S250734

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

B.B., a Minor, etc., et al.,
Plaintiffs and Appellants,
vs.
COUNTY OF LOS ANGELES, et al.,
Defendants and Appellants.

T.E., a Minor, etc., et al.,
Plaintiffs and Appellants,
vs.
COUNTY OF LOS ANGELES, et al.,
Defendants and Appellants.

D.B., a Minor, etc., et al.,
Plaintiffs and Appellants,
vs.
COUNTY OF LOS ANGELES, et al.,
Defendants and Appellants.

After Decision by the Court of Appeal, 2nd Dist., Div. 3 (No. B264946), On Appeal from the Superior Court of the County of Los Angeles, Hon. Ross M. Klein, Nos. TC027341, TC027438, BC505918

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF MICHAEL AND CINDY BURCH IN SUPPORT OF PLAINTIFFS

Ted W. Pelletier, Esq.* (C.S.B. #172938)
Kazan, McClain, Satterley & Greenwood, PLC
55 Harrison Street, Suite 400, Oakland, California 94607
Tel: (510) 302-1000
tpelletier@kazanlaw.com

Attorneys for Michael and Cindy Burch

S250734

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

B.B., a Minor, etc., et al.,
Plaintiffs and Appellants,
vs.
COUNTY OF LOS ANGELES, et al.,
Defendants and Appellants.

T.E., a Minor, etc., et al.,
Plaintiffs and Appellants,
vs.
COUNTY OF LOS ANGELES, et al.,
Defendants and Appellants.

D.B., a Minor, etc., et al.,
Plaintiffs and Appellants,
vs.
COUNTY OF LOS ANGELES, et al.,
Defendants and Appellants.

After Decision by the Court of Appeal, 2nd Dist., Div. 3 (No. B264946), On Appeal from the Superior Court of the County of Los Angeles, Hon. Ross M. Klein, Nos. TC027341, TC027438, BC505918

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF MICHAEL AND CINDY BURCH IN SUPPORT OF PLAINTIFFS

Ted W. Pelletier, Esq.* (C.S.B. #172938)
Kazan, McClain, Satterley & Greenwood, PLC
55 Harrison Street, Suite 400, Oakland, California 94607
Tel: (510) 302-1000
tpelletier@kazanlaw.com

Attorneys for Michael and Cindy Burch

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

APPLICATION TO FILE BRIEF OF AMICI CURIAE MICHAEL AND CINDY BURCH IN SUPPORT OF PLAINTIFFS

Amici curiae are Michael and Cindy Burch, two similarly situated plaintiffs in *Burch v. CertainTeed Corporation*, where the appellate court's opinion recently issued on April 15, 2019.[1]

On September 10, 2018, these amici filed a letter in this Court in the instant action, requesting depublication of the appellate court's opinion. Under California Rule of Court 8.520, subdivision (f), amici now respectfully request permission to file the attached amicus brief in support of plaintiffs B.B., T.E., and D.B. *et al.*

Amici have no interest in or connection with any of the parties in this case.

Amici will likely have a direct interest in the outcome of this action. The *Burch* opinion is partially published, including on the issue facing this Court here (application of Civil Code section 1431.2 to judgments against intentional tortfeasors). [2019 WL 1594460 at *9 -*17.] The *Burch* opinion will become final on May 15, and amici anticipate that the defendant (CertainTeed Corp.) will petition this Court for review of that issue. Thus, this Court's decision in the instant case will likely apply eventually to amici's judgment. But these amici may not get the opportunity to brief these issues in their

---

[1] *Burch v. CertainTeed Corp.* (4/15/19); __ Cal.App.5th __, 2019 WL 1594460 (1st Dist., Div. 4, Nos. A151633, A152252, A153624). Issued on April 15, the *Burch* opinion is not yet final in the appellate court. As of the filing of this application, neither party has petitioned for rehearing.

own case (*e.g.*, on potential "grant and hold" review under Rule 8.528).

Amici are familiar with the content of the parties' briefs and believe that they can assist this Court in resolving the issue before it in three ways, showing that: (1) the *Burch* court expressly disagrees with the opinion below and fully supports the arguments raised by the plaintiffs here; (2) the longstanding rule barring an intentional tortfeasor from shifting its liability to any other negligent person is a key consequence necessary to punish and deter intentional misconduct; and (3) this Court should not negate this well-settled rule based on the extreme facts of the instant case because the issue arises in many factual settings, including in actions (like *Burch*) where the intentional tortfeasor is apportioned a majority of the fault and the plaintiff(s) were not negligent at all.

