S254938

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Conservatorship of the Person and Estate of O.B.

T.B., et al.,
Petitioners and Respondents,

v.

O.B.,
Objector and Appellant.

After a Decision by the Court of Appeal,
Second District Court of Appeal No. B290805
Santa Barbara Superior Court Case No. 17PR00325

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE UNTIMELY *AMICUS CURIAE* BRIEF IN SUPPORT OF THE RESPONDENTS; AND PROPOSED *AMICUS CURIAE* BRIEF

Gretchen M. Nelson (112566)
Nelson & Fraenkel LLP
601 So. Figueroa Street, Suite 2050
Los Angeles, California 90017
Telephone: 213-622-6469
Telecopier: 213-622-6019
gnelson@nflawfirm.com

Attorneys for Amicus Curiae Consumer Attorneys of California

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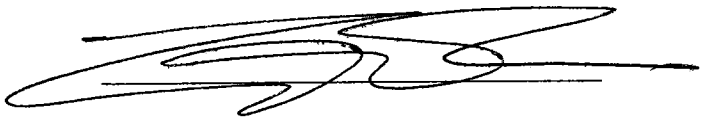
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Cal. Rules of Ct., rule 8.208, the Consumer Attorneys of California certifies that it is a non-profit organization with no shareholders. CAOC and its counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that CAOC and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

Dated: October 23, 2019



Gretchen M. Nelson

Attorneys for Amicus Curiae
Consumer Attorneys of California

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APPICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA SUPPORTING THE RESPONDENTS

Amicus curiae Consumer Attorneys of California ("CAOC") seeks permission to file the accompanying brief as a friend of the Court. (Cal. Rules of Court, rule 8.520 subd. (f)(1).)

CAOC further requests leave to file the brief out of time. Pursuant to California Rules of Court, rule 8.520, subdivision (f), an application by a person or entity seeking to file an amicus curiae brief is due no later than 30 days after all briefs are filed. That date in the present case was September 12, 2019. CAOC regrets that it unwittingly failed to file an application and brief timely in this matter. 5When CAOC realized that the deadline to file had expired, CAOC moved promptly to seek assistance in the preparation and filing of a proposed brief along with a request for leave to file the brief out of time. Rule 8.520, subdivision (f)(2) provides that "for good cause, the Chief Justice may allow later filing." CAOC respectfully requests that this late filing be permitted in light of the circumstances outlined in the accompanying declaration of Gretchen M. Nelson.

CAOC, founded in 1962, is a non-profit organization of more than 6,000 consumer attorneys dedicated to preserving and protecting the rights of ordinary consumers, championing the cause of those who deserve redress for injury to person or property, and resisting efforts to curtail the rights of such injured persons. CAOC frequently participates as *amicus curiae* in

seminal California cases. (See, e.g., *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260; *Laffitte v. Robert Half International Inc.* (2016) 1 Cal.5th 480; *Duran v. U.S. Bank Nat'l Assoc.* (2014) 59 Cal.4th 1; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; *Delaney v. Baker* (1999) 20 Cal.4th 23; *Kesner v. Superior Court* (2016) 1 Cal.5th 1132; *Morris v. De La Torre* (2005) 36 Cal.4th 260.)

CAOC is familiar with the issues before this Court and the scope of the presentation of those issues in the parties' briefing. CAOC seeks to assist the Court by "broadening its perspective" on the context of the issues presented. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177.) CAOC respectfully submits that further briefing is necessary to address matters not fully addressed by the parties' briefs, including the impact a ruling in this conservatorship matter would likely have on other types of cases or claims where the fact finder at the trial court is required to make a finding using the clear and convincing evidence standard. This includes claims for exemplary damages which require that the trier of fact determine whether a party has been guilty of oppression, fraud or malice by clear and convincing evidence. (Civil Code, § 3294, subd. (a).) CAOC seeks to provide an important broader perspective on the issue presented, beyond this particular case, and beyond the positions presented by the parties or other amici.

No party or its counsel authored any part of this brief. Except for CAOC and its counsel here, no one made a monetary

contribution, or other contribution of any kind, to fund its preparation or submission. (Cal. Rules of Ct., rule 8.520 subd. (f)(4).)

CAOC respectfully requests that it be granted leave to file the accompanying *amicus curiae* Brief supporting the Respondents in this matter.

I. INTRODUCTION

This appeal raises the question of whether the longstanding sufficiency of evidence standard should be altered where the standard of proof at the trial court is other than preponderance of the evidence. The present issue arises in a conservatorship proceeding where a trial court's decision is made under the "clear and convincing evidence" standard. (Probate Code, § 1801, subd. (e).)

