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' REPLY BRIEF

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INTRODUCTION

After a pit bull attacked and bit respondent Arianna Hedding-Kelton, she and her mother, respondent Jasmine Lawson, sued appellants Monica and Oscar Madrigal for pain-and-suffering damages. A jury found that Monica's negligence caused the attack—and Monica doesn't challenge that now. She simply wants to try an issue that the trial court erroneously prevented from being tried: Whether Monica's tenant/housemate Minh Do also bears some blame for the attack. Despite Monica's efforts to get that issue tried, the court excluded it. The result? Monica faces liability for *all* of respondents' damages, despite the existence of another potential tortfeasor. That contradicts Proposition 51.

Monica doesn't challenge the jury's finding that she was negligent. She challenges the court's refusal to let the jury decide whether to apportion fault to Do—either as a strictly-liable dog owner under Civil Code section 3342, or on negligence grounds, or both. So long as there was substantial evidence supporting these liability theories, Monica had a right to jury instructions on them. And there's no doubt that there was substantial evidence. Reams of it.

Respondents' claims to the contrary ignore the standard of review. They impermissibly reargue evidentiary conflicts *in their*

favor. They ignore the evidence in *Monica's* favor, which must be taken as true. And, in a case where a theory was *excluded* and instructions improperly refused, the existence of some quantum of evidence disfavoring Monica's position is beside the point. Indeed, if anything, its existence just means there should *be a trial* on apportionment—something that's never happened.

Respondents' argument that Monica waived apportionment fails, too. Respondents ignore that (1) the trial court erroneously rejected Do's inclusion on the verdict from day one; (2) Monica repeatedly raised her Proposition 51 rights; (3) Monica proposed a pinpoint instruction for apportionment of responsibility to Do on both strict liability and negligence grounds; and (4) Monica objected to pinpoint strict-liability ownership and negligence instructions and a verdict form omitting references to Do, *because* they omitted Do, among other things. There was no waiver.

In light of the substantial evidence supporting Do's dog-ownership and negligence, the trial court prejudicially erred in refusing to permit apportionment to Do. A retrial limited to apportionment of the existing damages award must be ordered.

ARGUMENT

I. RESPONDENTS IGNORE THE STANDARD OF REVIEW.

Respondents disregard the lens through which this Court must view this appeal. Where, as here, appellant challenges instructional errors, the 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, Inc.* (1995) 38 Cal.App.4th 294, 298.)

The Court must "view the evidence and all inferences" in "the light most favorable" to the appellant, Monica. (*Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 176 (*Godfrey*).) This "standard of review" is the "opposite of the traditional substantial evidence test." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 304; *Blevin v. Coastal Surgical Institute* (2015) 232 Cal.App.4th 1321, 1329.)

Multiple well-established rules govern substantial evidence review:

1. The Court "'accepts the evidence most favorable'" to the party benefitting from the standard of review "'as true'" and "'discards the unfavorable evidence.'" (*In re Michael G.*

(2012) 203 Cal.App.4th 580, 595 (*Michael G.*), alterations omitted.)

2. "'[T]he testimony of a single witness'" constitutes substantial evidence. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613 (*Gevorgian*).)

3. Where there are conflicts in witnesses' testimony, this Court must "accept as true" the "part of a witness's testimony which supports" Monica's position (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830 (*Daniel G.*)), and reject "that part which would defeat, or tend to defeat" her position (*In re Reed's Estate* (1955) 132 Cal.App.2d 732, 735 (*Reed's Estate*)).

4. In conducting substantial evidence review, "incompetent or otherwise inadmissible evidence," including hearsay, constitutes substantial evidence if "admitted without objection." (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 113 (*Tracy Z.*); *People v. Panah* (2005) 35 Cal.4th 395, 476 (*Panah*) ["incompetent testimony, such as hearsay or conclusion, if received without objection takes on the attributes of competent proof" for

> sufficiency of evidence purposes].) Such evidence is entitled to """as much weight""" as any other evidence in conducting substantial evidence review. (*People v. Bailey* (1991) 1 Cal.App.4th 459, 463.)

Respondents' briefing flouts these rules. They repeatedly argue evidence and inferences favorable to *them*. That's impermissible.

But viewed through the lens of the correct standard of review, there's no doubt: The trial court committed prejudicial error.

II. THE TRIAL COURT ERRONEOUSLY REFUSED TO ALLOW APPORTIONMENT.

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

Apportionment of responsibility instructions were required if Monica presented substantial evidence that Do was another potentially-responsible tortfeasor. (*Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 785 ["damages can be apportioned to" nonparty tortfeasor where there is "substantial evidence that [the] nonparty is at fault"]; *Soule v. Gen. Motors Corp. (*1994)

8 Cal.4th 548, 572 (*Soule*) [party entitled to "correct, nonargumentative instructions" on every theory supported by "substantial evidence"].)

Respondents don't disagree. They concede that if "substantial evidence" established Do's status as a strict-liability dog-owner or negligent actor, then Monica would be entitled to an "instruction for apportionment." (RB 25, 47.)

Thus, the key question is: Was there substantial evidence establishing Do's status as a dog-owner strictly liable under Civil Code section 3342 (AOB 42-45) and a negligent tortfeasor (AOB 48-60)?[1] The answer is yes.

B. Substantial Evidence Shows That Do Owned The Pit Bull.

1. There is abundant ownership evidence.

There was substantial evidence that Do owned the pit bull.

Ownership of property may be shown by testimony that an individual owned that property (*People v. Clifton* (1985) 171 Cal.App.3d 195, 201 (*Clifton*); AOB 43), and dog ownership may be established by evidence that (a) an individual "purchased" a dog, (b) his name appeared in government-issued dog records, and (c) he provided "care and attention" (*Ellsworth v. Elite Dry*

[1] Further undesignated statutory references are to the Civil Code.

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*); AOB 43). Respondents don't suggest otherwise.

Here, Oscar testified that Do "was the owner of the dog." (7RT/577; AOB 43.) That testimony is substantial evidence of ownership, because one witness's testimony constitutes substantial evidence. (*Gevorgian*, *supra*, 218 Cal.App.4th at p. 613.) Respondents ignore it, and instead complain that Monica didn't call Do as a witness to discuss ownership. (RB 9.) But respondents cite no law—and there is none—requiring her to call Do or any other witness, especially given the extensive evidence separately confirming that he was Munch's owner.

That ownership evidence didn't just come from the Madrigals—it came from respondents. Lawson testified that (1) she regarded Do and his girlfriend as "owners of the dog" (6RT/500-501); and (2) Do "bought the dog" (6RT/507-508.) That, too, is substantial evidence of Do's ownership. (*Clifton*, *supra*, 171 Cal.App.3d at p. 201; *O'Rourke*, *supra*, 9 Cal.App. at pp. 325-326 [ownership shown by fact that owner "bought and paid for" dog].)

Respondents ignore the first excerpt. Regarding the second, they claim Lawson "did not testify that Mr. Do 'bought' the dog" but that he "'brought' the dog." (RB 48.) That ignores the substantial evidence standard. Lawson testified in deposition

that Do "bought the dog"; only later did she claim to have said "brought." (6RT/500-501.) Under the standard of review, this Court must credit Lawson's testimony that Do "bought" Munch (6RT/500) and her other ownership testimony (6RT/507-508), and discard contrary testimony (*Reed's Estate*, *supra*, 132 Cal.App.2d at p. 735).

Monica, too, identified the pit bull (Munch) as "Minh Do's dog" and agreed that he was Munch's owner. (7RT/611.) This testimony is substantial evidence of ownership. (*Michael G.*, *supra*, 203 Cal.App.4th at p. 595.)

And, there's still more. Substantial evidence likewise showed that: (1) Do *purchased and took possession* of Munch; (2) Do *cared for* Munch; (3) Do *assumed costs and legal responsibilities* for Munch; (4) Do directed, and consented to, Munch's release to *Animal Control*; and (5) Do was listed as Munch's owner on the Animal Control Bite Report. (AOB 44-45, 18-19; 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.) That evidence likewise supports an ownership finding, yet respondents fail to grapple with it under the standard of review.

2. Respondents' evidentiary discussion contradicts the standard of review.

Respondents try to re-cast the ownership evidence, but their efforts contradict logic and common sense.

The jury rejected respondents' claim that the Madrigals owned Munch. That verdict and judgment are final. Respondents never cross-appealed. (AA/107-108; 211-213; AOB 45.) The *only* other potential dog-owner is Do. Nobody ever identified any other owner. Thus, respondents' efforts to quibble with the ownership evidence ring hollow. Do is the *only* other possible owner, and there is abundant evidence that he was, in fact, Munch's owner.

Respondents' arguments also contradict the standard of review:

***Purchase and possession*:** Respondents say there's "no evidence that Mr. Do 'purchased' the dog." (RB 47.) Nonsense. Lawson testified that Do "bought" Munch (6RT/500-501) and the words "buy" and "bought" mean to "acquire" something "by paying" (Dictionary.com, buy <https://www.dictionary.com/browse/buy>.) Crediting Lawson's testimony (*Michael G.*, *supra*, 203 Cal.App.4th at p. 595), it alone constitutes substantial evidence of Do's purchaser/owner status.

Oscar testified that Do "picked [Munch] up," taking possession from the seller. (7RT/582.) Taking that testimony in Monica's favor (*Michael G.*, *supra*, 203 Cal.App.4th at p. 595), it supports a finding that Do exercised dominion over Munch, as owner (*Ellsworth*, *supra*, 127 Cal.App.2d at p. 482; *Clifton*, *supra*, 171 Cal.App.3d at p. 201).

***Dog care*:** Oscar testified that Do took Munch to "get shots" (7RT/601), and Do "probably" gave Munch "bowls or leashes," which Oscar did not provide, because Do "was the owner" (7RT/577). On substantial-evidence review, this testimony must be credited. Respondents' claim that Oscar was "the only witness" to provide such testimony (RB 48) is immaterial and tantamount to an admission that there *is* substantial evidence of ownership. One witness's testimony constitutes substantial evidence. (*Gevorgian*, 218 Cal.App.4th at p. 613.)

Respondents' claim that Oscar's testimony is "speculative" (RB 48) lacks merit. He was speaking on personal knowledge and experience observing Do. And respondents *never objected*, so the testimony constitutes substantial ownership evidence. (*Panah*, *supra*, 35 Cal.4th at p. 476.)