Amici respectfully request permission to file the attached brief of amicus curiae in support of plaintiffs.

DATED: April 29, 2019

Respectfully submitted,

KAZAN, McCLAIN, SATTERLEY & GREENWOOD
A Professional Law Corporation

By: _____
Ted W. Pelletier

Attorneys for Michael and Cindy Burch

BRIEF OF AMICI CURIAE MICHAEL AND CINDY BURCH IN SUPPORT OF PLAINTIFFS

Amici curiae Michael and Cindy Burch ("amici") respectfully offer this brief in support of plaintiffs B.B. *et al.*, urging this Court to rule that Civil Code section 1431.2 ("Prop. 51") does not apply to reduce the judgment against an intentional tortfeasor.

The plaintiffs' briefs here set forth well the reasons that the opinion below is erroneous in holding that Prop. 51, though entirely silent on the subject, overrides California's well-settled principle that comparative fault does not apply to reduce the liability of an intentional tortfeasor. Amici offer this brief to supplement plaintiffs' arguments by showing that: (1) the recent opinion of the First District Court of Appeal in amici's case, *Burch v. CertainTeed Corporation*,[2] expressly disagrees with the opinion below and fully supports plaintiffs' arguments, which are correct; (2) the longstanding rule barring an intentional tortfeasor from shifting its liability to any other negligent person is a key consequence necessary to punish and deter intentional misconduct and thus should not nullified absent clear legislative intent to do so; and (3) this Court should not negate this well-settled rule based on the extreme facts of the instant case because the issue arises in many factual settings, including in actions (like *Burch*) where the intentional tortfeasor is apportioned a majority of the fault and the plaintiff(s) were not negligent at all.

---

[2] *Burch v. CertainTeed Corp.* (4/15/19); __ Cal.App.5th __, 2019 WL 1594460 (1st Dist., Div. 4, Nos. A151633, A152252, A153624).

I. The *Burch* decision expressly disagrees with the opinion below and fully supports plaintiffs' correct arguments here.

The First District's published decision in *Burch* expressly disagrees with the opinion below. [*Burch*, 2019 WL 1594460 at *12.][3] *Burch*'s analysis mirrors these plaintiffs' arguments, which are correct:

1. Plaintiffs argue that the opinion below is erroneous and this Court should instead follow the appellate-court precedent culminating in *Thomas v. Duggins Constr. Co.* (2006) 139 Cal.App.4th 1105, which held expressly that "an intentional tortfeasor" is not "entitled to a reduction or apportionment of noneconomic damages under Proposition 51." [*Id.* at 1108; *see* "Opening Brief on the Merits" of plaintiffs B.B. *et al.* ("B.B. Brief") at 23, 26-27, 34; "Opening Brief of Plaintiffs T.E." *et al.* ("T.E. Brief") at 8, 24, 26-28.]

Burch agrees: "we agree with *Thomas* and hold that section 1431.2 does not operate to limit an intentional tortfeasor's liability for noneconomic damages to its percentage of fault under comparative fault principles." [*Burch* at *12.]

Plaintiffs and *Burch* are correct. As *Burch* analyzes in detail, the *Thomas* line of authority correctly holds that California law has never allowed an intentional tortfeasor to shift its liability to other negligent actors: "at the time Proposition 51 passed, an intentional

---

[3] All subsequent citations to the *Burch* opinion are to the Westlaw version ("2019 WL 1594460"), citing to the individual starred page: *e.g.*, "*Burch* at *12".

tortfeasor was not entitled to a reduction of the judgment due to the plaintiff's negligence or that of third parties," a result resting in sound "policy considerations of de[ter]rence and punishment for intentional torts." [*Burch* at *13 (*citing Thomas*, 139 Cal.App.4th at 1108, 1112).]

2. Plaintiffs argue that Prop. 51 must be interpreted first by its "plain language," and the opinion below "failed to consider" the statute's critical phrase limiting its application to tort cases "based upon principles of comparative fault." [B.B. Brief at 19-20; T.E. Brief at 14-15.]

