No. _______

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHELA ST. JOHN-PARISIAN,
Respondent (Plaintiff, Respondent and Cross-Appellant below),

v.

FOSTER POULTRY FARMS, INC., et al.,
Petitioner (Defendants, Appellants and Cross-Respondents below).

After a Decision by the Court of Appeal for the
Second District, Division Six, Case No. B221595

Santa Barbara County Superior Court
Hon. Denise de Bellefeuille, Case No. 1245594

PETITION FOR REVIEW

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Foster Poultry Farms, Inc. ("Foster Farms") and Jesus Sepulveda respectfully petition for review of the decision of the Court of Appeal for the Second District, Division Six, filed on August 31, 2011.

ISSUES PRESENTED

1. Whether a trial court may refuse to instruct the jury on comparative negligence merely because the evidence of the plaintiff's negligence is circumstantial and "contradicted," requiring inferences in the defendant's favor.

2. Whether evidence of a plaintiff's preexisting clinical depression is admissible to rebut the plaintiff's claim that the defendant's conduct caused her "mental suffering, loss of enjoyment of life, ... anxiety, [and] emotional distress."

INTRODUCTION

The right to have a jury determine disputed issues of material fact—and hear the evidence necessary to do so fairly and accurately—is often invoked by plaintiffs seeking review. But defendants have the same right to have a jury hear the evidence and determine the facts, rather than have their province narrowed by judges who prefer to resolve critical issues of causation by themselves. This Petition seeks this Court's intervention to provide clear guidance as to the proper factfinder on two issues that arise every day in personal injury and other litigation: comparative negligence, and causation of mental and emotional distress. Although the decision of the Court of Appeal is not published, it manifests (and approves on the part of trial courts) significant confusion on questions of proper allocation of authority between judges and juries that this Court has not squarely addressed for many years.

The Court of Appeal in this case upheld a jury verdict awarding the plaintiff $4.2 million in damages—including $2.5 million in noneconomic

damages—for injuries sustained in an auto accident. The judgment rests on two legal errors that reflect deeper disarray within the California courts on issues of recurring importance and therefore warrant this Court's review both "to secure uniformity of decision" and "to settle an important question of law." (Cal. R. Ct. 8.500(b)(1).) Each error prevented the presentation of a routine defense that had ample evidentiary support and transformed what might have been a fair trial into one slanted conclusively toward the plaintiff. In its contrary holding, the Court of Appeal permits trial courts to insert themselves, not as the "thirteenth juror" recognized in the context of new trial motions (*e.g., Beagle v. Vasold* (1966) 65 Cal.2d 166, 180 fn.9), but as the first and only juror permitted to resolve disputed issues of fact based on the most probative evidence on each point.

First, the defendants sought to introduce evidence that the plaintiff was comparatively negligent by failing to brake to avoid the collision. The Court of Appeal affirmed the trial court's refusal to instruct the jury on this defense because the evidence of the plaintiff's negligence was circumstantial and "contradicted" (Typed Opn. 7), invading the jury's province and depriving the defendants of the jury's ability to choose inferences in their favor as well as the plaintiff's.

Second, the superior court precluded defendants from introducing evidence that the plaintiff's claimed anxiety, emotional distress, and loss of enjoyment of life resulted at least in part from a continuing clinical depression that long preceded that accident, having been diagnosed and treated since 1990—not from the accident. Based on its own conclusion that all of the plaintiff's mental and emotional injuries resulted from the accident, the Court of Appeal affirmed the exclusion of this evidence as irrelevant, even in the face of testimony that the plaintiff had become less joyous and outgoing after the accident, and was taking antidepressants. Here, too, the jury was cut out of the determination on causation. The jury

should have been the one to decide whether the before-and-after picture painted by the plaintiff's witnesses was accurate, or whether instead (for example) the plaintiff's post-accident need for antidepressants simply continued her 15 years of reliance on them.

Without the opportunity to argue the plaintiff's comparative fault or to dispute the cause of the millions in intangible damages that the plaintiff claimed (and was awarded), the defense was hamstrung. Because the Court of Appeal's decision reflects a significant lack of uniformity on questions of law of critical importance to the administration of justice in California, this Court should grant review.