Plus, there's ample evidence regarding Do's dog care, including feeding, walking, watering, and efforts to ensure that his girlfriend or sister provided care in his absence. (AOB 19;

7RT/610, 576.) Respondents concede that Do fed and watered Munch. (RB 12.) That, plus the other (unaddressed) evidence of Do's walking and back-up care arrangements is also substantial evidence of dog-ownership. (RB 49; *Ellsworth*, *supra*, 127 Cal.App.2d at pp. 481-483.)

***Costs and responsibilities*:** Do agreed to pay an additional $250 per month so Munch could live with him, and agreed to be "fully responsible for the pet." (3RT/185; 7RT/574-575, 585-586.) That's substantial evidence of ownership.

Respondents themselves elicited Monica's testimony regarding Do's "monthly" payments (3RT/185), and on substantial-evidence review it must be credited.

Oscar's testimony regarding Do's agreement to be "fully responsible" for Munch and pay additional rent (7RT/574-575, 585-586), was given while he had the lease before him to refresh recollection (Evid. Code, § 771) and on respondents' cross-examination (7RT/585-586), and it, too, must be credited.

Respondents' complaint that the "lease was not an exhibit" (RB 48) should be ignored as unaccompanied by authority (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*)), and lacks merit. Respondents had the opportunity to examine the lease and cross-examine Oscar about it (Evid. Code, § 771, subd. (b); 7RT/584-585), and they never objected to Oscar's

testimony (some of which they elicited). Even if testimony about lease terms were hearsay (it was not), hearsay testimony received without objection would *still* constitute substantial evidence supporting Do's ownership. (*Panah*, *supra*, 35 Cal.4th at p. 476.)[2]

***Animal Control evidence*:** Respondents claim that Oscar made the "ultimate decision" to euthanize Munch (RB 49), but that ignores the standard of review. Oscar was asked "Who ordered Munch's destruction, you or Mr. Do?" His answer: "Who signed the paper? Mr. Do." (7RT/589-590.) Oscar's testimony must be credited. All favorable inferences (including the inference that *Do* signed off on Munch's destruction because *he* owned Munch), must be drawn in *Monica's* favor. Respondents' references to other, equivocal testimony must be discarded. (*Daniel G.*, *supra*, 120 Cal.App.4th at p. 830.)

In addition, Do's "name" was "listed on" the "Sacramento Animal Control Bite Report," a government record, as Munch's "owner." (3RT/267.) That, too, supports an ownership finding.

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[2] Monica is not relying on the lease itself, which was not admitted. (RB 25; *Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, 298, fn. 2 (*Talcum*).) She is relying on *testimony* about the lease terms, which was properly received (and received without objection), showing that Do was willing to be "fully responsible" and pay additional rent to keep Munch in the home, thereby supporting a finding that he owned Munch. (7RT/575; *Panah*, *supra*, 35 Cal.4th at p. 476.)

Respondents don't dispute that Do was the dog-owner on the report. Expert Berman's testimony regarding the report's contents—and its reference to Do's ownership—was received without objection; it must be credited; and it is substantial evidence of ownership. (*Panah*, *supra*, 35 Cal.4th at p. 476; *Michael G.*, *supra*, 203 Cal.App.4th at p. 595.)[3]

Contrary to respondents' suggestion, Berman never claimed that such reports "are not indicative of ownership" (RB 49), and instead claimed that there might be "other owners" of Munch in addition to Do, who was listed on the report (RT/272). That testimony doesn't undermine Monica's claim that Do *was* Munch's owner, as the report's contents showed.

Regardless, Berman's testimony describing the report's contents and supporting Do's owner status must be credited and any other unfavorable testimony (if it existed) must be discarded. (*Reed's Estate*, *supra*, 132 Cal.App.2d at p. 735.)

Construing the record in Monica's favor, it contains substantial evidence supporting Do's ownership of Munch.

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[3] Monica is not relying on the Bite Report itself. (RB 25; *Talcum*, *supra*, 37 Cal.App.5th at p. 298, fn. 2.) She is relying on Berman's *testimony* about the report's reference to Do as Munch's owner, which was received without objection and constitutes substantial evidence of ownership. (*Panah*, *supra*, 35 Cal.4th at p. 476.)

Monica was therefore entitled to have the jury instructed on apportionment of responsibility to Do, under a strict-liability ownership theory.

3. Section 1431.2 permits apportionment between negligent and strictly-liable tortfeasors.

Respondents argue that even if Do was Munch's owner, Monica isn't entitled to apportionment under section 1431.2. (RB 40-44.) They say a jury "cannot evaluate" comparative responsibility between negligent and strict-liability tortfeasors because "where a defendant has culpable conduct and the non-party does not," there's "nothing to compare." (RB 41, 43-44.)

Respondents concede they have *no case* supporting them—no case prohibiting "apportionment of fault to a non-party dog owner." That alone means their argument should be ignored. (RB 43; *Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.)

And, Do *is* a party here (albeit a party defaulted on Monica's cross-complaint), so respondents' "non-party" reference is inaccurate. (AA/29-31, 246; AOB 24.) And even if Do were a non-party, that still wouldn't prevent apportionment, because Proposition 51 allows a defendant to seek apportionment as to parties and non-parties. (AOB 64-65.)

Regardless, respondents' no-apportionment argument fails. Under Proposition 51, allocation of "fault" includes allocation against strict-liability tortfeasors. The term "fault" includes "negligence and strict liability." (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 20 (*B.B.*); *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 855 (*Wilson*) [Proposition's comparative "fault" reference "embrace[s]" strict liability].) *B.B.* and *Wilson* are in lockstep with *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, which held that juries are "competent to apply comparative fault principles between negligent and strictly liable defendants." (21 Cal.3d at p. 331.)

These principles are well established:

They appear in 25 years of Proposition 51 authorities allowing apportionment between negligent and strictly-liable tortfeasors. (E.g., *Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 1541, 1576 (*Springmeyer*) ["Proposition 51 requires that fault be allocated between [negligent defendant] on the one hand, and [strictly-liable defendants], on the other"]; *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285 (*Pfeifer*) [comparative responsibility allows jury to apportion under "negligence, strict liability, or other theories"]; *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 325 (*Bigler-Engler*) [Proposition 51 applicable where one defendant "is liable under a negligence theory" and another is liable under "strict liability"];

Wimberly v. Derby Cycle Corp. (1997) 56 Cal.App.4th 618, 633, fn. 9 (*Wimberly*) [Proposition 51 applicable where "one party is strictly liable" and "another is liable" based on "independent negligence"].)

They appear in the model apportionment jury instruction's directions. (CACI No. 406, Directions for Use, citing *Pfeifer*.)

They appear in a leading personal injury practice guide. (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2022) ¶ 3:1007.)

Respondents cite *nothing* contrary. Instead, they claim that *Bigler-Engler* permitted apportionment between a negligent and (partially) strictly-liable defendant because the strictly-liable defendant was also "liable for negligent failure to warn." (RB 41-42.) Not so. The mixed liability of *Bigler-Engler*'s manufacturer-defendant wasn't relevant to its analysis. All that mattered was that liability was based "in part" on strict liability. (7 Cal.App.5th at p. 325 [Proposition 51 applicable where one defendant is "liable in part under a strict liability theory" and another is liable in "negligence"].) Do's comparative responsibility is based at least "in part" on strict liability, so Proposition 51 apportionment is allowed. (*Ibid.*)

Respondents also rely on cases where Proposition 51 principles were rejected because (1) multiple strictly-liable

defendants for one product sought to apportion responsibility among themselves, or (2) an employer sought to apply apportionment to imputed, vicarious-liability claims. (RB 43, citing *Wimberly*; *Romine v. Johnson Controls* (2014) 224 Cal.App.4th 990; *Miller v. Stouffer* (1992) 9 Cal.App.4th 70.) Neither situation applies here. Monica is not seeking to impute her negligence to Do. She contends he is an *independent*, *strictly-liable* tortfeasor.

Respondents cite *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1854, which rejected Proposition 51 principles where negligence liability was imputed "to the jointly liable defendant" car owner, considered a "*single* tortfeasor" with statutorily-imposed "*vicarious* liability" vis-à-vis the driver. (Original italics; RB 43.) But Monica is not seeking to impute her negligence to Do or hold him vicariously liable—she is seeking to hold him *independently* responsible under section 3342.

Respondents argue that *Henry v. Superior Court* (2008) 160 Cal.App.4th 440 (*Henry*), rejects Proposition 51 in cases where there is no "fault or culpable conduct." (RB 43.) But *Henry* did not reject apportionment against a strict-liability tortfeasor. In discussing Proposition 51 apportionment, *Henry* confirmed Monica's position: "Juries are often confronted with apportioning fault among defendants sued on different theories," and apportionment is proper "'whether their responsibility" rests on

"negligence, *strict liability*, or other theories.'" (*Henry*, at pp. 445, 461, italics added.) Regardless, *Henry* didn't involve apportionment between negligent and strictly-liable tortfeasors, just negligent tortfeasors; it is not authority on issues it didn't consider. (*Id.* at pp. 446, 462; *B.B.*, *supra*, 10 Cal.5th at p. 11.)

Finally, it is well-recognized that the term "fault" for Proposition 51 purposes *includes* strict liability. (*Wilson*, *supra*, 81 Cal.App.4th at p. 855 ["fault" as used in "'comparative fault'" reference in Proposition 51 "encompass[es]" strict liability]; *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1196.) Even under *Henry*'s description of Proposition 51's "fault" apportionment, strict liability is apportionable "fault."

4. Respondents wrongly claim that Do had to "consent" to Hedding-Kelton's presence in the backyard.

Respondents argue that Do can only be held strictly liable if Hedding-Kelton was "on the property" where the bite occurred with the "invitation of the dog owner(s)." Because Do never "consented" to her entering the backyard, he cannot be liable. (RB 44.) Wrong again.

a. Section 3342 only restricts claims by trespassers; Hedding-Kelton was Monica's invitee.

Section 3342, subdivision (a) directs that a dog-owner is liable to anyone "bitten by the dog while [1] in a public place or [2] lawfully in a private place." (Numerical alterations added.)

By using the phrase "*a* private place" and the indefinite article "a," the Legislature directed that owners are liable when the injured party is bitten in <u>any</u> private place, if she is "lawfully" present. (§ 3342, subd. (a); *Armin v. Riverside Community Hosp.* (2016) 5 Cal.App.5th 810, 829 (*Armin*) [statute's "use of the *indefinite* article in the words 'a pending peer review hearing' signifies *any* pending peer review proceeding"].)