Burch agrees: "[Prop. 51], like all statutes, must be interpreted according to its language," but "*B.B.* failed to credit the entire statutory text"; it "appears to have read the language 'based upon principles of comparative fault,' out of the statute." [*Burch* at *14.]

Plaintiffs and *Burch* are correct. The opinion below finds in Prop. 51 an "unambiguous mandate" that "each defendant" in "every" tort action gets a reduction of non-economic damages. [*B.B. v. County of Los Ang.* (2018) 25 Cal.App.5th 115, 123.] But the opinion relies on only part of the statute: "*[e]ach defendant* shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault." [*Id.* (*quoting* Civ. Code § 1431.2, subd. (a)).] The opinion fails to analyze the statute's express application only to those tort actions that are "based on principles of comparative fault." [*See Burch* at *14.] As *Burch* correctly holds, Prop. 51's use of this language "must be read to have incorporated [the] judicially construed principles" by which an intentional tortfeasor may not reduce its liability based on

others' negligence. [*Id.* (*citing In re Harris* (1989) 49 Cal.3d 131, 136 ("the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source"); *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 855 (The "phrase serves the function of placing the statutory mandate in a specific context, *i.e.*, actions for personal injury involving multiple tortfeasors *and otherwise subject to* the allocation of damages according to principles of comparative fault.")).]

The opinion below, by omitting the critical phrase from its analysis, violates the canon of statutory construction to "give meaning to every word of a statute if possible" and "avoid a construction making any word surplusage." [*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22; *accord* T.E. Brief at 15.]

3. Plaintiffs show that the opinion below is wrong to rule that its holding is compelled by this Court's 1992 decision in *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, which involved only the discrete issue of whether Prop. 51 applies to both trial defendants and absent tortfeasors. [B.B. Brief at 17-19; T.E. Brief at 16-17.]

Burch agrees: "Nor do we agree with *B.B.*'s view that *DaFonte* compels a different conclusion. The Supreme Court in *DaFonte* addressed only the question of whether [Prop. 51] eliminated a negligent defendant's joint and several liability for noneconomic damages attributed to the negligence of a joint tortfeasor who was statutorily immune from suit" but "had no occasion to consider" whether it "eliminates an intentional tortfeasor's joint and several liability for noneconomic damages in tort actions." [*Burch* at *15.]

Plaintiffs and *Burch* are correct. In *DaFonte*, this Court was presented with, and thus ruled only on, the issue of whether the damages reduction of Prop. 51 considers the comparative fault of both co-defendants and non-party co-tortfeasors. [*DaFonte*, 2 Cal.4th at 602 ("cases involving absent tortfeasors").] It had nothing to do with intentional tortfeasors.

Moreover, since issuing *DaFonte* in 1992, this Court has repeatedly confirmed that Prop. 51 does not apply to "every" tort action but instead only to "a tort action *governed by principles of comparative fault.*" [*Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985, 988 (emphasis added); *see also Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 959 n.1 ("[Prop. 51] provides that in a tort action *governed by principles of comparative fault*, a defendant shall not be jointly liable for the plaintiff's noneconomic damages"); *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 539 ("principles of comparative fault"); *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1156 ("based upon principles of comparative fault").]

Buttram is particularly instructive. There, the plaintiff argued that the defendant was an "intentional tortfeasor" who thus could not "assert the benefit" of Prop. 51. [*Buttram*, 16 Cal.4th at 539.] But this Court disagreed. Not because Prop. 51 applies to *every* defendant in every case, including intentional tortfeasors. But instead because the defendant ("OCF") had not been *found to be* an intentional tortfeasor. [*Id.*] The only cause of action was "products liability" – a non-intentional tort. Although the jury found "fraud or malice" in the "punitive damages phase," this did not make OCF an intentional

tortfeasor. [*Id.*] Thus, *Buttram* implicitly recognizes that, had OCF been an intentional tortfeasor, it could not "assert the benefit" of Prop. 51.

4. Plaintiffs show that the rule barring intentional tortfeasors from shifting liability to other negligent parties is a core "principle of comparative fault" (embedded into Prop. 51), as announced in this Court's seminal comparative-fault decisions, *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 825-826 (comparative-fault "system" created to "allow for the apportionment of damages in all cases involving misconduct which *falls short of being intentional*"), and *American Motorcycle Ass'n v. Superior Ct. (Viking Motorcycle Club)* (1978) 20 Cal.3d 578, 607-608 (comparative-fault system provides "justice" for the "*unintentionally* responsible"). [B.B. Brief at 24-26; T.E. Brief at 18-19.]