STATEMENT

On April 24, 2006, Chela St. John-Parisian ("Parisian" in the Court of Appeal's Typed Opinion, and here) was injured when her car collided with the center divider on Highway 101 near Santa Barbara. (Typed Opn. 2-3.) She claimed that the accident was caused by a tractor-trailer that moved into her lane from the righthand lane as she was attempting to pass it, striking her car and propelling her across the leftmost lane and into the median. (*Ibid.*) Parisian was unable to move into the lefthand lane to avoid being hit because another car was to her left when the tractor trailer began changing lanes. (Typed Opn. 2.)

According to Parisian, the tractor trailer that struck her was light-colored or white with a Foster Farms logo. (Typed Opn. 3; 4 RT 866.) Parisian sued Foster Farms and Jesus Sepulveda, the only Foster Farms driver in the vicinity the morning of the accident, claiming they negligently or recklessly caused her accident and seeking compensatory and punitive damages.

At trial in late 2009, defendants denied any involvement in the accident. Foster Farms did not operate any light-colored or white trailers at

that time; since 2004, all of its trailers in service featured a blue background. (Typed Opn. 2.) The only Foster Farms vehicle in the area that day was a blue trailer driven by Sepulveda. (Typed Opn. 5.) Two eyewitnesses in cars behind Parisian say they did not see a tractor-trailer or any other vehicle hit Parisian's car, and no a tractor-trailer was at the scene upon the arrival of the first police officer to respond. (Typed Opn. 3.)

Parisian's sole corroborating eyewitness was Diane Pulverman, the wife of Parisian's former counsel in this lawsuit.[1] (Typed Opn. 4 & fn. 1; 4 RT 811, 817.) Several months into the litigation, Pulverman miraculously remembered that she had seen the accident (4 RT 811), including a "mostly white" trailer with a Foster Farms logo. (Typed Opn. 3.) Pulverman did not call 911 to report the accident and has no contemporaneous record that she was present at the scene. (4 RT 815.)

Foster Farms contended that the accident was caused at least in part by Parisian's own negligence in failing to brake to allow the trailer to pull ahead and just avoid the collision. (Typed Opn. 7.) Parisian testified that, when she saw the tractor begin moving into her lane, "[s]he straightened out her wheels and remained in the number two lane." (Typed Opn. 2.) At her deposition in February 2008 (see 2 RT 401), Parisian testified that she did not brake at this time (4 RT 872 (quoting deposition transcript)):

> [Question:] When that happened did you attempt to brake your vehicle?
>
> Answer: No.

At trial Parisian said that she did brake at some point, "but was uncertain if it was before or after she was struck." (Typed Opn. 7.)

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[1] After Pulverman came forward as a witness and her husband withdrew from the case, Parisian was represented by Jeffrey Young, a lawyer who has known the Pulvermans for at least 20 years and shares office space in the same building as Mr. Pulverman. (4 RT 816-818.)

California Highway Patrol (CHP) Officer Danny Maher testified that he "did not see any skid marks … and did not recall Parisian saying that she had braked." (Typed Opn. 4.) One of the eyewitnesses, Vicki Marotto, testified that "she saw [Parisian's] car go out of control, as if it had a flat tire" (Typed Opn. 3), but she did not recall seeing it brake. (Typed Opn. 7.)

Defendants' expert witness, mechanical and safety engineer Jim Flynn, was prepared to testify that Parisian could have avoided the collision if she had braked her car significantly when she saw the tractor start to move into her lane. (Typed Opn. 7.) The trial court, however, excluded this testimony as speculative and lacking foundation despite the evidence that Parisian had not braked until after impact. (*Ibid.*)

Although there was substantial evidence—including her own testimony not long after the accident—that Parisian failed to apply her brakes to avoid the collision, and only her own equivocal trial testimony to support a conclusion that she *might* have braked before impact, the trial court refused to instruct the jury on comparative negligence. (Typed Opn. 7.)