Here, Hedding-Kelton *was* "lawfully in a private place" when Munch attacked her, so the dog-owner's (i.e. Do's) strict liability will lie. (§ 3342, subd. (a).) Hedding-Kelton was an invited guest to the Madrigals' property (which indisputably includes the house and backyard). (3RT/170, 186-188, 190; 5RT/280; 7RT/588-589.) It's undisputed that Hedding-Kelton had owner-Monica's permission to enter the backyard, with Monica "letting her out." (3RT/194; 6RT/389, 392, 504-505; 7RT/542; 3RT/183-184.)

Section 3342's "lawfully in a private place" language just "den[ies] liability to a trespasser." (6 Witkin, Summary of Cal. Law (11th ed. 2023) Torts, § 1570.) But Hedding-Kelton was no trespasser. Respondents concede that Monica gave Hedding-Kelton *permission* to enter the yard (RB 13-14), and Monica indisputably invited Hedding-Kelton to stay at the home (7RT/588-589).

b. Respondents' dog-owner-permission focus is misplaced.

Respondents nevertheless say that the "invitation of the dog owner(s)" to the bite location is a statutory requirement. (RB 44.) Not so.

Section 3342 directs that strict liability arises where a person 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." (§ 3342, subd. (a), italics added.)

Thus, while "the property of the owner of the dog" is *one* "private place" where strict bite liability could attach, it is not the only such "private place." (§ 3342, subd. (a).) Liability attaches when the bite occurs in "*a* private place" where the injured party is lawfully present—and that means *any* private place. (*Ibid.*, italics added; *Armin*, *supra*, 5 Cal.App.5th at p. 829.) Hedding-Kelton was lawfully present in *a* private place here.

Section 3342's use of the term "including" reinforces the point. "'[I]ncludes' and 'including' are words of enlargement," not limitation. (*Rea v. Blue Shield* (2014) 226 Cal.App.4th 1209, 1227-1228.) The "Legislature's choice of" the word "'including'" to introduce an example of one private place within section 3342's scope reinforces that "*other* [private places] are includable," too, beyond just the stated example of a dog-owner's property. (*Marriage of Angoco & San Nicolas* (1994) 27 Cal.App.4th 1527, 1534 [statute stated that "'[a]ll duties of support, including the duty to pay arrearages'" were enforceable via private action; statute's sweep indicated "*other* duties of support are includable" beyond payment of arrearages, and applied in "situations where no arrearages exist," italics added].)

Section 3342's definition of "private place[s]" is expansive. It "does not *exclude*" other private places beyond "the property of the owner of the dog." (§ 3342, subd. (a); *People v. Ng* (2022) 13 Cal.5th 448, 540 [under statute, "'"action" includes a civil action and a criminal action'"; Supreme Court held "definition does not *exclude* any proceeding not strictly criminal or civil," original italics].) The use of the term "a" confirms that "private place" is an expansive term and liability attaches in *any* private place where the injured party is lawfully present. (*Armin*, *supra*, 5 Cal.App.5th at p. 829.)

Thus, Do's permission is irrelevant. All that matters is that when the bite occurred, Hedding-Kelton was "lawfully in a private place." (§ 3342, subd. (a).) She was.

Respondents' cited cases, *Bauman v. Beaujean* (1966) 244 Cal.App.2d 384, and *Fullerton v. Conan* (1948) 87 Cal.App.2d 354, are inapposite. (RB 46.) Both involved *trespassers*. (*Bauman*, at pp. 385, 387-388 [dog bit child in backyard; "substantial evidence" showed no invitation to "play alone in the backyard"]; *Fullerton*, at p. 358 [bitten child "was a 'trespasser'"].) Hedding-Kelton was not a trespasser, so section 3342 imposes strict liability on Do.

c. Respondents' trespass-on-chattels argument is impermissible and absurd.

Equally without merit and irrelevant is respondents' argument that Monica's conduct was "akin to a trespass on chattel." (RB 45.) Respondents never made a trespass-on-chattel claim below and cannot state one now. (*Herbert v. Lankershim* (1937) 9 Cal.2d 409, 484 [respondent's "new theories on appeal" precluded where they were never presented "by pleading, or raised during the trial" or jury instructions].) And, respondents' description of Monica's conduct is that she trespassed not on chattels but on the "property she leased to Mr. Do," so trespass on chattels is inapplicable by respondents' own description. (RB 45.)

Respondents didn't own or possess the chattel (Munch) or the property (backyard) at issue, either, so they lack standing to claim trespass. (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566-1567; *Ralphs Grocery co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 261-262.)

Beyond that, it is patently absurd to claim that Monica trespassed *on her own backyard*, and there is nothing indicating that she "leased" the backyard "property" to Do exclusively (RB 45), so no trespass claim could ever succeed.

5. Respondents' "substantial factor" argument contradicts their theory of trial and lacks merit.

Respondents state ipse dixit that even if Do owned Munch, Monica "fail[ed] to address" whether his ownership was a "substantial factor" causing plaintiffs' harm, and ownership was "not a substantial factor." (RB 50.) The argument fails.

First, respondent's discussion of the supposed evidence on the substantial factor issue (and Do's dog-ownership as a supposed non-factor) is unsupported by citations to authority or the record so it should be ignored. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.)

Second, respondents' argument contradicts their theory of trial. "Where the parties try the case on the assumption that

certain issues are raised by the pleadings, or that a particular issue is controlling, neither party can change this theory" on appeal. (*Fuller v. Dept. of Transportation* (2019) 38 Cal.App.5th 1034, 1041 (*Fuller*).) Here, respondents' theory of trial—a necessary component of their claim against the Madrigals as (alleged) dog-owners—was that the Madrigals' ownership of Munch *was* a substantial factor causing harm. Indeed, respondents proposed jury instructions *directing the jury to find* that the Madrigals' conduct (as supposed owners) was a substantial factor; respondents tendered a verdict form asking the jury, as part of their *dog-bite claim*, whether Munch was "a substantial factor in causing harm" to Hedding-Kelton. (AA/46-47, 53-54, 90 [CACI 430, referencing "Causation: Substantial Factor"], 107-108 [verdict].)[4]

Thus, respondents have long contended, and *pressed* the theory, that dog ownership was a "substantial factor" causing harm, when attempting to tag the Madrigals with strict dog-ownership liability. They cannot change their theory now and claim that dog-ownership is "not a substantial factor" for a

[4] Respondents claim that appellants' appendix is "not consecutively numbered" (RB 25) but the Court filed the appendix and respondents' brief includes numerous pin-citations to it. Appellants' conformed appendix copy includes pagination consistent with the Rules of Court.

dog-bite injury (RB 50; *Fuller*, *supra*, 38 Cal.App.5th at p. 1041), just because the alleged owner is Do, not the Madrigals.

Third, respondents wrongly claim that Monica "fail[ed] to address" the role played in plaintiffs' harm by Do-as-owner. (RB 50.) Monica's opening brief argued that if "Do was Munch's owner," then the jury would "*have to* apportion" responsibility to him; the "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" harm. (AOB 47-48, original italics.) A "substantial factor" finding requires merely that "'the contribution of the individual cause be more than negligible or theoretical'" (*Uriell v. Regents of the University of California* (2015) 234 Cal.App.4th 735, 744 (*Uriell*)), and Monica argued that owner-Do's contribution was not just more-than-negligible but a *necessary* component of harm. (AOB 47-48.)

That's just common sense. *Of course* the dog owner's ownership has a more-than-"negligible" contribution to that dog's bites. The owner has dominion and control over the dog. Without the dog, there's no bite.

6. The Madrigals argued that Do owned Munch.

Respondents argue that the Madrigals waived any ownership argument because they "chose not to" argue that Do "was the dog's owner" before the jury. (RB 47; RB 46 [claiming the Madrigals "never affirmatively argued that Mr. Do *was* the dog's owner," original italics].)

Respondents are wrong. The Madrigals *repeatedly* argued that Do was Munch's owner, to support the defense case that *they* weren't owners. (See 7RT/798 [closing argument: the Madrigals let "Do adopt and bring a dog in that he would own"], 800-801 [Oscar didn't state "he was the owner" on an Animal Control bite report, but instead "*Do* did"; "Do stayed at the property" and agreed to euthanize Munch, which was "completely reasonable for *him*, the *dog owner*," italics added], 802 [Do's conduct showed "how much he wanted the dog to be his pet"; "the owner, Minh Do" was handling feeding and care].)

But without any instructions giving the jury a chance to weigh the Madrigals' theory and apportion to Do, there was no chance for the jury to do anything with the Madrigals' arguments about Do's ownership. The most jurors could do was find that the Madrigals didn't own Munch (and they did). Jurors were never asked whether Do owned Munch or whether to apportion responsibility. An apportionment retrial must be ordered.

C. Substantial Evidence Supports Do's Negligence.

Aside from the strict-liability ownership evidence, there was substantial evidence of Do's negligence. That's a separate, independent basis for apportionment and its refusal was also prejudicial error.

1. The governing framework.

This Court set forth the governing framework for negligent dog-handling claims in *Drake*: 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*).)

2. Substantial evidence showed that Munch's presence posed a risk of harm to others.

Respondents spend little time addressing whether Munch's presence *on its own* "posed a risk of harm" (*Drake*, *supra*, 15 Cal.App.4th at p. 931)—besides asserting ipse dixit that "[n]o expert testified that the dog living in the house as a standalone fact was dangerous" (RB 31). There was no need for an expert on this issue because the danger of a large pit bull in a house is common knowledge to lay jurors.

Moreover, respondents are wrong, because their own expert testified about the dog's danger. He said that he "would be" concerned about bringing an unneutered male pit bull into a home or around children without knowing its history, because a "lot of incidents happen" when such a dog is adopted into a home, and gave extensive testimony about pit bulls' viciousness. (4RT/246, 240-244.) According to the expert, it's "not very wise" to "presume" that a pit bull like Munch is "safe" and breed is "a very important factor." Having the dog around children "should be handled in a careful and controlled way" and assuming the dog is safe around children without restraint, commands, and observation "can lead to trouble." (4RT/242-244.) Crediting this testimony and the other testimony detailed in the opening brief (AOB 49-51) and taking all inferences in Monica's favor, a jury could find that when Do brought Munch to live in the Madrigals' home, he created "a risk of harm." (*Drake*, *supra*, 15 Cal.App.4th at p. 931.)

And that's common sense: Any large dog in a home (pit bull or not) poses *some* risk of injury that wouldn't exist in the dog's absence.