Burch agrees: "When Proposition 51 was enacted, the comparative fault principles announced in *Li* and *American Motorcycle* did not allow intentional tortfeasors to reduce their liability on the account of a negligent joint tortfeasor's fault." [*Burch* at *14.]

Plaintiffs and *Burch* are correct. Indeed, this Court long after Prop. 51 reiterated California's "public policy against reducing or offsetting liability for intentional wrongdoing by the negligence of another." [*PPG Indus., Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 316, 317.] And both *Burch* and plaintiffs catalog this policy's consistent application, before and after Prop. 51: from *Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 385 to *Allen v. Sundean* (1982) 137 Cal.App.3d 216 to *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154 to *Weidenfeller v. Star & Garter* (1991) 1

Cal.App.4th 1, 6-7. [*See* B.B. Brief at 23-25; T.E. Brief at 18-22; *Burch* at *14, *15.]

5. Plaintiffs show that, contrary to the opinion below, allowing an intentional tortfeasor to shift its liability to negligent actors neither is equitable nor promotes Prop. 51's express purpose. [B.B. Brief at 28-30 (Prop. 51 "intended to limit the liability of relatively blameless, negligent tortfeasors," not to "give intentional tortfeasors a free ride").]

Burch agrees: "Our interpretation also fulfills our obligation to effectuate Proposition 51's purpose. . . . The inequities that Proposition 51 targeted were "situations in which defendants who bore only a small share of fault for an accident could be left with the obligation to pay all or a large share of the plaintiff's damages if other more culpable tortfeasors were insolvent," and "this was never the case with an intentional tortfeasor," who is "the most culpable of all"; Prop. 51's "purpose is simply not fulfilled by applying it" to judgments against intentional tortfeasors. [*Burch* at *15.]

Once again, plaintiffs and *Burch* are correct. Prop. 51's purpose is to address the "inequities" of "minimally culpable" defendants, sued for their "deep pockets," having to "bear all of the plaintiff's damages." [*See Evangelatos*, 44 Cal.3d at 1198; *Thomas*, 139 Cal.App.4th at 1110; Civ. Code § 1431.1 (declaration of statutory purpose to "remedy the inequities" of holding "deep pocket" defendants fully liable despite "little or no basis for finding them at fault")).] The statute identified no "inequity" in holding the most culpable intentional tortfeasors fully liable, let alone sought to remedy it.

In sum, *Burch* is fully in accord with the plaintiffs' arguments here, and both are correct and should be followed by this Court.

II. Allowing intentional tortfeasors for the first time to shift their liability to negligent actors would strip away the main deterrent to intentional misconduct.

The rule barring intentional tortfeasors from shifting their liability to negligent actors rests on "policy considerations of deterrence and punishment." [*Thomas*, 139 Cal.App.4th 1105, 1112; *see Burch* at *13 (same).] Indeed, this Court in *PPG Indus.* recognized this "policy" rule, holding that an intentional tortfeasor could not "shift responsibility" for punitive damages to its "insurance company" (based on the insurer's "negligence in failing to settle the third party lawsuit") because it would defeat the public policies of punishing the intentional wrongdoer for its own outrageous conduct and deterring it and others from engaging in such conduct in the future." [*PPG Indus.*, 20 Cal.4th at 316, 317.]

Plaintiffs acknowledge generally that this rule rests on "deterrence and punishment" policy considerations, arguing that the opinion below would undermine this policy by "protect[ing] intentional tortfeasors who are deeply culpable." [*E.g.*, B.B. Brief at 30-34.] And thus, Prop. 51 – intended to protect "minimally culpable" deep-pocket defendants from "unfair" liability and never mentioning intentional tortfeasors at all – cannot fairly be read to "give intentional tortfeasors a free ride" they had never before enjoyed. [*Id.* at 28-29.]

Amici agree with this analysis but believe that plaintiffs do not fully describe the breadth of the "free ride" at issue. The opinion

below would not just "protect" intentional tortfeasors but strip away the *main* deterrent to their misconduct.

