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October 8, 2020

Chief Justice Tani Cantil-Sakauye  
and Associate Justices  
California Supreme Court  
350 McAllister Street  
San Francisco, California 94102

Re: ***King v. U.S. Bank National Association***  
Supreme Court Case No. S264308  
*Amicus Letter in Support of Defendant's Petition for Review*

Dear Chief Justice Cantil-Sakauye and Associate Justices:

We write on behalf of the Association of Southern California Defense Counsel (ASCDC) to urge this Court to grant defendant's petition for review.

ASCDC is a preeminent regional organization of approximately 1,100 leading attorneys who specialize in defending civil actions. ASCDC is dedicated to promoting the administration of justice and enhancing the standards of civil litigation practice, and acts as a liaison between the defense bar and the courts. ASCDC has appeared as amicus curiae in cases involving issues of significance to its members.

ASCDC and its members are particularly interested in ensuring that courts apply consistent, predictable standards when reviewing damages awards. That is especially true with respect to punitive damages, which generate a high risk of arbitrary and unfair results if not constrained by proper judicial review.

The Court of Appeal in this case upheld the imposition of punitive damages based on the sort of evidence that other Court of Appeal opinions have held insufficient as a matter of law. And the court overturned a trial court's determination that a compensatory damages award was excessive, without applying the sort of deference usually afforded to new trial orders. Because the Court of Appeal's published opinion creates uncertainty about how such issues will be reviewed in the future, ASCDC respectfully requests that this Court grant review to clarify the applicable standards on these issues, as explained more fully below.

**I. The Court of Appeal’s published opinion conflicts with other Court of Appeal opinions regarding whether an employee qualifies as a managing agent for the purposes of holding a corporation liable for punitive damages.**

A corporate employer cannot be liable for punitive damages based upon the acts of its employees, absent clear and convincing evidence that the wrongful conduct was committed, authorized, or ratified by a corporate officer, director, or managing agent. (Civ. Code, § 3294, subs. (a) & (b).) The determination of whether an employee qualifies as a managing agent does “not depend on employees’ managerial level, but on the extent to which they exercise substantial discretionary authority over decisions that ultimately determine corporate policy.” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 576-577; see *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 714-715 [same].) This rule serves to prevent punishment of businesses for misconduct that does not reflect the business’s state of mind or the intentions of company leaders. (*Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 167 (*Cruz*).)

Prior to the Court of Appeal’s opinion in this case, published Court of Appeal opinions provided seemingly clear guidance on how to determine whether an employee has the power to determine corporate policy within the meaning of the managing agent requirement. In *Cruz*, the Second Appellate District explained that corporate policy means “the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations.” (*Cruz, supra*, 83 Cal.App.4th at p. 167.) More recently, in *CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 (*CRST*), a different panel of the Second Appellate District further explained that an employee does not have control over corporate policy merely because they have a supervisory position or the power to hire and fire employees. Thus, the court found that a trucking company’s fleet manager was not a managing agent, even though she had the authority to investigate complaints about unsafe driving and had the power to terminate drivers. (*Id.* at pp. 1267, 1274.) Although the fleet manager had discretion to manage her own investigations, her authority did not extend outside her own job duties, and therefore she could not be considered to be creating corporate policy that would be followed by others in the future. (See *ibid.*; see also *Meruelo v. Marcus & Millichap, Inc.* (Dec. 4, 2002, G026423) 2002 WL 31720284, at pp. \*7-\*8 [nonpub. opn.] [senior

level sales manager who was given discretion in his own transactions and required little supervision was not a managing agent].<sup>1</sup>

The Court of Appeal’s opinion in this case took a very different approach and found that an employee qualified as a managing agent even though she had no apparent authority to create policies that would be followed by others. The relevant employee at issue was a human resources generalist who reported to a vice president/human resources manager, who in turn reported to another supervisor, who then reported to the director of human resources. (Typed opn. 6, 12, 15.) Like most human resources generalists, the employee at issue in this case was responsible for investigating an employee’s claim of discrimination and then reporting her findings up the chain of command. (Typed opn. 6.) As part of her job, she “had to consult with a supervisor on how to conduct an investigation on a case-by-case basis, depending on the circumstances.” (*Ibid.*) Nevertheless, the Third Appellate District found that this human resources generalist was a managing agent because she was given discretion on how to conduct a particular investigation. (Typed opn. 41.)

The Court of Appeal’s reasoning conflicts with *Cruz* and *CRST*. Rather than focusing on the employee’s authority to set policies that would be followed by the organization over time, the court focused on the employee’s discretion regarding performance of her own investigations. That directly conflicts with the holding of *CRST*, in which the court found that the fleet manager was *not* a managing agent even though she also had discretion to perform her investigations on a case-by-case basis.

