

Supreme Court No. S254938

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CONSERVATORSHIP OF ESTATE  
OF O.B.

Second District Court of  
Appeal No. B290805

T.B., et al.,

Petitioners and Respondents,

vs.  
O.B.,

Objector and Appellant.

SUPREME COURT  
FILED

SEP 13 2019

Jorge Novate Clerk

Deputy

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From a Decision by the Court of Appeal  
Second Appellate District, Division Six  
Case No. B290805

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**APPLICATION OF THE ASSOCIATION OF  
SOUTHERN CALIFORNIA DEFENSE COUNSEL TO  
FILE AMICUS CURIAE BRIEF SUPPORTING  
DEFENDANT AS REGARDS THE APPROPRIATE  
APPELLATE STANDARD OF REVIEW**

**PROPOSED AMICUS CURIAE BRIEF ON BEHALF  
OF SOUTHERN CALIFORNIA DEFENSE COUNSEL  
TO FILE AMICUS CURIAE BRIEF SUPPORTING  
DEFENDANT AS REGARDS THE APPROPRIATE  
APPELLATE STANDARD OF REVIEW**

---

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Attorneys for Prospective Amicus Curiae  
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## TABLE OF CONTENTS

	PAGE
APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL SUPPORTING DEFENDANT AS REGARDS THE APPROPRIATE APPELLATE STANDARD OF REVIEW	6
INTRODUCTION	8
ARGUMENT	10
A. Trial And Appellate Courts Are Perfectly Capable Of Looking At The Evidence Through The Prism Of An Evidentiary Standard.	10
B. A Clear And Convincing Evidence Prism Of Review Does Not Mean That A Court Usurps A Factfinder's Role.	16
CONCLUSION	18
CERTIFICATION	20

## TABLE OF AUTHORITIES

	PAGE
<b>Cases</b>	
<i>Anderson v. Liberty Lobby, Inc.</i> (1986) 477 U.S. 242	10, 11, 12, 13
<i>Estate of Duke</i> (2015) 61 Cal.4th 871	8
<i>Ex parte McInish</i> (Ala. 2008) 47 So.3d 767	12
<i>Food Pro Internat., Inc. v. Farmers Ins. Exchange</i> (2008) 169 Cal.App.4th 976	11
<i>Hoch v. Allied-Signal, Inc.</i> (1994) 24 Cal.App.4th 48	11, 17
<i>In re Angelia P.</i> (1981) 28 Cal.3d 908	11, 15
<i>In re Marriage of Murray</i> (2002) 101 Cal.App.4th 581	13
<i>J.M. v. Huntington Beach Union High School Dist.</i> (2017) 2 Cal.5th 648	7
<i>Johnson &amp; Johnson Talcum Powder Cases</i> (2019) 37 Cal.App.5th 292	11
<i>Looney v. Superior Court</i> (1993) 16 Cal.App.4th 521	12
<i>Matter of Welfare of D.T.J.</i> (Minn.Ct.App. 1996) 554 N.W.2d 104	12
<i>Morgan v. Davidson</i> (2018) 29 Cal.App.5th 540	13

<i>New York Times Co. v. Sullivan</i> (1964) 376 U.S. 254	8, 10
<i>Pacific Gas and Electric Company v. Superior Court</i> (2018) 24 Cal.App.5th 1150	11
<i>Parrish v. Latham &amp; Watkins</i> (2017) 3 Cal.5th 767	7
<i>People v. Jackson</i> (2016) 1 Cal.5th 269	14, 16, 18
<i>Perry v. Bakewell Hawthorne, LLC</i> (2017) 2 Cal.5th 536	7, 10
<i>Shade Foods, Inc. v. Innovative Products Sales &amp; Marketing, Inc.</i> (2000) 78 Cal.App.4th 847	17
<i>Sheehan v. Sullivan</i> (1899) 126 Cal. 189	15
<i>Sheila S v. Superior Court</i> (2000) 84 Cal.App.4th 872	13
<i>Stewart v. Truck Ins. Exchange</i> (1993) 17 Cal.App.4th 468	11
<i>Troester v. Starbucks Corp.</i> (2018) 5 Cal.5th 829	6
<i>Vasilenko v. Grace Family Church</i> (2017) 3 Cal.5th 1077	7
<i>Williams v. Precision Coil, Inc.</i> (W.Va. 1995) 459 S.E.2d 329	12
<i>Woody v. Stapp</i> (Wash.Ct.App. 2008) 186 p.3d 807	12