Numerous intentional torts are codified in our Civil Code, including those committed by Deputy Aviles here (§ 1708 – assault and battery) and by CertainTeed in *Burch* (§ 1709 – fraudulent deceit). [*See also, e.g.,* Civ. Code §§ 1708.5-1708.9 (various specific batteries including domestic violence, stalking).]

But committing these torts subjects the actor to only two consistent consequences. Liability for damages caused by intentional torts cannot be covered by insurance. [Ins. Code § 533 ("[a]n insurer is not liable for a loss caused by the willful act of the insured").] And, at issue here, the intentional actor cannot shift its liability to other negligent actors.

Those are the only uniform consequences. Some intentional conduct can also draw civil penalties, but these apply only in isolated circumstances.[4] And though intentional misconduct can support an award of punitive damages under Civil Code section 3294, it is not automatic because the same misconduct must then be proved by the higher standard of clear-and-convincing evidence. [*See* Civ. Code § 3294 (punitive damages based on "fraud" and "malice," defined as "conduct which is intended by the defendant to cause injury to the

---

[4] *E.g.*, Civ. Code §§ 1710.1 (treble damages for altering serial number with "intent to defraud"), 1721 (treble damages for "intentional and malicious destruction" at construction site), 3333.7, subd. (a) (treble damages for employer's "willful failure," *i.e.*, "intentional and uncorrected failure," to comply with federal requirements to drug test employee commercial-vehicle drivers).

plaintiff").] Indeed, in *Burch*, the jury found CertainTeed liable for committing intentional fraud but did *not* find by clear and convincing evidence that CertainTeed acted with "fraud" (or "malice" or "oppression") as defined in section 3294.

Thus, reversing the well-settled rule that intentional tortfeasors cannot shift their liability to negligent actors would remove one of the only real consequences of committing such torts. And as to wealthy defendants who can afford to pay damages without relying on insurance coverage, it would remove what is effectively the *only* real consequence of intentional misconduct.

This cannot be California policy. And it certainly cannot be construed to have been the radical new policy choice of the voters in an initiative that never mentioned intentional torts at all, let alone explained that such misconduct would now have little to deter it.

III. To remedy a perceived unfairness in "this case," this Court should not and need not eliminate the well-settled rule in all cases.

The opinion below, in holding that Prop. 51 eliminated the well-settled rule against intentional tortfeasors shifting their liability, appears to have been animated by a perceived unfairness in holding a police officer fully liable for the damages of a violent, drug-crazed man who instigated the incident that ultimately resulted in his own death. [*See B.B.*, 25 Cal.App.5th at 119-120 (opinion's first sentence citing "prolonged and violent struggle" to arrest man who had "assaulted a woman while under the apparent influence of cocaine, marijuana, and PCP"), 127-128 (rejecting "policy considerations of

punishment and deterrence" in favor of "prevent[ing] unfairness" in "Deputy Aviles's liability").]

Amplifying this concern, defendants repeatedly stress the "facts of this case" to argue that construing Prop. 51 as reversing the well-settled rule "produces a fair and equitable result" in *this* case. [Answer Brief on the Merits ("Answer Brief") at 41 ("equitable result in this case"), 44 ("facts of this case"), 45 ("Given the facts of this case, the fair and equitable result is one in which Deputy Aviles pays for his one-fifth proportional fault"), 46 ("Mr. Burley was the most culpable person in his own death").]

But defendants ask for (and the opinion below embraces) a sweeping rule that would apply not just on the "facts of this case" but to *every* California tort case involving a judgment against an intentional tortfeasor. And not every case will arise on extreme "facts" like those present here. For instance, the same requested rule would apply equally in a police-brutality case where the plaintiff was an innocent victim who bore no fault at all, allowing the intentional tortfeasor to shift liability onto other negligent officers.

Burch provides another prime example. There, CertainTeed committed the intentional tort of fraud, CertainTeed bore the large majority of the apportioned fault (62%), and Mr. Burch bore *zero* fault. Whatever the purported "equitable result" in the extreme facts of the instant case, it would not be equitable in *Burch*.

Moreover, defendants' proposed result would not be nearly as "equitable" as they suggest. Although the decedent instigated the altercation, Deputy Aviles was still the only police officer who responded by committing an "intentional battery by use of excessive

force." [*B.B.*, 25 Cal.App.5th at 120.] At least five other deputies (Beserra, Fernandez, Lee, Celaya, LeFevre) managed to respond to the same situation without resorting to battery. [*See id.* at 121.] Deputy Aviles's intentional commission of a battery properly brings him the well-established consequence of full liability for the plaintiffs' wrongful-death damages.