The duty question is simple. Everyone has "a duty 'to exercise, in his or her activities, reasonable care for the safety of others'" and everyone "'is responsible'" for "'an injury'" caused by his "'want of ordinary care or skill in the management of his'"

property. (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 213-214.) Do was engaged in activities—owning and handling a large pit bull in a house where other adults lived, where one child visited and usually stayed "'[a]lmost every other weekend'" and where other children "often" visited. (6RT/501-503; 2RT/178.) Do had a duty to conduct those activities, and manage his dog, with reasonable care. (*Brown*, at pp. 213-214.)

3. Substantial evidence shows the risk of harm was reasonably foreseeable—and that Do himself foresaw it.

a. Substantial evidence establishes Do's awareness of, and the foreseeability of, a risk that Munch could harm others.

The next question is whether the risk that pit-bull Munch could harm others was "was reasonably foreseeable." (*Drake*, *supra*, 15 Cal.App.4th at p. 931.) Substantial evidence shows that it was.

Foreseeability of harm can be inferred from evidence that a dog's owner was aware of its potential danger. (*Drake*, *supra*, 15 Cal.App.4th at p. 931 ["inference could be drawn" that dog's conduct was "reasonably foreseeable" based on owner's knowledge of dog's propensities to jump on others].)

And the "vicious propensities and dangerous character of a dog" and "knowledge thereof by the owner" can be inferred from evidence of the dog's "size and breed" and the fact that the owner restrained him. (*Frederickson v. Kepner* (1947) 82 Cal.App.2d 905, 908-909 (*Frederickson*); *Radoff v. Hunter* (1958) 158 Cal.App.2d 770, 773-774 (*Radoff*) [same; large, chained German Shepherd; "evidence was sufficient to support the finding that defendants should have anticipated an attack"]; *Davis v. Mene* (1921) 52 Cal.App. 368, 369 [muzzled bulldog; breed and restraint properly "considered in determining the knowledge of appellants as to the [dog's] proclivities"].)

Here, substantial evidence shows that (1) Do guided Munch and held his collar when he encountered Hedding-Kelton (6RT/385-387); (2) Do "usually" stage-managed interactions between Munch and Hedding-Kelton (5RT/303-304; 3RT/180; 7RT/609-610; 6RT/385-387); (3) Do ensured that Munch would be reintroduced to Hedding-Kelton each time she visited; and (4) she was never "left alone with Munch even after the reintroduction period," with an adult always present (6RT/385-387; see AOB 52-54 and accompanying citations.)

Substantial evidence also showed that there were numerous opportunities for Do, Hedding-Kelton and Munch to encounter one another, because she visited Sacramento "'[a]lmost

every other weekend'" and usually stayed in the Madrigals' home. (3RT/177-179; 6RT/385-386; 6RT/501-502.)

Substantial evidence (from respondents' expert) also showed that pit bulls (including unneutered males like Munch) can be "much more dangerous" than other breeds; they have "predatory" aggression in their "genetic history"; they are "unusual" in "how often they bite" and they cause "more serious injuries" than other dogs. (AOB 49-51; 4RT/240-242, 253-255.)

Taking this evidence as true, jurors could use Do's conduct to draw an inference about his state of mind. (*Powell v. Tagami* (2018) 26 Cal.App.5th 219, 234 [factfinder generally must "infer" a "state of mind" from "circumstantial evidence"].) Jurors could infer that Do was aware of the danger Munch posed—i.e., jurors could infer that he took re-introductory steps, with hand on collar, because he knew Hedding-Kelton and other children visited, and he knew of a risk that the dog could harm them, including Hedding-Kelton specifically. (6RT/501-503; 2RT/178.) Substantial evidence likewise supports Munch's large size and pit-bull breed (3RT/171-172), and Do's restraint, holding his collar (6RT/385-386)—that, too permits an inference that he knew Munch was dangerous (*Frederickson*, *supra*, 82 Cal.App.2d at pp. 908-909).

And, substantial evidence (including evidence from respondents' expert) shows that pit bulls are a dangerous,

aggressive breed (4RT/240-248), and respondents themselves argued that there was a "danger of bringing an adult, male pit bull to live in the[] home" (8RT/773), so jurors could infer that an attack by such a dog on anyone (adult or child) was foreseeable to the owner/handler. Because such inferences can be drawn, they must be. (*Godfrey*, *supra*, 128 Cal.App.3d at p. 176.)

b. Respondents' attempt to change the governing standard lacks merit.

Respondents' response amounts to attacking the (correct) legal standard we cited and quibbling with the evidence.

Respondents ignore *Frederickson* and *Radoff*, which establish the size-breed-and-restraint inference rule. Respondents are silent even though they cited *Radoff* below in arguing that "breed does make a difference" and the "size and breed gives notice" of a dog's capacity to harm, when that argument suited them. (AA/42-43.) Respondents presumably don't address *Frederickson* and *Radoff* because they have no good response.

Rather than engaging with the on-point cases and substantial evidence of foreseeability, respondents attempt to move the goalposts, claiming an owner must have "actual knowledge of vicious or dangerous propensities" or must know "the dog was prone to engage in the type of harmful behavior" at

issue to be negligent. (RB 26-27, citing *Drake*, *supra*, 15 Cal.App.4th at p. 929; *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 163 (*Yuzon*); *Nava v. McMillan* (1981) 123 Cal.App.3d 262, 264-265 (*Nava*).)

Respondents' cases set forth no such rule.

- *Drake* never mentions the phrase "actual knowledge"; references to a "known, dangerous propensity" and knowledge of a dog's danger appear in the dissent, which in any case does not state respondents' rule. (15 Cal.App.4th at p. 941 (dis. opn. of Sparks, J.).)
- *Yuzon* sets an "actual knowledge" negligence bar *for landlords* (116 Cal.App.4th at p. 152), but Do isn't a landlord.
- *Nava* addressed liability where a dog "whose mere appearance or barking allegedly cause[d]" someone "to enter the street, where she is then struck" by a car; *Nava* didn't address foreseeability in the circumstances presented here and is inapposite. (123 Cal.App.3d at pp. 264-265.)
- *Buffington v. Nicholson* (1947) 78 Cal.App.2d 37, which respondents themselves cite as an "antecedent rule" no longer applicable (RB 27),

> states that the actual-knowledge standard applies only when negligence liability is being imposed "on someone other than the [dog's] owner." (*Lundy v. Cal. Realty* (1985) 170 Cal.App.3d 813, 821; *Buffington*, at pp. 41-42 ["previous knowledge" standard applied to keeper].) Here, substantial evidence shows Do was Munch's *owner*, and regardless, respondents cite no authority setting a currently-applicable actual knowledge rule.

And, there is no absolute actual-knowledge rule. An injured party may sue another for negligent dog-handling and control either "by proof of knowledge of dangerous propensities *or ordinary negligence*." (6 Witkin, Summary of Cal. Law, Torts (11th ed. 2023) § 1573, italics added.) *Salinas v. Martin* (2008) 166 Cal.App.4th 404 (*Salinas*), confirms the point. There, a property owner was sued when he negligently allowed dogs to run loose on his property and plaintiff was attacked. Although he had "no knowledge of prior specific incidents of violence or aggressiveness" by the dogs, other evidence suggested that he was aware that they could be "dangerous" or "an attack on someone may result" so he was "*charged with awareness of the risk*" despite no actual knowledge. (*Salinas*, at pp. 415-416, italics added.)

Regardless, *Frederickson* and *Radoff* make clear that "knowledge" of a dog's dangerousness may be *inferred* from evidence of the dog's size and breed, and the owner's restraint. (See p. 41, *ante*.) Respondents argue that the "fact that a dog is a 'large dog' does not equate to actual knowledge of dangerous propensities" (RB 28) and "using a leash" or "collar" does not show recognition of danger (RB 29). But *Frederickson* says that size, breed, and restraint can support an inference that a dog-owner (here, Do) was aware of his dog's dangerousness/viciousness. (82 Cal.App.2d at pp. 908-909.) Such an inference can, and must, be drawn here, given the substantial evidence of Munch's large size; his pit-bull breed; and Do's efforts to restrain him and "usually" manage reintroductions with hand on collar (3RT/171-172; 7RT/609-610; 6RT/385-387), among other evidence.

c. Respondents' attempt to quibble with the evidence lacks merit.

Respondents also try to reargue the evidence, claiming that Hedding-Kelton wasn't at the Madrigals' home "every other weekend," and was a "virtual stranger"; therefore, Do wouldn't really be aware of a risk to her from Munch's presence in the yard or home, or even aware of her potential presence on the day of the attack. (RB 28, fn. 3, 29, 31, 34.) But Lawson's testimony is contrary: She testified in deposition that Hedding-Kelton visited

Sacramento "all the time" and "'[a]lmost every other weekend'" and "[u]sually" stayed with the Madrigals, so Hedding-Kelton was "'very well known to Munch.'" (6RT/501-503.) That testimony establishes the frequency of Hedding-Kelton's interactions with the Madrigals, Do, and Munch. Although Lawson attempted to contradict that testimony in trial, on substantial evidence review, this Court must accept her initial testimony (*Daniel G.*, *supra*, 120 Cal.App.4th at p. 830), and reject contrary testimony (*Reed's Estate*, *supra*, 132 Cal.App.2d at p. 735).

Respondents also cherry-pick evidence and claim it shows that Munch *himself* didn't display pre-attack aggression. (RB 29-30.) But that doesn't assist them. To the extent that any such evidence (or inferences therefrom) tend to show an attack was unforeseeable, it must all be discarded. (*Michael G.*, *supra*, 203 Cal.App.4th at p. 595.) The contrary evidence showing Do's foresight discussed above—the evidence of Do's repeated re-introductory, collar-holding conduct; pit-bull breed danger; Munch's size and breed; and Do's restraint—all supports an inference that Do knew pit-bull Munch could pose a risk of harm. From that evidence, "an inference could be drawn that such [harmful] conduct was reasonably foreseeable." (*Drake*, *supra*, 15 Cal.App.4th at p. 931.) These inferences and *all inferences* must be drawn in Monica's favor.

It makes no difference that the evidence of Munch's proclivities was conflicting—if respondents want to argue on retrial (contrary to their arguments before) that the attack was unforeseeable because Munch supposedly didn't "display any signs of aggression" (RB 29), they can. But Monica should be allowed to argue that the attack *was* reasonably foreseeable to Do based on the evidence outlined above, indicating that Do himself foresaw, or reasonably should have foreseen, danger. She has *never* been allowed to. A retrial is required.

d. Respondents' "motion in limine" argument contradicts the record showing the defense motion was *denied*.