This case is perhaps the ideal vehicle to resolve this split of authority because the Courts of Appeal have repeatedly been asked to apply the managing agent standard to the type of employee at issue here—a human resources employee. A review of unpublished opinions shows the results have been anything but consistent. (Compare *Martinez v. Rite Aid Corporation* (May 7, 2013, B228621) 2013 WL 1735550, at p. \*24 [nonpub.opn.] [the court found there was insufficient evidence to show the human resources manager was a managing agent] and *Mnaskanian v. 21st Century Ins.* (Dec. 21, 2007, B191052) 2007 WL 4465273, at p. \*4 [nonpub. opn.] [the court found there was insufficient evidence to show the senior vice president of human resources and the employee relations director were

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<sup>1</sup> We do not cite the unpublished opinions in this letter as precedent (Cal. Rules of Court, rule 8.1115), but only to show there are inconsistencies in Court of Appeal opinions and this Court’s guidance is needed.

managing agents] with *Joseph-Mitchell v. SEIU Local 721* (Jan. 8, 2020, B289210) 2020 WL 89826, at p. \* 20 [nonpub. opn.] [the court found there was sufficient evidence that the human resources director was a managing agent] and *Bryant v. San Diego Gas & Electric Company* (2015) 2015 WL 6164142, at p. \*11 [nonpub. opn.] [the court found the director of labor relations and human resources was a managing agent].)

## **II. The Court of Appeal’s published opinion creates a split of authority on the clear and convincing evidence standard of proof.**

The prerequisites for an award of punitive damages must be proven by clear and convincing evidence. (Civ. Code, § 3294, subd. (a); CACI No. 3944.) As this Court recently explained, the clear and convincing evidence standard applies not only to the fact finder, but also to appellate courts when deciding whether factual findings are supported by substantial evidence. (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 995 (*Conservatorship of O.B.*).

*Conservatorship of O.B.* confirmed the approach that some Court of Appeal decisions had already adopted in the punitive damages context, but those earlier Court of Appeal opinions applied the clear and convincing evidence standard in a very different way from the Court of Appeal in this case. For example, in *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287 (*Tomaselli*), called into doubt on another ground by *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724, fn. 7, the court explained that a finding of malice cannot be supported by evidence that supports a *possible* inference of malice, but is equally consistent with the hypothesis that the defendant were merely negligent. Such evidence is, by definition, not clear and convincing. (See *id.* at p. 1288, fn. 14 [punitive damages “ ‘should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence, or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing.’ ”]; see also *Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1170 (*Butte Fire Cases*) [“ ‘ ‘ ‘The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages’ ” ’ ” and there should be some evidence that is inconsistent with the proposition that the wrongful conduct was merely overzealousness or negligence]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 892-893 (*Shade Foods*) [“This conduct may have been unreasonable to the point of constituting a form of unfair dealing, but we do not think the jury could reasonably find that it constituted clear and

convincing evidence of ‘despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights’ or ‘despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others’ ”.)

The Court of Appeal opinion in this matter, while recognizing that the clear and convincing evidence standard must be taken into account on appeal, departed from the approach taken in *Tomaselli, Butte Fire Cases*, and *Shade Foods*. (Typed opn. 37-38.) The court held that the plaintiff’s proof was legally sufficient to support the finding of malice even if the evidence was equally consistent with mere negligence: “That [the human resources generalist’s] ‘actions could just as easily have been the “result of a[n] . . . error of judgment, over-zealousness, mere negligence, or other such noniniquitous human failing,” ’ . . . does not change the fact that there was substantial evidence supporting the jury’s verdict.” (Typed opn. 40.)

This Court should grant review to resolve this split of authority and clarify whether evidence of malice can qualify as clear and convincing when that evidence is equally consistent with a finding of mere negligence.

### **III. The Court of Appeal’s opinion also sows discord among the Courts of Appeal regarding the standard used to review new trial orders.**

When a trial court grants a new trial on the issue of excessive damages, “the presumption of correctness normally accorded on appeal to the jury’s verdict is replaced by a presumption in favor of the order.” (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 932.) The Court of Appeal will not reverse the order unless the trial court abused its discretion. (*Id.* at pp. 932-933; see *id.* at p. 933 [even though some of the “reasons stated by the trial court in support of its action might be held insufficient to justify reduction in the amount of a verdict as a matter of law by an appellate court,” the Supreme Court affirmed the new trial order].)

Applying these standards, Court of Appeal opinions in other matters have concluded that the key question for an appellate court in reviewing a trial court’s new trial order on the issue of excessive damages is simply “ ‘ “whether a verdict for an amount considerably less than that awarded [by the jury] would have had reasonable and substantial support in the evidence.” ’ ” (*Dell’Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 547 (*Dell’Oca*), quoting *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 379.) In applying this standard, the court in *Dell’Oca* concluded that it did not need to

address the plaintiffs' arguments that the evidence supported the jury verdict or that the trial court should have weighed the evidence differently. (*Id.* at p. 552.)


The analysis of the court below conflicts with the standards laid out in *Dell'Oca*. Instead of first determining if there was substantial evidence to support the new trial order as required in *Dell'Oca*, the court looked to see if substantial evidence supported the jury verdict. (Typed opn. 49.) After reweighing the evidence and stating it could not "as a matter of law" find there were duplicative damages, the court worked backwards and decided there was not a substantial basis for the trial court to have concluded the damages were duplicative. (*Ibid.*) If the court had followed the *Dell'Oca* standard, there would have been no need to address the plaintiffs' arguments that the evidence supported the jury verdict or that the trial court should have weighed the evidence differently. The court should have applied a presumption of correctness to the trial court's order and reversed only upon a showing of abuse of discretion.

The different approaches between this case and *Dell'Oca* creates confusion about how such orders will be reviewed in future cases. This Court should grant review to eliminate this confusion and clarify which approach is correct.

For the foregoing reasons, this Court should grant defendant's petition for review, or in the alternative, order depublication of the Court of Appeal's opinion.

Respectfully submitted,

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cc: See attached Proof of Service