In sum, policy considerations do not support defendants' requested rule allowing all intentional tortfeasors for the first time in California to shift their liability to other negligent actors. The instant case, though arising on extreme facts, does not merit a wholesale change of California tort law.

But if this Court has any hesitation in applying the well-settled law to these extreme facts, it need not adopt the opinion's all-or-nothing rule change. Two moderate options appear more suitable:

1. Defendants contend that allowing them to reduce their liability is equitable because the decedent Burley was "*an intentional wrongdoer himself*, as he *intentionally* ingested PCP and cocaine, assaulted a pregnant woman, and repeatedly struck a sheriff's deputy who was making a lawful arrest." [Answer Brief at 44 (emphasis added) (*citing B.B.*, 25 Cal.App.5th at 121).] It does not appear that they jury found Burley to have committed any "intentional" tortious conduct. But if it did so find, then intentional tortfeasor Aviles would already be entitled to shift 40% of his liability to the *intentional tortfeasor Burley*. [*See Baird v. Jones* (1993) 21 Cal.App.4th 684, 692-693 (intentional tortfeasor may shift liability to other intentional tortfeasor). The well-settled "policy" at issue here instead bars "reducing or offsetting liability for intentional wrongdoing by the

negligence of another." [*PPG Indus.*, 20 Cal.4th at 316-317; *see Weidenfeller*, 1 Cal.App.4th at 6-7 (intentional actor cannot shift liability to the "*negligence* of the victim or a joint tortfeasor").]

Thus, if Burley was an intentional (not negligent) actor, then defendants could obtain a 40% damages reduction reflecting that intentional misconduct.

2. If this Court deems it "inequitable" for defendants to bear the 40% liability of the violent Burley (even if not intentional), then this Court could fashion a compromise rule: an intentional tortfeasor's liability for all damages is "joint and several," allowing a reduction for the plaintiff's comparative fault (if any) but no reduction based on the fault of any co-tortfeasor. This is the existing rule of joint-and-several liability for "concurrent tortfeasors" in the comparative-fault system:

> [A]fter *Li [v. Yellow Cab]*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only "in proportion to the amount of negligence attributable to the person recovering."

[*American Motorcycle*, 20 Cal.3d at 578 (*quoting Li*, 13 Cal.3d at 829 (creating comparative-fault system wherein "the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering"); *see also Zavala v. Regents of Univ. of Cal.* (1981) 125 Cal.App.3d 646, 647 (pre-Prop. 51, 80% liable plaintiff receives 20% of all damages); *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 273 (post-Prop. 51, "reduction of economic damages by 10% due to

Plaintiff's 10% fault"); *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 839 (post-Prop. 51, economic damages reduced by the "2 percent . . . comparative fault of the decedent").]

Under this compromise, an intentional tortfeasor would not always face 100% liability but instead would have pure joint-and-several liability as to both economic and non-economic damages, with a reduction for any plaintiff fault. Thus here, again, the defendants would obtain a 40% reduction of all damages reflecting Burley's comparative fault.

Amici do not advocate for either of these more moderate compromise results here. The correct result, comporting with well-settled California precedent, is that these defendants and all intentional tortfeasors simply may not shift their liability to other negligent actors. But if this Court wishes to ameliorate any perceived unfairness in applying the settled rules to the extreme facts of the instant case, these options allow for it without defendants' (and the opinion below's) proffered rule that would allow *every* intentional tortfeasor to shift its liability – removing the primary consequence of committing intentional misconduct.

CONCLUSION

Amici agree with these plaintiffs, and *Burch*, that Prop. 51 changed the rules only for those tort actions "based on principles of comparative fault" and thus not for judgments against intentional tortfeasors. Construing Prop. 51 to apply more broadly to change well-settled California law would be extremely inequitable, removing the primary deterrent against committing intentional misconduct.