Respondents complain about Monica's reliance on evidence that pit bulls are dangerous to show Do's foreseeability and breach of the standard of care. (RB 31-32; see AOB 49-51 and citations to respondents' expert testimony.) According to respondents, the argument is "improper" because the trial court "granted" a defense "motion in limine and precluded such evidence," so the Madrigals are "directly contradict[ing] the court order they themselves requested." (RB 32.)

That's wrong. The court *denied* the Madrigals' motion to exclude breed-danger evidence. (AA/51 [Defense motion in limine

"No. 5 – exclude testimony breed danger and the animal's name 'munch.' Action: Denied." [boldface omitted].)

Respondents misquote and mischaracterize the motion colloquy. (RB 11, 31-32; 1RT/90-93.) In denying the motion and permitting pit-bull danger evidence, the court's *only* restriction was that "we need to steer away" from language about "animals with unusually dangerous natures," but the court allowed evidence that "when a Pit Bull attacks, it can be more powerful than other dogs" and "[t]hey can be a more dangerous dog is what [the expert] would say." (1RT/91, 93.) "[T]o the extent that a Pit Bull can inflict serious damage given their physiological characteristics, I think that is fair game." (1RT/93.)

Post-denial, respondents presented extensive evidence about pit bulls' serious dangers, attack-prone tendencies, "gameness," their tendency to "create more serious injuries" and "fatal attacks" compared to other dogs, and the fact that unneutered males "are usually involved" in "more serious incidents." (4RT/241.) Pit bulls are "are unusual in" how "often they bite and how seriously they bite and how often they're involved in fatal incidents." (4RT/254.) If a pit bull were going to encounter children, such encounters "should be done in a careful manner, watching the dog's behavior" and without "unrestricted access." (4RT/243-244; see AOB 49-51.)

Respondents *used that evidence* and other evidence (see AOB 57-58; 7RT/769, 770, 773, 831), to argue that Monica was negligent in allowing Hedding-Kelton to access Munch without restraining or controlling him, emphasizing that the Madrigals should "have understood the danger of bringing an adult, male pit bull to live in their home" and should have been "reasonably careful" in "allow[ing] a child" to encounter "an adult, male pit bull." (7RT/772-773; see RB 10.) Those issues, respondents emphasized, were "the answer to this entire case." (7RT/772-773.)

And, respondents ridiculed the defense argument that Monica had no prior knowledge of Munch's *specific* tendencies towards aggression, arguing that despite "no prior knowledge" specific to Munch's aggression she "should have" known pit bulls had "predatory aggression" tendencies; "[y]ou don't put a child in an enclosure with an animal like this." (8RT/831-832.)

Thus, despite Monica's objection, the court admitted the breed-danger evidence. Respondents used it to argue *Monica's negligence* in failing to foresee the danger of keeping (and exposing Hedding-Kelton to) what they claimed was a dangerous dog. As respondents put it, Monica did not take "any action to restrain or control" the dangerous Munch pre-attack. (RB 10.)

But respondents don't get to use the danger evidence just for their purposes; Monica is entitled to argue all evidence and

inferences in favor of *Do's negligence*. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795 [party may argue ""all reasonable inferences from the evidence""]; *People v. Chism* (2014) 58 Cal.4th 1266, 1305 ["'evidence admitted at trial may generally be considered for any purpose'"].)

Nothing prohibits Monica from using the same evidence that respondents introduced, to show that *Do* should've foreseen the danger of bringing the dog into the house, bringing the dog downstairs unrestrained, and allowing it to roam freely, unsupervised, and potentially encounter children. All inferences from that and the other dangerous-dog evidence (including breed, size, and prior restraint) must be taken in Monica's favor, and she has established substantial evidence that Do could reasonably have foreseen harm to Hedding-Kelton.

e. *Drake* and *Salinas* are analogous and instructive.

Respondents' one-paragraph discussion of *Drake* and *Salinas* is unavailing. *Drake* is on-point because there, an owner knew his dog "had a habit of jumping on people" and based on that evidence "an inference could be drawn that such conduct was reasonably foreseeable" to the owner. (15 Cal.App.4th at pp. 919-920, 931.) *Salinas* is likewise on-point because there, evidence indicated that a property owner knew "an attack" from a third-party's pit bull "may result" from allowing the dog to run

free and the property-owner was "charged with awareness of the risk." (*Salinas,* at pp. 415-416.) Here, substantial evidence supports a finding that Do knew of a risk that Munch could harm others and thus a further "inference could be drawn that" Munch's harmful acts were "reasonably foreseeable." (*Drake*, at pp. 919-920, 931.)

Respondents seem to argue that *Drake* and *Salinas* focus on whether a particular dog had "prior violent or dangerous propensities" (RB 29), but they do not. They focus on someone's (the owner's or someone else's) *knowledge* of the *risk* that a dog could harm others. In *Drake* and *Salinas*, such knowledge was found. Here, Do's knowledge of Munch's potential to harm others may likewise be inferred, and from that knowledge a further "inference could be drawn that such [harmful] conduct was reasonably foreseeable." (*Drake*, at p. 931.)

4. Substantial evidence shows that Do's conduct fell below the standard of care.

In addition to substantial evidence showing Do's duty (§ II.C.2) and reasonable foreseeability (§ II.C.3), Monica has also presented substantial evidence that Do "failed to exercise ordinary care to avert" a risk of harm to Hedding-Kelton (*Drake*, *supra*, 15 Cal.App.4th at p. 931).

Breach is "a fact issue" and turns on whether there is a "reasonable doubt" about whether "conduct violates the standard of due care"; if a reasonable doubt exists, the question is for the jury. (*Hernandez v. Jensen* (2021) 61 Cal.App.5th 1056, 1068-1069); *Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 207.)

Here, there's *far* more than a reasonable doubt about Do's lack of ordinary care.

On the morning of the attack, Do took Munch downstairs and left him *unrestrained* in the backyard—a place where Munch could, and did, encounter multiple children—not just Hedding-Kelton but her nine-year-old cousin Bradley. (AOB 20-21; 4RT/262-264; 6RT/389-390, 423; 3RT/192-193, 183-184.) Do could've kept Munch in his room and kennel, safely away from *everyone* in the house, including children. Do could've warned everyone in the house that Munch was coming downstairs and to take precautions to stay away from him or handle him with care. Do could've taken the same precautions he used previously and stayed downstairs to determine if children were present and manage any potential interactions with them, keeping hands fixed on Munch's collar, and guiding him, or at minimum observing his behavior.

But he did not. Instead he went back upstairs *to sleep*. (3RT/192-193, 183-184.) He separated himself from a dog that

(respondents' expert evidence showed) was a large, dangerous, unneutered male pit bull. He left Munch unrestrained—where multiple children could (and two children ultimately did) encounter him. (4RT/262-264; 3RT/193-194.) A jury could find that this conduct fell below the standard of care.

Respondents' response is to quibble with the evidence. (RB 35-36.) Their arguments contradict the standard of review and must be rejected:

1. Respondents repeatedly claim Munch was kept in an "enclosure" but substantial evidence is to the contrary. (RB 34.) The "enclosure" respondents describe is the backyard, measuring 455 square feet and giving unrestrained Munch space to run, maneuver—and attack anyone coming out or anyone inside the home whenever a door was opened. (3RT/190, 181-182, 192-194; 7RT/542.) This wasn't a cage, it was a *yard*, and the fact that Monica had to command Munch "to stay so he didn't come into the house" when opening the door shows just how uncontrollably Munch was moving, and how vulnerable everyone on the property (inside or outside) was to his unfettered movements. (7RT/542.)

2. Respondents wrongly claim that Do lacked any knowledge of children's presence in the home. (RB 34.) While the record regarding Do's specific interaction with anyone besides Monica during the time immediately preceding the attack is unclear, there's substantial evidence that: (1) Do and Munch used

shared common spaces (including the dining room, living room, stairs and garage) in the small home (3RT/180-183, 188, 192-193; 7RT/582); (2) the Madrigals "often" had child-relatives visit (3RT/170); (3) Hedding-Kelton (herself a nine-year-old) visited Sacramento "all the time" and "'[a]lmost every other weekend,'" usually staying with the Madrigals (6RT/501-503); (4) Do and Munch had encountered Hedding-Kelton on visits before (3RT/180; 7RT/609-610; 6RT/384-387); and (5) Do and Hedding-Kelton were both present together in the home, at the same time, just before the attack occurred and while Munch was in the backyard (6RT/391-392).

From this, jurors could infer that when Do took Munch downstairs (just before the attack) on a Sunday morning (4RT/449, 451-452), he was at minimum aware that Hedding-Kelton or other child-visitors *might* be present on a weekend. He had previously encountered Hedding-Kelton, who visited all the time, and jurors could infer that in such a small, shared house Do would have encountered other child-visitors.

But Do took virtually no precautions to protect anyone (including children) from attack. He left his large, unneutered adult male pit bull unattended and running free in the backyard.

3. Respondents repeatedly and wrongly claim that Munch was "separated" from others by a door or locking mechanisms, such that "visitors could not access" him and he was

"no risk" to anyone. (RB 34-36.) The evidence of Munch's supposedly secured status is conflicting. Testimony that Do shut a door behind Munch or that there were yard access-restrictions must be discarded on substantial evidence review (*Michael G.*, *supra*, 203 Cal.App.4th at p. 595), and instead evidence showing that Do always gave Munch "free roam" of the home and yard, making *no* effort to restrict his movement, and allowing him to go "*wherever* he chose" while "unrestrained" (3RT/183-184; 5RT/284; 4RT/249, 257, 259, italics added) must be credited. Testimony that the unrestrained Munch was able to freely move towards the *indoor* areas of the home (and anyone, including children, inside) whenever someone opened the sliding door must also be credited. (7RT/542; 3RT/183-184; 6RT/392.)

And most importantly, taking the evidence and inferences in Monica's favor, the record shows that—far from securing Munch—Do left him unrestrained in such an easily *child-accessible* area that another child-guest, *nine-year old Bradley* (4RT/262; 5RT/423), was able to access Munch on his own *before the attack*, despite no evidence that Bradley asked anyone for permission to enter the yard, opened any supposed barriers, or had any difficulty encountering the dog (4RT/262-264). Testimony that Bradley was in the yard with Munch, including before and contemporaneously with the attack, was admitted without objection. (*Ibid.*) A nine-year-old boy was

able to gain access without *any* evidence that he had to surmount *any* locks, permissions, or restrictions. (4RT/262-264 [describing testimony that Bradley "had gone out" and that "both children were outside" when attack occurred; there was "no evidence" Bradley was attacked]; *Tracy Z.*, *supra*, 195 Cal.App.3d at p. 113; *Panah*, *supra*, 35 Cal.4th at p. 476.) Taking that evidence and all inferences in Monica's favor (and discarding all contrary evidence that Munch was fully secured), a jury could find that there were no realistic pre-attack barriers to accessing Munch.