In the damages phase, Parisian sought to recover substantial noneconomic damages for loss of enjoyment of life, anxiety, and mental and emotional distress. Parisian's witnesses compared her mental and emotional state before the accident with her condition after the accident. Parisian's daughter, Krystal Franks, testified that "prior to the accident, Parisian 'was happy and outgoing and enthusiastic … [a] social butterfly.'" (Typed Opn. 12 (quoting 9 RT 2201).) Franks also said that, before the accident, her mother had been a bubbly and happy person. (9 RT 2212.) A friend and co-worker of Parisian testified that "[b]efore the collision, [Parisian] had been 'gregarious and active … . Very into life.'" (Typed Opn. 12 (quoting 9 RT 2187).)

To contrast with these accounts of Parisian's sunny mental and emotional state before the accident, Parisian presented testimony that she had "become an introvert" after the accident. (*Ibid.*) Parisian's pain physician, Dr. Robert Hullander, repeatedly told the jury that, as part of her treatment after the accident, "she was taking an antidepressant" (8 RT 2236; see also 8 RT 2237 ("on an antidepressant"); (8 RT 2273 ("tried … anti-depressants").)

Defendants sought to counter Parisian's suggestion that the accident changed her personality and caused her loss of enjoyment of life by introducing evidence that she was being "treated for clinical depression since 1990 on a regular basis." (9 RT 2212; see Typed Opn. 12-13.) In particular, defendants informed the court that Parisian "still was "being medicated," so that her treatment had continued from "1990 all the way to the present." (9 RT 2215.)

Parisian objected to the admission of any evidence of her preexisting depression. (9 RT 2215-2216; see also 1 RT 35.) The trial court acknow-ledged the problem with the one-sided picture painted by plaintiff's evidence, admonishing Parisian's counsel that

> when you put her overall attitude towards life and her emotional state at issue, you really don't get to pick and choose what—all the good stuff and leave the bad stuff out. … You can't have it both ways. You can't just have the good stuff come in and not the bad stuff.

(9 RT 2217-2218.) The court did let Parisian "have it both ways," however, merely precluding Parisian from offering *still more* testimony about "her happy-go-lucky demeanor" before the accident. (9 RT 2218) But the court refused to allow defendants to rebut the substantial evidence already in the record with evidence that Parisian was being treated for depression when the accident occurred, and had been for 15 years. (*Ibid.*)

The jury was charged that the "noneconomic damages claimed by the plaintiff" include "mental suffering, loss of enjoyment of life, inconvenience, grief, anxiety, [and] emotional distress." (13 RT 2878.) In response, the jury, having found that Sepulveda and Foster Farms were responsible for the accident, awarded Parisian $2 million in future noneconomic damages and $450,000 in past noneconomic damages, along with $1,742,000 in past and future economic damages. (Typed Opn. 13.)

The Court of Appeal affirmed the resulting judgment. The court first upheld both the refusal to give a comparative negligence instruction and the exclusion of defendants' expert testimony that the collision was avoidable by the plaintiff. (Typed Opn. 8.) The court held that the refusal to instruct, and the exclusion of supporting evidence, was justified because the evidence of Parisian's failure to brake was "contradicted by" other evidence. (Typed Opn. 7.) In particular, the Court of Appeal identified the plaintiff's testimony at trial that she did brake but was unsure whether she did so before or after the collision; the lack of "expert testimony that the absence of skid marks means a driver did not brake"; and the fact that neither the testimony of the CHP officer nor the testimony of the eyewitness affirmatively established that the plaintiff failed to brake. (*Ibid*.)

The Court of Appeal also upheld the exclusion of evidence of Parisian's preexisting depression as irrelevant (Typed Opn. 12-13), notwithstanding the likelihood that the one-sided presentation of evidence of Parisian's pre-accident mental state substantially and improperly inflated the noneconomic damages figure. In the view of the Court of Appeal, the evidence was irrelevant because Parisian had "stipulated that she would make no claim for mental injury beyond that associated with her physical injuries," and "all the references to Parisian's mental state related to" what the Court of Appeal considered to be "the direct consequences of her

physical injuries resulting from the collision." (Typed Opn. 13.) Having resolved the causation issue in the same way the trial court did, the Court of Appeal perceived no reason to permit the jury to decide which mental and emotional injuries were "associated with" or the "the direct consequences of" Parisian's "physical injuries resulting from the collision," and which reflected the continuation of pre-existing mental and emotional conditions.