But, the battle lines are drawn over far more than conservatorship proceedings. A ruling by this Court will impact many other claims where the evidentiary burden of proof is clear and convincing evidence, including dependency cases involving a loss of parental rights (Code Civ. Proc., § 527.6, subd. (i)), certain will contests (Probate Code, § 6110, subd. (c)(2)), exemplary damages (Civ. Code, § 3294, subd. (a)), and other claims and cases.

Much ado is made by Appellant and amici that a majority of appellate courts have found it appropriate to modify the substantial evidence rule to evaluate evidence through the "prism" of the underlying proof standard. (Petitioner's Opening Brief pp. 29-37, *Amicus Curiae* Brief of Association of Southern California Defense Counsel ("ASCDC Brief"), pp. 8, 13-14.) Though we question their claim that a majority of courts have come to that conclusion, see *infra* pp. 18-22, the mere fact that a majority of courts have reached the same conclusion on an issue should not drive this Court's decision. (*Rodriguez v. Bethlehem*

Steel Corp. (1974) 12 Cal.3d 382, 391-392 ["'[w]e should be mindful of the trend although our decision is not reached by a process of following the crowd'" quoting *Diaz v. Eli Lilly Co.* (Mass. 1973) 364 Mass. 153, 162.)

Rather, the decision to modify a standard of review should be based on the underlying rationale for appellate standards of review and the downstream implications if a review standard is modified. Analyzed in this manner, we show below how creating a new appellate standard of review that incorporates the evidentiary standards applied to the fact finder will undermine the rationale for the distinct differences in the evidentiary standards applied at the trial court level and the principles that guide appellate review of those decisions.

Among other things, adding the clear and convincing evidence standard of proof to appellate review diminishes the high degree of deference the appellate courts must give to the rulings of the lower court. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1128.) And, changing the well-established substantial evidence standard will also increase the number of cases that are appealed because of the uncertainty occasioned by importing an evidentiary standard of proof into appellate review.

Further, altering the substantial evidence review standard will likely sow confusion in the courts and lead to disparate results. Even now, there is disagreement in the appellate courts as to what it means to layer the clear and convincing evidence

standard over substantial evidence. Some courts believe that it would effectively require that the appellate court find *more* substantial evidence. (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 604.) Others say the distinction is "nuanced" albeit "one that can make a difference in a close case." (*T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1238-1239.) And, there are courts that seem to independently apply the underlying clear and convincing burden of proof in reviewing a trial court's finding. (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 971.)

For all these reasons, CAOC urges this Court to retain the substantial evidence appellate review standard as it has long existed and reject efforts to incorporate into that standard any heightened standard of review to account for the clear and convincing evidentiary standard applicable in the trial court.

II. ARGUMENT

A. Appellate Standards of Review Balance Power Among Judges, Create a More Efficient Judicial System, Provide Uniformity in Decisions and Give Notice to the Parties of the Likely Outcome on Appeal

Trial court decisions are affirmed or reversed by appellate courts bounded by the standard of review. These review standards have been described as the "keystone to court of appeals decision making,"[1] the "compass that guides the

[1] Michael D. Murray & Christy H. DeSanctis, *Legal Research and Writing* 493 (2005).

appellate court to its decision"[2] and the "appellate court's 'measuring stick.'"[3] Describing the standards of review through metaphors or analogies may be easy but as one scholar has explained "standard[s] of review [are] far easier to describe than to define."[4]

Used properly, the standard of review imposes restraint on appellate judges which in turn leads to a more respected and consistent body of appellate law. The standards of review balance power among the courts, inform the parties of their chance of success on appeal, and enhance judicial economy.

The standards of review "assure that the separate functions of trial and appellate courts in a judicial system are maintained."[5] Trial courts decide factual disputes and appellate courts decide questions of law. (*Harustak v. Wilkins* (2000) 84

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[2] *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018 ("However convoluted the facts, or complex the issues, the standard of review is the compass that guides the appellate court to its decision. It defines and limits the course the court follows in arriving at its destination. Deviations from the path, whether it be one most or least traveled, leave writer and reader lost in the wilderness").

[3] W. Wendell Hall, *Standards of Review in Texas,* 34 St. Mary's L.J. 1, 8, quoting John C. Godbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal,* 30 Sw.L.J. 801, 810 (1976).