Again, *Drake* and *Salinas* are instructive. (AOB 60-62.) In *Drake*, the owner restrained his dog, but the "radius of the tether" still allowed the dog to access individuals passing his front yard; the court held there was a "question for the jury on the issue of breach" and the existence of some restraint didn't defeat negligence. (15 Cal.App.4th at p. 931.) Here, Do didn't even restrain Munch, and the evidence shows the yard was so unsecured that nine-year-old Bradley accessed Munch the same morning, pre-attack, with nothing suggesting he had to unlock or evade anything to do so. And, even if it could be believed (contrary to the evidence favoring Monica) that Do had placed Munch behind a locked door that rendered him inaccessible, that still wouldn't defeat Do's negligence; in failing to further restrain Munch in the yard, Do still "gave him access" to freely approach the open areas of the home (threatening the children and adults

therein) whenever the door was opened. (*Drake*, at p. 931; 7RT/542.) An inadequately limited restraint that still gives a pit bull "access" to harm others can constitute a breach. (*Drake*, at p. 931.)

Salinas similarly found a jury question on negligence, where the defendant allowed pit bulls to run freely on his property: The defendant "had the unfettered ability to prevent the dangerous condition," including the ability to prevent the pit bulls from entering the property, and he could either "restrain or remove dogs." (166 Cal.App.4th at pp. 408, 415-416.) The defendant failed to take precautions, like directing the dog's owners to restrain the dogs or "effectively contain them," or warning the plaintiff. (*Id.* at pp. 415-416.) "None of the precautions" were "at all burdensome." (*Id.* at p. 416.) While the "responsibility of the dog owners for the attack upon appellant may be primary," the defendant-property owner could be held negligent. (*Id.* at p. 416.)

Respondents fail to grapple with *Salinas*, but it's on-point. Do is the dog-owner, so his "responsibility" for "the attack" on Hedding-Kelton should "be primary." (166 Cal.App.4th at p. 416.) Non-"burdensome" precautions were available (*ibid.*), but Do didn't take them. (See pp. 53-54, *ante*.)

There's substantial evidence of breach.

5. Respondents' "substantial factor" argument lacks merit.

Respondents throw in a one-paragraph argument that (even if negligent) Do's conduct was not a "substantial factor" causing harm. (RB 37.) Aside from citing a case and instruction setting forth generalized substantial-factor principles, respondents provide *no* citations to the record or authority to show that Do's negligence was not a substantial factor causing the dog-bite. Instead, they assert ipse dixit that Monica's acts were "the sole cause." (*Ibid.*) Respondents' unsupported argument should be ignored.

Regardless, the argument is inappropriate at this stage and unmeritorious. The substantial factor question is a "question of fact for the jury," so Monica should *at least* be able to try the issue, but she's never been allowed to. (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 288.)

A "substantial factor" finding requires merely that "'the contribution of the individual cause be more than negligible or theoretical.'" (*Uriell*, *supra*, 234 Cal.App.4th at pp. 744-745.) Taking the evidence and all inferences in Monica's favor, there is substantial evidence that Do's negligence made a more-than "negligible" contribution to respondents' harm: If Do had kept Munch upstairs in his kennel, he would never have encountered Hedding-Kelton. If Do had restrained Munch (rather than

leaving him unrestrained in an unrestricted area freely accessible to a nine-year-old), Munch might not have encountered Hedding-Kelton. If Do had remained downstairs, he might have been able to attempt to safely restrain or reintroduce Munch. But Do was upstairs, absent.

Substantial evidence shows Do's conduct made more than a "negligible" or "theoretical" contribution to respondents' harm.

6. Respondents' "superseding cause" argument lacks merit.

Respondents also claim that Monica's negligence was a "superseding cause." (RB 39.) They cite no authority to support the superseding-cause point, instead just stating that Do "expressed shock" about Monica's conduct. The argument is full of assertions, unsupported by authority holding that Monica's conduct would be a superseding cause as a matter of law, and should be ignored.

The argument also suffers from the same flaw identified above. The "'issue of superseding cause'" is virtually always "'for the jury.'" (*Lawson v. Safeway Inc.* (2010) 191 Cal.App.4th 400, 417.) Respondents don't explain why Do's negligence and apportionment can be decided against Monica now, when she has never presented her case to a jury.

Respondents also mischaracterize Monica's negligence theory; she is not claiming Do was negligent because he "brought the dog into the Madrigals' home one year" earlier (RB 39), but based on Do's conduct on the day of the attack, where he failed to restrain or reintroduce Munch, and left the dangerous pit bull unattended where young children could access him, among other omissions.

The superseding-cause argument also lacks merit. To constitute a "superseding cause," a third party's negligence must be "'so highly extraordinary as to be unforeseeable.'" (*Springmeyer*, *supra*, 60 Cal.App.4th at p. 1558.) A third person's act is not a superseding cause unless "a reasonable man knowing the situation" would "regard it as highly extraordinary that the third person so acted." (*Stewart v. Cox* (1961) 55 Cal.2d 857, 864.) Taking the record and inferences in Monica's favor, it wasn't "highly extraordinary" (*ibid.*) for Monica to open a door in her home. It wasn't highly extraordinary for her to grant her niece Hedding-Kelton's request and allow her to access Monica's own backyard—when there was already another nine-year old present and previously able to access the yard without incident and without any attack. (4RT/262-264; see pp. 56-57, *ante*.)

At bottom, respondents are making jury arguments. But this isn't the appropriate forum. Monica's position is that both sides' jury arguments *should be permitted*, and she should have

the chance to argue Do's strict liability and negligence to the jury. She never did.

Refusing apportionment was prejudicial error (see AOB 66-74; § IV, *post*), and reversal and partial retrial are now required.

III. RESPONDENTS WRONGLY CLAIM THAT MONICA WAIVED HER APPORTIONMENT THEORIES.

A. No Objection Was Necessary To Preserve Monica's Apportionment Instructional-Error Challenges.

Respondents argue that Monica waived her apportionment theories. Not so.

To be clear, Monica is challenging the trial court's *giving* of strict liability and negligence instructions that omitted Do despite substantial evidence of Do's comparative responsibility. (AA/89 [negligence], 91-92 [dog-bite claim].) Monica is also challenging the court's *refusal* of instructions: (a) directing the jury that there are "three defendants" (including Do) (AA/101-102), (b) requiring the jury conduct an "apportionment of responsibility" analysis among Do and the Madrigals and assign them "percentages of responsibility" (AA/102-103), and (c) directing the jury that it must find "comparative fault" of "nonparties" (AA/104).

No objection was required to preserve these challenges. Errors in giving and refusing instructions are "deemed excepted to." (Code Civ. Proc., § 647.) That alone is dispositive on waiver.

B. Monica Preserved Her Objections To The Lack Of Apportionment On Both Theories.

Even if objections were required, Monica repeatedly made them:

Do's involvement was raised at the outset. Monica's cross-complaint sought to apportion strict liability and negligence responsibility to Do. (AA/27.)[5] She then argued *at the beginning* of trial that she had her "own set of jury instructions to include Monica, Oscar, and Minh Do" and said she had "theories of liability, damages, and the presence of the party Minh Do." (1RT/104-105; AA/101-104.) The court rejected putting Do on the verdict form, ruling that "in terms of putting him [Do] on the verdict form, I don't see why we would do that"; he's "not participating." (1RT/105-106.)

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[5] Respondents wrongly claim that Monica's cross-complaint "did not raise" strict liability apportionment. (RB 21.) The cross-complaint invokes Monica's indemnity rights based on Do's "fault *or legal responsibility*" (AA/27, italics added), and thus invokes Do's strict liability—his responsibility without fault (*Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1154 ["'strict liability'" is "'liability without fault'"]).

Assertion of Proposition 51 rights. Monica extensively discussed Proposition 51 and apportionment. "Proposition 51 must be preserved"; 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." (7RT/625; AOB 28.)

Apportionment instruction. Monica proposed an instruction, modeled on CACI No. 406, apportioning "[r]esponsibility" to Do for "Plaintiffs' harm." (AA/103; 7RT/623-625.) The instruction referenced Do and the term "fault" throughout, showing that she sought to allocate responsibility to him as a *strict liability* tortfeasor. (See pp. 67-68, *post*.) The instruction also proposed that the jury would "decide how much responsibility each" of Monica, Oscar, and Do had, "by assigning percentages of responsibility to each person listed on the verdict form." (AA/103.)

Strict liability instructional objection. Monica objected to respondents' version of CACI No. 463, the instruction regarding a dog-owner's strict liability. (7RT/728-732; AA/91.) Defense counsel stated that Monica had no objections to the instruction "*other than* Minh Do" (7RT/730-731, italics added), who had already been discussed as a potential tortfeasor (7RT/720-724, 625), who was referenced in the instruction requiring apportionment to Do on strict liability and negligence

grounds (AA/103), and who three witnesses had already identified as Munch's owner (6RT/500-501; 7RT/577, 611).

Negligence instructional objection. Monica objected to Do's absence from respondents' proposal of CACI No. 400, which said the jury could find that "Monica Madrigal was negligent" but omitted Do. (AA/89-90, 54; 7RT/729-730.) When the court asked if Monica had "any objection," defense counsel replied, "[j]ust as the objection previously stated" earlier regarding Minh Do's status "being a defendant in the case," thereby referencing preceding discussions of Do's negligence. (7RT/729-730, 720-724.)

Proposed verdict form stating strict-liability ownership claim against Do. Despite the trial court's ruling that Do would not be included on the verdict form (1RT/105-106), Monica still proposed a verdict form days later (1RT/105-106; AA/64), that referenced Do, tendered the strict-liability ownership theory, and asked if Do "own[ed] the dog" (AA/68). The verdict form also proposed apportionment between Do and Monica. (AA/67.)

Reiterated objections to Do's absence from final verdict form. Before instructing the jury, the court asked if counsel had reviewed the final draft special verdict form and instructions—a form and instructions that made *no reference* to Do on negligence or strict liability claims. Defense counsel reiterated what Monica had been saying throughout the case:

"[W]e just have the same objections with regard to the individual Minh Do that we had before." (8RT/744.)