REASONS WHY REVIEW SHOULD BE GRANTED

I. THE COURT SHOULD GRANT REVIEW TO FORECLOSE CONFUSION IN THE LOWER COURTS ABOUT THE QUANTUM OF EVIDENCE THAT ENTITLES A DEFENDANT TO A JURY INSTRUCTION ON COMPARATIVE FAULT.

The Court of Appeal in this case affirmed the trial court's refusal to instruct the jury on comparative negligence, even though the defendants undisputedly offered at least four separate pieces of evidence from which the plaintiff's negligence could be inferred. The court reasoned that defendants' evidence was circumstantial and "contradicted" by other facts (Typed Opn. 7), and therefore insufficient to put the defense to the jury. But that conclusion had it backwards, applying the standard for judgment notwithstanding the verdict to the very different question whether a party is entitled to have the jury instructed on a theory of the case that is supported by disputed evidence. Defendants did not have to show that the evidence excluded the possibility that a jury could find that Parisian was *not* responsible; they only had to show that the evidence would support a finding that she *was* responsible, at least in part.

Under this Court's longstanding precedent, even purely inferential and highly contested evidence of the plaintiff's negligence suffices to compel the trial court to instruct the jury on comparative fault. The clear message of this Court's decisions seems to have become obscured over

time, however, as is reflected in the Court of Appeal's enthusiasm for resolving an issue that was addressed by "contradict[ory]" evidence.

The decision below reflects confusion within the Court of Appeal as to the evidentiary standard for instructing on comparative fault. Some courts presented with similar facts have held that a comparative fault instruction was required, while other courts have set a higher bar. The Court should grant review to resolve this confusion and restore uniformity on this important and frequently arising issue of law.

A. The Decision Below Improperly Departs From The Established Principle That Purely Inferential And Highly Contested Evidence Of The Plaintiff's Negligence Entitles A Defendant To An Instruction On Comparative Fault.

One would have thought that it was settled that a defendant is entitled to a jury instruction on comparative negligence whenever "there is some evidence of a substantial character to support such a defense." (*Phillips v. G. L. Truman Excavation Co.* (1961) 55 Cal.2d 801, 807.) This Court long ago observed—in the context of the related but more drastic former defense of contributory negligence—that, even if "the evidence as to the negligence of defendants may appear … to be strong, and the evidence as to the contributory negligence of the plaintiff to be slight," the jury must be instructed on the defense. (*Ibid.*)

In *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, overruled in part on another ground in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, this Court clarified that even evidence of the plaintiff's negligence that is "entirely inferential" and "contradicted by direct testimony" is enough to require a jury instruction on the point. (*Hasson*, 19 Cal.3d at 548.) The Court stressed that "the fact that evidence is 'circumstantial' does not mean that it cannot be 'substantial.'" (*Ibid.*) The Court further emphasized that in evaluating the evidentiary basis for the instruction, "all reasonable

inferences *in support of the defense* will be drawn." (*Ibid.* (emphasis added).)

In *Hasson*, a product liability case, the evidence of contributory negligence consisted solely of the results of experimental testing performed by a defense expert, indicating that the plaintiff's brakes "could not have failed as suggested unless subjected to 'severe abuse.'" (*Ibid.*) The Court acknowledged that the test results were "subject to more than one reasonable interpretation," but held that because they "*permit* the inference" that only excessively hard use would have caused the brakes to fail, the test results satisfied the evidentiary threshold for a comparative fault instruction. (*Id.* at 550 (emphasis in original).) Under these circumstances, the defendant was entitled to the requested instruction on the issue. (See *id.* at 551.)

These decisions accord with the general principle that a party has "a *right* to instructions on his or her theory of the case, if it is reasonable and finds support in … any inference that may be properly drawn from the evidence." (7 Witkin, Cal. Procedure (5th ed. 2008) Trial § 258.)

Hasson dictates that a comparative fault instruction should have been given in this case. As the Court of Appeal acknowledged, the defendants presented at least four pieces of evidence that the plaintiff negligently failed to brake when she saw the front wheels of tractor with which she collided enter her lane, most prominently Parisian's own testimony at her deposition that she did not brake until after impact. (See Typed Opn. 7; see also p.4, *supra*.) This evidence, corroborated by the lack of skid marks and the failure of other witnesses to observe braking, would "*permit* the inference" that Parisian failed to brake to avoid the collision, and thus entitled defendants to a comparative fault instruction under *Hasson* (19 Cal.3d at 550).