DATED: April 29, 2019

Respectfully submitted,

KAZAN, McCLAIN, SATTERLEY
& GREENWOOD
A Professional Law Corporation

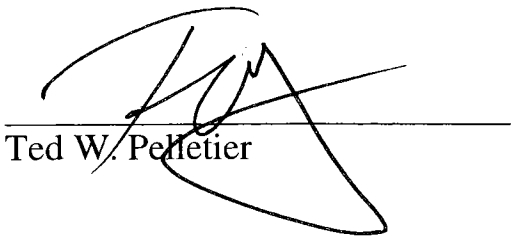
By: _____
Ted W. Pelletier

Attorneys for Plaintiffs

CERTIFICATE OF WORD COUNT

I, Ted W. Pelletier, hereby certify that the text of this combined brief consists of 3,998 words, in Times New Roman 14-point font, as counted by my word processing program.

DATED: April 29, 2019



Ted W. Pelletier

PROOF OF SERVICE

B.B., et al. v. County of Los Angeles, et al.
Supreme Court Case No. S250734

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is Jack London Market, 55 Harrison Street, Suite 400, Oakland, CA 94607.

On April 29, 2019, I served true copies of the following document(s) described as:

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF MICHAEL AND CINDY BURCH IN SUPPORT OF PLAINTIFFS

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Kazan, McClain, Satterley & Greenwood for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Oakland, California.

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

Executed on April 29, 2019, at Oakland, California.

E. A. Pawek

SERVICE LIST

Sabrina H. Strong, Esq.
Dimitri D. Portnoi, Esq.
Jefferson J. Harwell
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, California 90071-2899
Attorneys for Defendants and Appellants

John E. Sweeney
THE SWEENEY FIRM
315 South Beverly Drive Suite 305
Beverly Hills, California 90212
Attorneys for Plaintiffs B.B., a minor, and B.B., a minor, by and through their Guardian ad Litem Shanell Scott

Norman Pine
Scott Tillett
Stacey Tillett
Chaya M. Citrin
PINE TILLETT PINE LLP
14156 Magnolia Boulevard, Suite 200
Sherman Oaks, California 91423
Attorneys for Plaintiffs B. B., a minor, and B.B., a minor, by and through their Guardian ad Litem Shanell Scott

Michael D. Seplow
Paul L. Hoffman
Aidan C. McGlaze
John Washington
SCHONBRUN SEPLOW HARRIS
& HOFFMAN LLP
11543 W. Olympic Boulevard
Los Angeles California 90064
Attorneys for Plaintiffs D. B., a minor, and D.B., a minor, by and through their Guardian ad Litem Terri Thomas, and Rhandi Thomas, and T.E., a minor, by and through her Guardian ad Litem Akira Earl

Carl E. Douglas
Jamon Hicks
DOUGLAS/HICKS LAW
5120 W. Goldleaf Circle, Suite 140
Los Angeles, California 90056
Attorneys for Plaintiffs D. B., a minor, and D.B., a minor,
by and through their Guardian ad Litem Terri Thomas,
and Rhandi Thomas, and T.E., a minor, by and through
her Guardian ad Litem Akira Earl

Drew R. Antablin, Esq.
ANTABLIN & BRUCE, ALP
8484 Wilshire Boulevard, Suite 548
Beverly Hills, California 90211
Attorneys for Plaintiffs D. B., a minor, and D.B., a minor, by and through their Guardian ad Litem Terri Thomas, and Rhandi Thomas, and T.E., a minor, by and through her Guardian ad Litem Akira Earl

Olu K. Orange Esq.
ORANGE LAW OFFICES, P.C.
3435 Wilshire Boulevard, Suite 2910
Los Angeles, California 90010
Attorneys for Plaintiffs D. B., a minor, and D.B., a minor,
by and through their Guardian ad Litem Terri Thomas,
and Rhandi Thomas, and T.E., a minor, by and through
her Guardian ad Litem Akira Earl

Eugene P. Ramirez
Julie Fleming
MANNING MARDER KASS
ELLROD
& RAMIREZ
801 S. Figueroa Street, 15th Floor
Los Angeles, California 90017
Attorneys for County of Los Angeles, David Aviles and Paul Beserra

Clerk, Second District Court of Appeal
Ronald Reagan State Building
300 South Spring Street
2nd Floor, North Tower
Los Angeles, California 90013

Clerk, Hon. Ross M. Klein
Los Angeles County Superior Court
Gov. George Deukmejian Courthouse
275 Magnolia Avenue
Long Beach, California 90802

Attorney General
Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013-1230