In raising apportionment, strict-liability, and negligence issues left and right, Monica "fairly apprise[d] the trial court of the issue it is being called upon to decide" (*People v. Scott* (1978) 21 Cal.3d 284, 290), and the court's comments indicate that it comprehended her objections (7RT/730 [court responding "All right" to negligence objection and "Right. Okay," to strict-liability objection]). The "record shows that the court understood the issue[s] presented," and apportionment of Do's strict liability *and* negligence was presented repeatedly. (*Scott*, at p. 290.) Indeed, why would Monica have raised Do's status or objected to the instructions unless she wanted to apportion responsibility to him?

Tellingly, respondents fail to mention Code of Civil Procedure section 647, Monica's objections to the dog-ownership and negligence instructions, and the final draft verdict form. There can be no doubt: Monica raised apportionment "sufficiently to give the opposing parties and the trial court the opportunity to address" it (*West Chandler Boulevard Neighborhood Assn. v. City of Los Angeles* (2011) 198 Cal.App.4th 1506, 1517), so there was no waiver.

C. Respondents' Waiver Theories Lack Merit.

1. Respondents wrongly argue that Monica "did not raise the strict liability argument."

Respondents' remaining waiver arguments don't withstand scrutiny.

Respondents assert that Monica "did not raise the strict liability argument" below. (RB 21.) Not so. She objected to the strict-liability-ownership instruction that omitted Do. (7RT/730-731.) She objected to the verdict form stating strict-liability-ownership claims (AA/106-108) that omitted Do (8RT/744). In both instances she *referenced Do* as the ground for objecting. (7RT/730-731, 744.) She also proposed a verdict form directing the jury to find that Do was Munch's strictly-liable owner. (AA/64, 68.) She repeatedly raised strict liability.

Respondents claim that Monica's apportionment "jury instruction" did not seek to "apportion responsibility" to Do under "a strict liability theory" and only sought apportionment of "his *negligence*." (RB 21-22.) Wrong. The instruction *also* preserved the strict-liability issue; it *necessarily* tendered a claim for strict-liability apportionment against Do, based on its use of the word "fault." (AA/103.)

CACI No. 406's draft language includes two options for apportionment—use of the word "negligence" or the word "fault." (CACI No. 406.) The Directions for Use require that the latter term "fault," be selected "if there is a need to allocate responsibility between tortfeasors whose alleged liability is based on conduct *other than negligence, e.g., strict products liability*." (CACI No. 406, Directions for Use, italics added.)

Here, Monica's proposed apportionment instruction used the word "fault," not negligence (AA/103; 6RT/623-625)—just as the Directions require for apportionment between a negligent tortfeasor (Monica) and another strictly-liable party (Do) (CACI No. 406, Directions for Use). If, as respondents contend, Monica only sought apportionment "based on Mr. Do's *negligence*" (RB 21, original italics), the instruction would have used "negligence," not "fault." It did not. It necessarily tendered a strict-liability apportionment claim against Do. In repeatedly arguing for Do's inclusion in the strict-liability-ownership analysis in various forms, *and* in proposing CACI No. 406 with "fault" selected, Monica sought to apportion Do's strict liability *and* his negligence.

2. Respondents' verdict-form argument fails.

Respondents claim waiver because Monica did not propose a verdict form apportioning responsibility to Do under a strict liability theory. (RB 22.) But she absolutely did, in her proposed

Instruction No. 406. Instruction No. 406 indisputably references apportionment of negligence (RB 21) and tenders a strict liability apportionment theory against Do based on the use of the term "fault" (CACI No. 406, Directions for Use).

And, the instruction references Monica, Oscar, and Do by name, and directs that jurors should "decide how much responsibility each" of Monica, Oscar, and Do "ha[ve] by assigning percentages of responsibility to each person listed on *the verdict form*." (AA/103, italics added.) This language plainly proposes, and contemplates, apportionment of responsibility (including both ownership and negligence liability) to Do on a verdict form.

Respondents' no-verdict-form argument distorts the history of the verdict rulings. (RB 21-22.) The trial court refused at the beginning of trial to include Do "on the verdict form" because he supposedly wasn't a party. (1RT/104-106.) Monica was not required to continue objecting or propose anything further to preserve her argument for including Do on the verdict form that ultimately tendered strict liability and negligence claims against the Madrigals. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213 (*Mary M.*) [error not waived by "proceeding in accordance" and "submit[ting] to the authority" of adverse ruling].)

It's true that *in addition* to proceeding in the face of the court's initial no-verdict-form ruling (1RT/105-106) *and* proposing Instruction No. 406 for apportionment of responsibility to Do under strict liability and negligence on the "verdict form" (AA/103; 7RT/724), Monica *later* made another attempt to propose apportionment (1RT/105-106; AA/67). Despite the broad ruling against Do's inclusion, Monica floated an alternative, middle-ground verdict form that referenced Do's owner-strict-liability and proposed apportionment to Do (1RT/105-106; AA/67), but did not propose apportionment percentages under strict liability (AA/68-69).

But that doesn't waive the issue. No further verdict form proposals were even required after the initial ruling prohibiting Do from appearing on the verdict *at all*. (See p. 69, *ante*; 1RT/105-106.) And, a party is allowed despite an unfavorable ruling to seek a middle ground, and present "the most favorable view of the law that the court might entertain" without waiving error on broader rulings (like Do's improper exclusion from the verdict form entirely). (*Williamson v. Pacific Greyhound Lines* (1949) 93 Cal.App.2d 484, 487-488 [court rejected proposed instructions but party could still present alternatives in "the most favorable view of the law that the court will entertain" without waiving broader error].)

Kitzig v. Nordquist (2000) 81 Cal.App.4th 1384, is inapposite. (RB 23.) While the *Kitzig* defendant failed to request a verdict form seeking apportionment and was deemed to have waived the issue (*Kitzig*, at p. 1398), Monica *did* raise the apportionment issue at the outset but the court refused to put Do "on the verdict form" at all (1RT/104-106). She requested apportionment under strict-liability and negligence theories, including as to Do, via a "verdict form" in her proposed Instruction No. 406 (AA/103), and demanded that Do be included in ownership-strict-liability and negligence instructions (7RT/728-732). Those demands were made after Monica had already tendered her strict-liability claim against owner-Do, including in her proposed verdict form and apportionment instruction. (AA/67.) That accomplished what the *Kitzig* defendant failed to do—seeking an allocation of responsibility to the additional tortfeasor. (*Ibid.*)

And beyond that, Monica objected and presented apportionment and both theories of Do's liability in numerous forms, and even objected to the final draft verdict form (on both ownership liability *and* negligence) because Do was excluded. (8RT/744.) Her objection to Do's absence from the final verdict form is in substance a *proposal* of an alternative verdict form that would have *included* Do on both questions.

After making objections, asserting her Proposition 51 rights, and repeatedly bringing her apportionment claims to the court's and respondents' attention, Monica wasn't required to risk angering the court by re-tendering the same theories again. Monica "submit[ted] to the authority" of the rulings against her on apportionment and Do's inclusion on the verdict form, without waiving error. (*Mary M.*, *supra*, 54 Cal.3d at pp. 212-213.) Presenting "a position *before* the ruling is sufficient" to preserve errors, and Monica presented her position on Proposition 51, strict liability, and negligence before the court gave the jury a verdict form erroneously omitting Do from both claims, over objection. (*Novak v. Fay* (2015) 236 Cal.App.4th 329, 336, original italics.)

3. Monica did not argue that "no one was negligent" and is not asserting a "new theory" of negligence.

Respondents claim that Monica argued that "no one was negligent" at trial, "including Mr. Do." (RB 20.) The transcript says otherwise—Monica *did* argue that Do was negligent.

Monica accepted the court's invitation to discuss the "negligence claim" and "the claims that are not strict liability" (7RT/720) and then argued, among other things, that Do brought Munch "out of the kennel" and "outside in the yard"; "[t]here's no way this injury occurs except that Minh Do puts the dog in the

position where the bite occurred" (7RT/720-721). She continued: "Minh Do chose to go back to bed rather than secure the dog because he was too tired or too inattentive to take the dog back up inside." (7RT/724.) "Without that dog being in the yard, Monica's opening the door would have made no difference." (7RT/720.) "[T]his doesn't happen, this injury doesn't happen without Minh Do's activity." (*Ibid.*)

Those arguments are consistent with Monica's current theories (as respondents frame them). Monica argues now that (among other things) Do was negligent by "not restraining Munch" or going "downstairs to reintroduce Munch" (RB 21), and she argued below that he went "back to bed rather than secure the dog" or "take [him] back up inside" to show his negligence (7RT/724). More broadly, Monica relied on the *full course* of "Minh Do's activity" to argue that the "injury doesn't happen without" it (7RT/724)—and she is still relying on his full course of "activity" in heading upstairs and failing to monitor or restrain Munch in a place where he knew children could be present, to show negligence.

Respondents complain that Monica argued in "closing" that "no one was negligent." (RB 20.) But that doesn't waive anything. By closing, the trial court had already rejected Monica's repeated efforts to raise a negligence/apportionment theory against Do and there were no instructions on it, so there

was no valid way to raise Do's comparative negligence in closing. Counsel's decision to "'make the best of a bad situation'" and at least argue that Monica wasn't negligent in the face of the adverse rulings isn't a waiver of her argument that Do *was* negligent. (*Mary M.*, *supra*, 54 Cal.3d at p. 213.)

IV. THE APPORTIONMENT ERRORS WERE PREJUDICIAL.

A. *Collins* Holds That Prejudice Is Shown Here.

There was substantial evidence that Do owned Munch, and substantial evidence supporting his negligence. Yet apportionment was erroneously prohibited; no instructions regarding Do's strict liability or negligence were given; and there's never been a finding regarding absent-tortfeasor Do's responsibility. Prejudice is shown on that basis alone.

Collins v. Plant Insulation Co. (2010) 185 Cal.App.4th 260 (*Collins*) holds that the exclusion of a potentially liable tortfeasor in these circumstances *is* prejudicial error: "Since the evidence was sufficient to support an apportionment of fault to [absent tortfeasor], *the error was prejudicial*, requiring reversal of the judgment." (*Collins*, at p. 276, italics added.) Monica discussed *Collins* and its on-point prejudice holding in her opening brief. (AOB 66-68.)