Instead, the court below disregarded both *Hasson* and the evidence of Parisian's negligence because that evidence was "contradicted by" other facts; that is, the court openly drew its own conclusions as to the weight of the evidence and the inferences to be drawn from it. (Typed Opn. 7.) Yet a court "ha[s] no legal right to weigh the conflicting evidence by refusing the instructions." (*Phillips*, 55 Cal.2d at 808.)

The court's refusal to give any weight to witness testimony that was short of conclusive contravenes this Court's directive in *Hasson*, 19 Cal.3d at 548, that "all reasonable inferences in support of the defense will be drawn." *Hasson* also forecloses the trial court's suggestion that the evidence must be "affirmative." (Typed Opn. 7; see also *id.* at 8.)

Where, as here, there is *some* evidence of negligence by the plaintiff—"even though the trial court thought it was slight as compared to the evidence of negligence of the defendants"—the trial court's refusal to instruct on comparative negligence is erroneous. (*Phillips*, 55 Cal.2d at 808.) The instructional error was compounded by the improper exclusion of expert testimony on the central question of the plaintiff's comparative negligence. (See Typed Opn. 7.)

The Court of Appeal faulted the defendants for failing to present any evidence "that [the plaintiff] could have done anything to avoid the collision." (Typed Opn. 8.) But that failure resulted not from a lack of available proof, but from a trial court error based—and affirmed—on the same grounds as the refusal of the comparative negligence instruction. Defendants proffered expert testimony of a mechanical and safety engineer specializing in accident reconstruction to show that the plaintiff could have avoided the collision by braking when she saw the tractor's front tires move into her lane. (See Typed Opn. 7.) The trial court excluded the testimony as improperly speculative and lacking foundation, and the Court of Appeal affirmed on the same grounds. (Typed Opn. 8.)

The testimony of a qualified accident reconstructionist that an accident was avoidable, based on the known circumstances of the accident, is well within the scope of proper expert testimony. (See *Kastner v. Los Angeles Metropolitan Transit Auth.* (1965) 63 Cal.2d 52, 56-58; see also, *e.g.*, *Box v. Cal. Date Growers Ass'n* (1976) 57 Cal.App.3d 266, 275; *Rosenberg v. Goldstein* (1966) 247 Cal.App.2d 25, 30.) Ample foundation was laid by the same testimony that supported the inference that Parisian did not brake before the accident, along with largely undisputed evidence about the location, conditions, timing, and other circumstances of the accident. The Court of Appeal bootstrapped its conclusion that the comparative fault instruction was properly denied because the "contradicted" evidence was insufficient to compel a finding of causation and comparative fault (Typed Opn. 7-8) with its own approval (Typed Opn. 7) of the exclusion of the accident reconstructionist testimony going directly to that point.

Because the refusal of an instruction resulted in an "entire absence of instructional support" for the comparative fault defense (*Soule*, 8 Cal.4th at 581), the error was patently prejudicial. (Accord, *e.g.*, *Nat'l Med. Transp. Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 435; *Kaljian v. Menezes* (1995) 36 Cal.App.4th 573, 590.) The lack of a comparative negligence instruction necessarily stripped the evidence of Parisian's fault of any significance for the jury, which had neither any reason to consider whether she contributed to causing the accident, nor any basis to apply any conclusion that she did, unless it found that she was the sole cause of the accident to the exclusion of the defendants.

Review is warranted to prevent the spread of this practice of evidence-weighing, which undermines California's jury-centric system of comparative fault.

B. The Decision Below Reflects Confusion Among The Lower Courts As To The Evidentiary Threshold For Instructing On Comparative Negligence.

The mishandling of the comparative negligence instruction and evidence here reflects deeper disarray in the California courts. The language in *Phillips* and *Hasson*—requiring "*some* evidence of a *substantial* character"—has engendered confusion because of a perceived tension between the requirement of "some" evidence and "substantial" evidence. *Hasson* stated expressly that circumstantial evidence suffices to satisfy this standard, so that direct evidence is not required. (19 Cal.3d at 548.) Nonetheless, some lower courts have latched onto the "substantial" language to impose a higher standard.