[4] Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels,* 47 Marq. L.Rev. 231, 232 (1991) (describing the standards of review as the "height of the hurdles over which an appellate must leap").

[5] Richard H. W. Maloy, *"Standard of Review" – Just a Tip of the Icicle,* 77 U.Det. Mercy L. Rev. 603, 609, n. 6 (2000).

Cal.App.4th 208, 213, citing *Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263; *Achen v. Pepsi–Cola Bottling Co.* (1951) 105 Cal.App.2d 113, 125 [appellate courts "sit as a court [of law] to review errors of law and not [claimed] errors of fact"].) Thus, standards of review reign in the appellate courts and insure that they are not tempted to retry the case at the appellate level.

And, "standards of review exist so that the legal process may work efficiently and fairly."[6] If appellate courts review all trial court decisions without deference to the work of the lower court, not only are the trial court proceedings made meaningless but the work of the appellate courts increase exponentially. (*Anderson v. City of Bessemer City* (1985) 470 U.S. 564, 574-575 ["Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources . . . . [T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much"].)

Any decision to modify or change an appellate standard of review must be made with due consideration of the foregoing policy reasons for review standards to ensure that there is public

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[6] Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 Me. L.Rev. 367, 397 (1997).

confidence in the appellate process as well as the trial court process.

B. Modifying the Substantial Evidence Standard to Account for the Burden of Proof Will Effectively Nullify the Jury or Trial Court's Fact Finding and Cause Appellate Courts to Effectively Retry the Case

The substantial evidence review standard applies after a trial on the merits or a resolution of factual disputes. The trial court's decision must be affirmed as long as it is supported by "substantial" evidence. The lower court's rulings are presumed correct, and ambiguities are resolved in favor of affirmance. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 ["A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness"]; *Munoz v. Olin* (1979) 24 Cal.3d 629, 635–636; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 ["It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury"].)[7]

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[7] "The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to

Under the substantial evidence standard the testimony of one witness may be sufficient to support the verdict, even if there is other evidence that would support a contrary finding. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1245-1246.)

There are strong reasons for limiting appellate review of factual decisions by the trial court or jury to substantial evidence, not the least of which is that factual disputes are generally resolved by observing and hearing the testimony of witnesses whose credibility is at issue. It cannot be gainsaid that appellate courts are at a distinct disadvantage when it comes to deciding credibility. [*Marriage of Boswell* (2014) 225 Cal.App.4th 1172, 1175 ["[w]e do not judge credibility on appeal"]; *Escobar v. Flores* (2010) 183 Cal.App.4th 737, 748-749 ("we have nothing but the cold, unadorned words on the pages of the reporter's transcript [but] [t]he trial court ... had the ability to judge [child's] maturity not only by what he said but by how he said it, and how he presented himself when he said it"]; *Green v. Green* (1963) 215 Cal.App.2d 31, 34 ["It is too well settled to require citation of authority that it is the province of the lower court to judge the effect or value of the evidence and weigh the same, determine the credibility of witnesses and resolve the conflicts in the evidence or in the reasonable inferences to be drawn therefrom"]; *In re Ana C.* (2012) 204 Cal.App.4th 1317, 1329 ["That the dependency court reasonably could have assessed her credibility less

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determine the facts." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.)

favorably or that our court could reasonably make a different assessment of credibility is not sufficient grounds for reversal"].)

This Court and courts of appeal throughout California have long held that the standard for assessing evidentiary proof is for the trial court and it is not for the appellate courts. As this Court in *Crail v. Blakely* (1973) 8 Cal.3d 744, stated: " 'The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' [Citations.]" (*Id.*, at 750.) (See also *In re I.W.* (2009) 180 Cal.App.4th 1517, 1525–1526 [on appeal, "the clear and convincing test disappears and 'the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]"].)

The substantial evidence standard tasks the appellate courts with determining only whether there was substantial evidence in the record to support the factual finding. Thus, review is limited to a consideration of whether any reasonable factfinder could have made such a factual determination. "[W]e resolve all factual conflicts and questions of credibility in favor of the prevailing party, and draw all reasonable inferences in support of the trial court's findings." (*City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 538; *People v. Snow* (2003) 30 Cal.4th 43, 66.)

Altering the substantial evidence standard to permit appellate courts to view the evidence through a prism of the underlying burden of proof will undoubtedly result in appellate courts weighing the evidence – an analysis that is antithetical to appellate review.