What do respondents have to say about *Collins*? Virtually nothing.

Respondents say that "there was substantial evidence" to support apportionment in *Collins*, but "there is no" such evidence here. (RB 51.) They don't show why, and they're wrong. The evidence detailed above supports jury findings on dog-ownership and negligence, and respondents don't dispute that *if* the premise is established—if substantial evidence supported apportionment—then under *Collins*'s reasoning, refusing apportionment was prejudicial.

B. All Relevant Factors Show Prejudice.

Even if prejudice were assessed without *Collins*'s on-point analysis, all relevant factors in *Soule*, *supra*, 8 Cal.4th 548, demonstrate that refusing apportionment was prejudicial.

"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.) Put another way, prejudice is shown where there is "more than an *abstract possibility*" of a different result if apportionment to Do had been allowed. (AOB 66, 68-74; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 (*College Hospital*), citations omitted, original italics.) Where there is "substantial evidence" or "realistic evidence" supporting a different verdict absent

instructional error, prejudice is found. (*People v. Hendrix* (2022) 13 Cal.5th 933, 939, 950 (*Hendrix*).) Respondents themselves cite *College Hospital* and *Soule* (RB 51); they ignore *Hendrix*, and they provide no valid authority contradicting these standards.

The *Soule* factors make prejudice abundantly clear.

State of the evidence. Respondents don't address the state-of-the-evidence factor, other than (wrongly) claiming there was no substantial evidence of Do's ownership or negligence. (RB 51.) There were sharp conflicts in the evidence, and on this record, there's a strong case that Do was Munch's owner and was negligent. (AOB 72-75.) While there was conflicting negligence evidence, that just means there needs to be an apportionment retrial resolving conflicts in the experts' testimony, the circumstances preceding the bite, the supposed yard-access restrictions, and numerous other issues. There was certainly "substantial evidence" and "realistic evidence" supporting apportionment of *some* responsibility to Do. (*Hendrix*, *supra*, 13 Cal.5th at pp. 939, 950.)

Close verdicts. The verdicts were close, including two 10-2 verdicts regarding the negligence claim against Monica—two jurors found that she was not negligent *at all*. (*Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 32 [10-2 verdict is close].) Upon retrial there's a reasonable chance that a

properly-instructed jury would apportion some responsibility to Do. (9RT/851-852; AA/106-107.)

Respondents claim that based on the split on negligence, the jurors finding Monica wasn't negligent "would certainly have decided" that Do also wasn't negligent. (RB 53.) That is abject speculation—and given the state of the evidence, there's far more than an "*abstract possibility*" that those jurors rejected the negligence claim against Monica because they believed *someone else*—Do, the owner of the dog, who left him in an unrestrained position to attack—was instead responsible. (*College Hospital*, *supra*, 8 Cal.4th at p. 715, original italics.)

A 10-2 "close verdict is a key indication that the jury was misled" (*Veronese*, at p. 32) and a different result would occur absent error—yet respondents ignore *Veronese* and make no credible effort to contradict the prejudice established by the close verdicts.

There was also a *unanimous* finding that the Madrigals were not Munch's owners. On this record, where the Madrigals argued that Do was the *true owner* (7RT/798-802), the verdict strongly suggests that if Do's ownership had been before the jury, there is more than an "*abstract possibility*" that it would have found ownership and apportioned him *some* responsibility (*College Hospital*, *supra*, 8 Cal.4th at p. 715, original italics). Munch's only potential owner besides the Madrigals was Do.

No other instructions. Respondents don't dispute that there were no other instructions curing the prejudice from the absence of apportionment to Do. (*Soule*, *supra*, 8 Cal.4th at pp. 570-571.) That, too, strongly supports prejudice. (AOB 70.)

Closing arguments. Throughout closing argument, respondents sought to hold the Madrigals fully liable, and make liability an all-or-nothing proposition. (AOB 70-72.) Respondents argued that if Monica "is not negligent, and the Madrigals are not owners, there's no damages to award. Plaintiffs get zero." (8RT/776.) Respondents were certainly entitled to *make the argument* given the court's rulings (RB 54), but the point is that Monica wasn't allowed to *contradict* the argument and make her case that someone else—Do—should bear some responsibility. Respondents' argument is manifestly prejudicial, because the Madrigals couldn't defend themselves by arguing that Do was Munch's owner or negligent, and were unable to give the jury a middle ground—conceding *some* fault but arguing that *someone else* was also responsible. (AOB 70-72.)

Respondents also argued that Monica's "whole case is Minh Do, Minh Do. It's not our fault. We're innocent. Let's blame someone else." (8RT/834.) That highlights the central role Do's status played at trial, yet the jury couldn't address it—that's prejudicial. And, there was nothing wrong with blaming Do.

Monica had a legal right not to just blame Do, but to *seek apportionment* to him.

In sum, there's *far more* than an "*abstract possibility*" of a different result (*College Hospital*, *supra*, 8 Cal.4th at p. 715), with responsibility apportioned to Do, absent the trial court's refusal of apportionment.

C. Respondents' Anti-Prejudice Arguments Contradict The Record And Lack Merit.

Respondents' few contrary arguments misunderstand the prejudice standard and are either unmeritorious or irrelevant.

Prejudice turns on what would have happened absent "trial error" (*College Hospital*, *supra*, 8 Cal.4th at p. 715), and is analyzed in light of the entire record (*Soule*, *supra*, 8 Cal.4th at pp. 573-574, 580). The analysis does not myopically focus on one decision or piece of evidence, but on the errors committed and whether, collectively, there is more than an "abstract possibility" of a different result if they hadn't occurred.

Here, the errors were numerous. The trial court refused to include Do on the verdict form *at all*. (1RT/105-106.) The court refused Monica's apportionment instruction raising strict liability and negligence and directing the jury to apportion responsibility on both grounds to Do and the Madrigals. (7RT/724; see p. 68, *ante*.) The court *refused* to give strict liability and negligence

instructions referencing Do, instead giving instructions omitting Do. The court rejected Monica's objections to the final verdict form omitting Do. Each ruling was error. If the court had ruled in Monica's favor at any of these junctures, then arguments and findings on Do's status as a strict-liability dog-owner or negligent tortfeasor *would have been allowed*, and there is certainly more than an "*abstract possibility*" of a better result. (*College Hospital*, *supra*, 8 Cal.4th at p. 715, original italics.)

Respondents argue otherwise, claiming that the proposed instruction on apportionment was "not based on a strict liability theory" (they're wrong). (RB 52; § III.C.1, *ante*.) Respondents claim sections 3342 and 1431.2 are inapplicable (RB 52), and we showed above why that's wrong (§§ II.B.3-4, *ante*). Respondents claim Do's conduct wasn't a substantial factor causing harm (RB 53), and we debunked that (§ II.C.5, *ante*).

Respondents claim that Monica's proposed apportionment instruction did not reference apportionment for Lawson's bystander emotional distress claim. (RB 52.) Wrong. The instruction seeks apportionment of "Plaintiffs' harm"—*undifferentiated*, and referencing *both plaintiffs'* harm twice. (AA/103.) It embraces apportionment as to both Hedding-Kelton and Lawson's claims.

Respondents myopically focus just on Monica's proposed verdict form in discussing the supposed lack of prejudice. (RB

52-53.) But Monica raised the apportionment problem in numerous other contexts—only to be rejected by a court that failed to understand Proposition 51 and to allow apportionment on a record with *ample* evidence of Do's dog-ownership and negligence. Absent those repeated errors—in a scenario where Do was included in instructions, or Monica's apportionment instruction was given, or the verdict form included Do—there is far more than an abstract possibility of a better result. Prejudice is shown.

V. THE REQUIRED REMEDIES ARE UNDISPUTED.

A. Prejudicial Apportionment Error Requires A Limited, Apportionment-Only Retrial.

With prejudicial error shown, it must be remedied.

Monica's opening brief demonstrated that upon finding prejudicial error on apportionment of responsibility, the appropriate remedy is reversing the judgment and directing a partial, apportionment-only retrial; in that retrial, jurors shall be instructed that the existing damages award stands, and they must "apportion that total damage" among potentially responsible tortfeasors, including Do. (*O'Kelly v. Willig Freight Lines* (1977) 66 Cal.App.3d 578, 583; AOB 74-76; *Collins*, *supra*, 185 Cal.App.4th at pp. 276-277 [with "no challenge to the jury's

liability verdict," retrial is appropriately "limited to the issue of apportionment"].)

Respondents do not disagree. Although they (unsuccessfully) challenge Monica's showing of error, they do not dispute that *if* the trial court prejudicially erred in refusing apportionment, *then* an apportionment-only retrial must ensue.

B. The Costs/Interest Award Must Fall.

Upon the judgment's reversal, the order awarding respondents costs and section 3291 interest (which is itself a costs item) must fall. (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 a costs item].) A costs order falls with the judgment on which it is based. (*Aljabban v. Fontana Indoor Swap Meet, Inc.* (2020) 54 Cal.App.5th 482, 513-514.) Respondents don't disagree.

C. The Initial Judgment Cannot Stand.

Finally, it is beyond dispute that the initial judgment entered against Oscar (AA/119, 107, 236) cannot stand. The jury rejected the sole, dog-ownership claim against Oscar (AA/107-108), so judgment must be entered for him (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 329). Respondents don't disagree.

The Madrigals argued that the initial judgment was entirely superseded (AOB 35-37), but if the Court concludes otherwise, then at minimum, the portions of that judgment against Oscar must be reversed.

CONCLUSION

Monica conceded negligence, but that doesn't prevent her from seeking apportionment of some responsibility to Do. Substantial evidence supports a finding that Do was the dog owner and thus strictly liable. Substantial evidence likewise supports a finding that Do was negligent. Monica should've been allowed to argue—and the jury should've been allowed to decide—apportionment. Refusing apportionment was serious, prejudicial error.

The judgment and costs/interest award against Monica must be reversed with directions to hold a retrial limited to apportionment of responsibility for the existing, fixed $297,000 in damages.

Date: June 7, 2023

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By */s/ David E. Hackett*
David E. Hackett

Attorneys for Appellants
MONICA MADRIGAL and
OSCAR MADRIGA

CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this **APPELLANTS' REPLY BRIEF** contains **13,998** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: June 7, 2023

/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 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048; my electronic service address is vworrell@gmsr.com.

On June 7, 2023, I served the foregoing document(s) described as: **APPELLANTS' REPLY 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
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(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 on June 7, 2023 in 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.

Valerie Worrell
Valerie Worrell