This confusion is reflected in the decision in this case and others that have found the defendant's evidence too slight to warrant a comparative fault instruction. "Some evidence of a substantial character," in these courts' view, does not mean evidence that is merely substantial enough to support a jury's inference that the plaintiff had been negligent, but requires some heightened quantum. (See, *e.g.*, *$400,000 Award to Woman Who Slipped in Store Entrance Upheld;* Donaldson v. Blockbuster Inc., No. C062440 (July 1, 2011) Strafford Premises Liab. Rep. (reporting unpublished decision upholding trial court's refusal to instruct on comparative negligence where the plaintiff, entering from the rain past signs warning of wet floors, had stepped from an entry mat onto a tile floor without "doing anything unusual" such as taking precautions in light of the slick surface).)

By contrast, other courts have allowed a comparative negligence instruction based on facts virtually indistinguishable from this case. In *Perdue v. Hopper Truck Lines* (1963) 221 Cal.App.2d 604, the court of appeal addressed facts substantially identical to the ones here, and

concluded that a comparative fault instruction was warranted. The plaintiff in *Perdue* was attempting to pass a 36-foot tractor-trailer when it began pulling into her lane, resulting in a collision between the right rear wheel of the trailer and the left side of the plaintiff's vehicle. The court held that the mere fact of the collision, under those circumstances, was sufficient to support an inference of negligence by the plaintiff (and thus to warrant a comparative fault instruction). The court reasoned that "[f]or the trailer to have crossed 2 feet into her lane, the truck pulling it must first have entered it; had she been paying attention she would have seen the truck move into her lane and slowed down or veered right to avoid the trailer—she made no effort to do either." (*Id.* at 610.)

The decision in *Perdue* accords with other decisions recognizing that whether a plaintiff was comparatively negligent in failing to brake to avoid an accident is a question properly left to the jury for resolution. As one court recognized in approving a comparative negligence instruction, "whether a reasonable man in plaintiff's position would have started to brake to avoid the accident at a point earlier in time" presents "a question for the jury." (*Hargrave v. Winquist* (1982) 134 Cal.App.3d 916, 928.) See also *McCown v. Berry Construction, Inc.* (1970) 6 Cal.App.3d 319 (driver who failed to signal before stopping to turn could sue the driver who rear-ended him based on second driver's failure to brake to avoid the collision); *Fresno City Lines, Inc. v. Herman* (1950) 97 Cal.App.2d 366, 369 ("whether plaintiff Crane should have applied his brakes before and after the collision presented a factual question" sufficient for the jury to find contributory negligence).

The decision here, in contrast, usurped the role of the jury by improperly weighing the evidence and discounting evidence that was inferential. That assumption of a broader judicial role conflicts with the

holdings of other courts, and warrants this Court's review to restore uniformity among the California courts.

C. The Standard For Entitlement To A Comparative Fault Instruction Presents A Question Of Recurring Importance.

Comparative negligence is a frequently asserted defense that often has tremendously significant implications for the scope of a defendant's legal and financial liability—especially when damage awards reach the millions, as here. A relatively small proportion of comparative fault on the plaintiff's part may result in a substantial reduction in the amount of damages that a defendant is required to pay. The evidentiary threshold for allowing defendants to present this defense to a jury is therefore a question of critical importance. Setting the bar too high deprives defendants of a principal means of mitigating their liability. And the creeping intrusion of trial courts in the resolution of contested issues of fact, through subtle alterations of the governing legal standards, presents a still deeper and more important issue requiring this Court's resolution. Clear guidance from this Court is needed to clarify that "substantial" evidence may be entirely circumstantial and dependent on inference. The trial court cannot legitimately resolve a disputed issue of fact through the simple expedient of failing to instruct the jury on a potentially outcome-determinative legal principle.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT EVIDENCE OF A PLAINTIFF'S PREEXISTING MENTAL STATE IS ADMISSIBLE TO REBUT THE CAUSATION AND DEGREE OF A PLAINTIFF'S CLAIMED LOSS OF ENJOYMENT OF LIFE, ANXIETY, AND EMOTIONAL DISTRESS.