The concern that appellate courts will engage in evidence-weighing when substantial review is conducted in light of the clear and convincing evidentiary burden is not unfounded. That is what occurred in *Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, 332-335. There, the appellate court affirmed the grant of JNOV as to a punitive damage award and in doing so weighed the evidence balancing the quantum of evidence presented in support of the punitive damage award with evidence it deemed favorable to the defendant. (*Johnson & Johnson,* 37 Cal.App.5th at 332-335.) The appellate court did so despite the fact that the jury's finding of malice was based on inferences drawn from the evidence. (*Id.*, 299-302, 333-334.)

Inferences are based on witness credibility and other trial intangibles not evident from the record. (*Duffy v. Cavalier* (1989) 215 Cal.App.3d 1517, 1539 [affirming an award of punitive damages and a finding of breach of fiduciary duty stating "[w]e must accept as true all evidence and all reasonable inferences from that evidence tending to establish the correctness of the jury's verdict and the trial court's findings, resolving every conflict in favor of the judgment"].) The appellate court's willingness in *Johnson & Johnson* to engage in evidence

weighing in the face of a finding by the jury of malice demonstrates the perils of allowing a reviewing court to layer the trial court burden of proof over the appellate review standard.

In addition, altering the substantial review standard will increase the work load of the appellate courts because courts will engage in evidence weighing on their quest to assess whether the outcome was "clear and convincing." And, the outcome of any case will be unknowable given the manner in which the appellate courts will review the underlying evidence. Parties will be stymied in their ability to evaluate, with any degree of certainty, their chance of success on appeal. That uncertainty will, in turn, further increase the number of cases before the appellate courts.

This is not to say that the mere fact that there will be an increased work load at the appellate level is a reason to decline to alter a standard of review, but it is not the fact of an increased work load but the reason for the increase that is important. By altering the standard of review, work will increase as the appellate courts sift through the evidence, weigh the evidence and ultimately make factual decisions in deciding whether the trial court's analysis meets the clear and convincing evidentiary proof standard. Doing so will upend the distinct separate roles that played by the trial courts and appellate courts.

Moreover, modifying the substantial evidence review standard will not only impact appellate courts but trial courts when ruling on post-trial motions such as motions for judgment notwithstanding the verdict. There, the trial court is to decide

whether there is substantial evidence to support the verdict. (*Brandenburg v. Pac. Gas & Elec. Co.* (1946) 28 Cal.2d 282, 284 ["A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict"].)

The scales will tilt decidedly against the fact finder if the standard of review is altered to require that review under substantial evidence be based on the burden of proof in the trial court. Appellate courts will weigh evidence to size up whether the quantum of evidence tilts to one side or the other. Judges reviewing jury decisions on post-trial motions will do the same and will be tempted by their perception of the case to unravel the decision of the jury. And, the Constitutional right to a jury trial afforded all parties will be impaired. In sum, there are strong reasons that militate against altering the standard of review to account for the burden of proof in the trial court.

C. There Are Flaws In Appellant's Argument That A Majority Of Appellate Courts Conduct Review Through The Prism Of The Underlying Burden Of Proof.

Appellant argues that applying the substantial evidence standard without consideration of the underlying evidentiary burden of proof has become the minority rule. (Petitioner's Opening Brief, pp. 29-37; See also ASCDC Brief ("ASCDC Brief"), pp. 8, 13-14). Appellant maintains the trend is demonstrative of

the need to modify the appellate review standard. There are at least two problems with the argument. First, it is not clear that it is accurate. As we show below, for every opinion supporting a standard of review that incorporates the underlying burden of proof, there is a countervailing opinion declining to modify or amend the substantial evidence rule to adjust for the burden of proof in the trial court. And, second although a trend in the courts may be of interest, it should not serve as the reason for changing the law or, as in this case, a long-standing appellate review standard.

The following thirty-two cases are just a few of those where the substantial evidence rule has been applied without consideration for the underlying trial court's decision based on clear and convincing evidence:[8]

> *Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010-1011;
>
> *Baines v. Zuieback* (1948) 84 Cal.App.2d 483, 488;
>
> *Bank of America Nat'l Trust & Savings Assoc. v. Steele* (1961) 188 Cal.App.2d 62, 67-68;
>
> *Crail v. Blakely* (1973) 8 Cal.3d 744, 750;
>
> *Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1297;
>
> *Ian J. v. Peter M.* (2013) 213 Cal.App.4th 189, 208;

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[8] None of this arithmetic exercise accounts for the numerous unpublished appellate opinions which, if included, might swing the majority/minority argument further in either direction.

