essential factual findings necessary to support his liability are absent from the verdict, the judgment must be reversed, with directions to enter a new judgment in the defendant's favor. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960-962 & fn. 8; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 329.)

Accordingly, if the Initial Judgment against Oscar is somehow still valid, it must be reversed with directions to enter judgment in his favor.

CONCLUSION

Substantial evidence supports findings that (1) Do was Munch's owner and thus strictly liable for Hedding-Kelton's injuries under section 3342; and (2) Do's negligent failure to control and restrain Munch caused plaintiffs' damages. Accordingly, under Proposition 51, the trial court was required to give apportionment instructions allowing the jury to apportion responsibility to Do. The court's failure to do so was prejudicial.

This Court must therefore reverse the judgment and costs/interest order, and direct the trial court to conduct a limited retrial of apportionment, in which all the respective shares of responsibility for all tortfeasors (including Do) shall be tried and the existing noneconomic damages sums shall be apportioned among them.

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this Appellant's Opening Brief contains **13,966** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: Nov. 2, 2022

/s/ David E. Hackett

David E. Hackett

PROOF OF SERVICE

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036, my email address is chsu@gmsr.com. On November 2, 2022, I served the foregoing document(s) described as: **APPELLANTS' OPENING BRIEF** on the interested party(ies) in this action, addressed as follows:

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CALIFORNIA SUPREME COURT [Electronic Service under Rule8.44(b)(1)]	Sacramento County Superior Court Hon. Steven M. Gevercer, Dept. 27 720 Ninth Street Sacramento, CA 95814-1311 Email: dept27@saccourt.ca.gov

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system.

Executed this 2nd day of November, 2022, at Los Angeles, California.

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

Chris Hsu
Chris Hsu