As noted above, the defendants also were ordered to pay nearly $2.5 million in noneconomic damages, but were precluded from presenting

evidence that the plaintiff's claimed loss of enjoyment of life resulted at least in part from her preexisting clinical depression—not from the accident. In affirming the exclusion of evidence of the plaintiff's depression, the Court of Appeal disregarded the basic principle that a defendant can be assessed only those damages *caused* by its own negligence. Where, as here, the plaintiff claims mental and emotional distress, the plaintiff's preexisting mental and emotional state provides the baseline against which the plaintiff's post-accident state must be assessed to determine what injuries are fairly attributable to the defendant's negligence. If a plaintiff is clinically depressed, the defendant is entitled to argue, and the jury to conclude, that this preexisting condition caused at least some—if not all—of the plaintiff's continuing post-accident distress. This Court should grant review to clarify that evidence of a plaintiff's preexisting depression—like other mental state evidence—must be admitted for this purpose.

A. Evidence Of Clinical Depression Is Critical To The Assessment Of Noneconomic Damages That Depend In Part On The Plaintiff's Personality Characteristics Before And After An Accident.

Although Parisian claimed that she was not putting her mental state in issue in her successful claim for $2.45 million in noneconomic damages, her evidence repeatedly did exactly that, showing that she had "become an introvert" after the accident. (9 RT 2187.) Before the accident, by contrast, her evidence painted her as "happy and outgoing and enthusiastic," "a very big social butterfly," "a bubbly and happy person," "very outgoing and gregarious," and "[v]ery into life." (9 RT 2201, 2212, 2187, 2188.)

In fact, however, Parisian had been treated for clinical depression beginning in 1990 and continuing through the accident. (9 RT 2212-2219; 12 JA 3292-3297.) Although that evidence unquestionably bore on the

cause and intensity of her claimed loss of enjoyment of life, both courts below held that the depression evidence was properly excluded as irrelevant even after Parisian introduced the evidence outlined above. (Typed Opn. 13.)

This cut to the quick of the defense against noneconomic damages, by allowing the jury to assume that all of Parisian's mental distress resulted from her physical injuries related to the accident. To the contrary, Parisian was not entitled to recover for any proportion of her emotional discomfort that preceded and was therefore unrelated to the accident.

The Court of Appeal concluded that Parisian's depression was not relevant because she "stipulated that she would make no claim for mental injury beyond that associated with her physical injuries." (Typed Opn. 13.) But even if plaintiff's complaint did not *separately* claim any mental or emotional injury, mental and emotional distress—and "anxiety" and "loss of enjoyment of life" (13 RT 2878)—are all components of pain and suffering damages, which the plaintiff was awarded in the amount of nearly $2.5 million. (See, *e.g.*, *Huff v. Tracy* (1976) 57 Cal.App.3d 939, 942 fn. 1; *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 764.) It was the jury's function—not the courts'—to separate out the "mental injury … associated with her physical injuries" (Typed Opn. 13) from her pre-existing mental condition.[2]

Parisian put her preexisting mental state in issue by claiming that the accident caused her to become introverted and to lose her enjoyment of life. Any doubt was removed by the repeated testimony of her pain physician that she was taking antidepressants, inviting the jury to believe that this

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[2] Moreover, Parisian stipulated only that she would not claim that the accident caused her pre-existing, continuing *depression* (12 JA 3294), not that she would disavow damages for her mental state. In any event, her evidence placed her mental state squarely in issue.

need to combat depression resulted from the accident rather than her 15-year history of treatment, with medication, for that mental and emotional condition.

As this Court has held, "[a] party who chooses to allege that he has mental and emotional difficulties can hardly deny his mental state is in controversy." (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 839-840.) Here, as in *Vinson*, "by asserting a causal link between her mental distress and defendants' conduct, plaintiff implicitly claims it was not caused by a preexisting mental condition, thereby raising the question of alternative sources for the distress." (*Id.* at 840.) Defendants, in turn, were entitled to refute the plaintiff's claim by presenting evidence that her mental and emotional distress was attributable at least in part to her preexisting clinical depression.