In re Alexzander C. (2017) 18 Cal.App.4th 438, 451;

In re Angelique C. (2003) 113 Cal.App.4th 509, 519;

In re A.S. (2011) 202 Cal.App.4th 237, 247;

In re B.J.B. (1986) 185 Cal.App.3d 1201, 1211;

In re C.M. (2014) 232 Cal.App.4th 1394, 1402;

In re Cole C. (2009) 174 Cal.App.4th 900, 915-916;

In re E.B. (2010) 184 Cal.App.4th 568;

In re I.W. (2009) 180 Cal.App.4th 1517;

In re J.I. (2003) 108 Cal.App.4th 903, 911;

In re Jason L. (1990) 222 Cal.App.3d 1206, 1214;

In re J.N. (2010) 181 Cal.App.4th 1010;

In re Levi H. (2011) 197 Cal.App.4th 1279, 1291;

In re Madison S. (2017) 15 Cal.App.5th 308, 317-318;

In re Mark L. (2001) 94 Cal.App.4th 573, 580-581;

In re Marriage of E. & Stephen P. (2013) 213 Cal.App.4th 983, 989-990;

In re Marriage of Murray (2002) 101 Cal.App.4th 581, 602-604;

In re Marriage of Ruelas (2007) 154 Cal.App.4th 339, 345;

In re Marriage of Saslow (1985) 40 Cal.3d 848, 863;

In re Phillip B. (1979) 92 Cal.App.3d 796;

In re Z.G. (2016) 5 Cal.App.5th 705, 720;

Mazik v. Geico General Ins. Co. (2019) 35 Cal.App.5th 455, 462-463;

Morgan v. Davidson (2018) 29 Cal.App.5th 540, 546-550;

Notten v. Mensing (1935) 3 Cal.2d 469, 477;

Patrick v. Maryland Casualty Co. (1990) 217 Cal.App.3d 1566, 1576

Sheila S. v. Superior Court (2000) 84 Cal.App.4th 872, 880-881;

Somps v. Somps (1967) 250 Cal.App.2d 328, 337.

And, the following nineteen cases are those identified by Appellant and *amici* where courts have reviewed a trial court decision for substantial evidence bearing in mind the underlying burden of proof:

In re Alexis S. (2012) 205 Cal.App.4th 48;

In re Amos L. (1981) 124 Cal.App.3d 1031;

In re Angelia P. (1981) 28 Cal.3d 908, 918-919;

In re Andy G. (2010) 183 Cal.App.4th 1405;

In re Baby Girl M. (2006) 135 Cal.App.4th 1528;

In re Basilio T. (1992) 4 Cal.App.4th 155;

In re Hailey T. (2012) 212 Cal.App.4th 139;

In re Heidi T. (1978) 87 Cal.App.3d 864;

In re Henry V. (2004) 119 Cal.App.4th 522;

In re Jamon O. (1994) 8 Cal.4th 398, 422-34;

In re Kristin H. (1996) 46 Cal.App.4th 1635;

In re Luke M. (2003) 107 Cal.App.4th 1412;

In re Mariah T. (2008) 159 Cal.App.4th 428;

In re Victoria M. (1989) 207 Cal.App.3d 1317;

In re William B. (2008) 163 Cal.App.4th 1220;

Johnson & Johnson Talcum Powder Cases (2019) 37 Cal.App.4th 292, 333;

Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc. (2000) 78 Cal.App.4th 847;

Pulte Home Corp. v. American Safety Indem. Co. (2017) 14 Cal.App.5th 1086;

Pfeifer v. John Crane, Inc. (2013) 220 Cal.App.4th 1270.[9]

No doubt there are other cases that can be lined up on one side or the other. But, numbers matter naught. The outcome in this case should not be driven by counting how many cases line up against each other. That exercise is best relegated to nursery rhymes like the counting of magpies lyrically outlined in the British rhyme "One for Sorrow." (Peter Tate, *Flights of Fancy: Birds in Myth, Legend and Superstition* (Random House 2009.)

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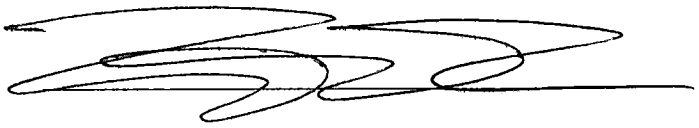
[9] We do not include those cases on appeal from the grant of summary judgment, or demurrer or non-suit since appellate review is *de novo* – a uniquely different scenario from appellate review of decisions resolving disputed factual issues. (ASCDC Brief, pp. 11-12.) This is because conflating *de novo* review with the substantial evidence review standard is misguided. (See, e.g., *Certain Underwriters at Lloyd's of London v. Superior Court (Powerine Oil Co., Inc.)* (2001) 24 Cal.4th 945, 972 [summary judgment motions raise only questions of law "namely whether there is any triable issues as to any material fact"].) The appellate court thus independently reviews the trial court's determination of law and the appellate court is "'not bound by the trial court's stated reasons, if any supporting its ruling,. . .'" (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 629, quoting *Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1083.)