When mental or emotional injuries are a component of the claimed damages, the plaintiff's preexisting mental or emotional condition is critical to ascertaining the degree to which the alleged injuries are attributable to defendant's conduct. (See, *e.g.*, *Wollersheim v. Church of Scientology* (1989) 212 Cal.App.3d 872, 905-906 (reducing damages award to reflect that defendant's "conduct only aggravated a preexisting psychological condition" of the plaintiff, and "did not create the condition"); *Frampton v. Stoloff* (1956) 142 Cal.App.2d 175, 178-179 (holding that damages award properly excluded expenses attributable not to auto accident but to plaintiff's "pre-existing mental illness").)

Moreover, whenever there is evidence of a preexisting mental or emotional condition, it is up to the jury to "separate out that distress attributable to [defendant's] conduct" from that attributable to preexisting factors. (See, *e.g.*, *Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 808.) In that situation, the jury may determine that not all of plaintiff's

alleged injuries were causally connected to the accident for which she seeks damages. (*Sumpter v. Matteson* (2008) 158 Cal.App.4th 928, 935.)

Although this Court has not yet specifically addressed whether depression is somehow different from other relevant pre-existing mental conditions, courts in other jurisdictions have confirmed that a plaintiff's preexisting depression is as relevant as any other mental or emotional condition to assessing the scope of noneconomic damages fairly attributable to the defendant's conduct. (See, *e.g.*, *Wood v. Bass Pro Shops* (1995) 250 Va. 297, 303 [462 S.E.2d 101] (where plaintiff sought damages for mental anguish, defendant was entitled to present evidence of pre-accident depression to show that the "mental anguish was caused by a factor for which the defendant was not responsible"); *Haight v. Aldridge Elec. Co.* (1991) 215 Ill.App.3d 353, 361 [575 N.E.2d 243] (evidence of plaintiff's depression in high school was admissible as an "attempt to inquire into the same or similar emotional and personality conditions that allegedly afflict [plaintiff after the accident]").)

This Court should grant review to clarify that when a plaintiff seeks noneconomic damages for her loss of enjoyment of life, the defendant is entitled to rebut this evidence with evidence of her mental and emotional state before the accident—including continuing clinical depression.

B. The Issue Of The Admissibility Of Pre-Existing Mental State Evidence Is Important And Recurring.

The importance of ensuring that noneconomic damages are assessed fairly—not on artificially limited evidence—is only increasing. As it is, noneconomic damages "are often far greater than the economic damages." (*Bostick v. Flex Equip. Co.* (2007) 147 Cal.App.4th 80, 93; *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 633 (same).) Indeed, significant awards of noneconomic damages have become much more common in recent years, often reaching into the millions of dollars, as in

the present case. This is reflected in recent cases reducing awards of noneconomic damages as excessive. (See, *e.g.*, *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 146-147; *Horsford v. Bd. of Trs. of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 389-390.) Those damage awards necessarily rest on juries' assessment of pain and discomfort—mental and emotional as well as physical—that results from an accident. Indeed, this Court long ago observed that "mental suffering frequently constitutes the principal element of tort damages." (*Capelouto v. Kaiser Found. Hosps.* (1972) 7 Cal.3d 889, 893.)

It is difficult, if not impossible, to separate out noneconomic damages relating to any plaintiff's post-accident mental or emotional state from those tied only to her physical injuries—much less to do so as a matter of law so that no factfinder is needed. (See *id.* at 892-93 ("In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal.") (footnote and citations omitted).)

And if it is possible at all, Parisian (like most if not all other plaintiffs) did not try. Rather, she sought damages for her reduced ability to enjoy life, along with anxiety, and emotional distress. Yet a lost ability necessarily must be measured against the ability that existed before the accident. The same goes for anxiety; no one can tell how much, if any, presently experienced anxiety results from a particular event without knowing what level of anxiety existed beforehand. Even if Parisian had not introduced evidence of her "bubbly" personality before the accident, her

post-accident introversion could not properly be assessed without the baseline provided by her pre-accident state of mind.

Trial courts are not entitled to make the judgment that the baseline condition of a plaintiff seeking millions in noneconomic damages should enter into the jury's assessment of the value of her mental and emotional damages after the accident in question. Continuing depression is critically relevant to a fair determination of that value. This Court should grant review to ensure that the lower courts do not permit subjective aversion to evidence of depression to deprive defendants of a fair trial on noneconomic damages.

CONCLUSION

The petition for review should be granted and the judgment of the Court of Appeal reversed.

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