III. CONCLUSION

CAOC respectfully urges this Court to find that the substantial evidence standard of review should continue to stand on the same firm ground that it has for decades. Appellate review of decisions by a fact finder should not sway in the wind of the underlying burden of proof for doing so will prompt appellate courts to simply override decisions in their quest to decide whether evidence was clear and convincing or whether the fact finder's decision satisfied that burden.

Dated: October 23, 2019

Respectfully submitted,



Gretchen M. Nelson

Attorneys for Amicus Curiae
Consumer Attorneys of California

CERTIFICATE OF COMPLIANCE

Pursuant to Cal. Rules of Ct., rule 8.204, subd. (c)(1), counsel of record certifies that this Application to File and the Proposed Amicus Brief of Consumer Attorneys of California is produced using 13-point Times New Roman type, including footnotes, and contains 4,276 words. Counsel relies on the word count provided by Microsoft Word software.

DATED: October 23, 2019

Gretchen M. Nelson

Attorneys for Amicus Curiae
Consumer Attorneys of California

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is, and was at the time of service, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to, or interested in, this legal action; and that declarant's business address is 601 So. Figueroa Street, Suite 2050, Los Angeles, CA 90017.

2. On October 23, 2019, declarant served the following documents:

A. APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE UNTIMELY *AMICUS CURIAE* BRIEF IN SUPPORT OF THE RESPONDENTS; AND PROPOSED BRIEF; and

B. DECLARATION OF GRETCHEN M. NELSON IN SUPPORT OF APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE A UNTIMELY *AMICUS CURIAE* BRIEF

by depositing a true copy as shown below with GSO Priority Overnight or Federal Express for delivery overnight on the next business day or by placing with the U.S. Post Office as to those so designated. The copies were placed in sealed envelopes with postage fully prepaid, addressed to the following interested parties and courts:

By Overnight Delivery
Supreme Court of the State of California – Orig. & 13
Clerks Office
350 McAllister Street
San Francisco, CA 94102-4797

By U.S. Mail
California Court of Appeal
Second Appellate District
Division Six
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

By U.S. Mail
Superior Court of Santa Barbara County
Hon. James Rigali
312-C East Cook Street
Santa Maria, CA 93454

By U.S. Mail
Gerald J. Miller
P.O. Box 342
Liberty Hill, Tx 78642
(512) 778-4161
(Courtesy email to GJMEsq@sbcglobal.net)

By Overnight Delivery
Shaun P. Martin
University of San Diego School of Law
5998 Alcala Park, Warren Hall
San Diego, CA 92210
619-260-2347

By U.S. Mail
Laura Hoffman King
241 South Broadway Street
Suite 205
Santa Maria, CA 93455

By U.S. Mail
Neil S. Tardiff
Tardiff Law Offices
P.O. BOX 1446
San Luis Obispo, CA 93401

By U.S. Mail
Lana June Clark
Law Office of Lana Clark
1607 Mission Drive, Suite 107
Solvang, CA 93463-3636

By U.S. Mail
Thomas F. Coleman
Attorney at Law
555 S. Sunrise Way, Suite 205
Palm Springs, CA 92264

By U.S. Mail
Brook John Changala
Attorney at Law
2 Park Plaza, Suite 850
Irvine, CA 92614-2521

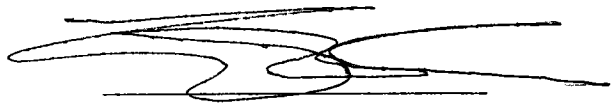
By U.S. Mail
Jeremy Brooks Rosen
Horvitz & Levy LLP
3601 West Olive Avenue, 8th Floor
Burbank, CA 91505-4681

By U.S. Mail
Robert A. Olson
Edward L. Xanders
Greines, Martin, Stein & Richland LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, CA 90036

By U.S. Mail
Mitchell Keiter
Keiter Appellate Law
424 South Beverly Drive
Beverly Hills, CA 90212

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 23rd day of October, 2019, at Los Angeles, California.



Gretchen M. Nelson