**Statutes**

Civ. Code, § 3294 8, 15

Code Civ. Proc., § 425.13 9, 12

Code Civ. Proc., § 425.16 9

Code of Civ. Proc., § 425.14 9

**Other Authorities**

Cal. Rules of Court, rule 8.200 6

Witkin, Cal. Evid.  
(5th ed. 2019) Burden of Proof, § 40 8

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE  
BRIEF OF THE ASSOCIATION OF SOUTHERN  
CALIFORNIA DEFENSE COUNSEL SUPPORTING  
DEFENDANT AS REGARDS THE APPROPRIATE  
APPELLATE STANDARD OF REVIEW**

Pursuant to California Rules of Court, rule 8.200(c)(1), the Association of Southern California Defense Counsel (ASCDC) respectfully requests leave to file an amicus brief supporting the position of defendant the Association of Southern California Defense Counsel as regards the appropriate appellate standard of review.

ASCDC is the nation's preeminent regional organization of lawyers who specialize in defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members and has appeared as amicus curiae in numerous appellate cases.

ASCDC members routinely represent clients in defending actions which involve heightened clear and convincing trial court burdens of proof, e.g., punitive damages (including whether such damages may even be pleaded against religious or healthcare defendants and whether discovery can be conducted as to the defendant's financial circumstances) and public-figure defamation claims. ASCDC has appeared as amicus curiae in courts across California, including numerous recent appearances before this Court. (See, e.g., *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829; *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th

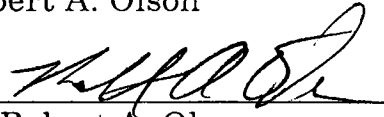
1077; *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536;  
*J.M. v. Huntington Beach Union High School Dist.* (2017) 2  
Cal.5th 648; *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767.)

Counsel for ASCDC has reviewed the briefing. ASCDC does not intend to repeat legal arguments already made. It believes, however, that it can provide an important broader perspective going beyond this particular case. No party has funded this amicus brief nor has any party drafted it. It is solely the work of counsel representing ASCDC.

ASCDC respectfully requests that it be granted leave to file the accompanying Amicus Curiae Brief supporting defendants.

Date: September 6, 2019      Respectfully Submitted,

GREINES, MARTIN, STEIN &  
RICHLAND LLP  
Robert A. Olson

By   
Robert A. Olson

Attorneys for Prospective  
Amicus Curiae Association of  
Southern California Defense  
Counsel



## INTRODUCTION

Courts and judges, both appellate and trial, routinely apply evidentiary proof and standards of review prisms in evaluating the sufficiency of evidence. A distinct minority of Court of Appeal decisions have held that courts and judges are incompetent to do so in one specific context—appellate review of the sufficiency of evidence to meet a clear and convincing standard of proof. Although this issue is presently before this Court in a conservatorship context, it arises in many others, most notably punitive damages for which liability, by statute, must be established by clear and convincing evidence. (Civil Code, § 3294.) A noted treatise lists 22 distinct civil subjects on which clear and convincing proof is required. (1 Witkin, Cal. Evid. (5th ed. 2019) Burden of Proof, § 40 see, e.g., *Estate of Duke* (2015) 61 Cal.4th 871, 879 [“reformation (of wills is only) permissible if clear and convincing evidence establishes an error in the expression of the testator’s intent and establishes the testator’s actual specific intent at the time the will was drafted”].) *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, requires such a level of evidence in a defamation claim brought by a public figure or on a public issue.

Procedurally, appellate *and* trial courts confront the issue of whether the evidence suffices to meet a heightened evidentiary standard at a variety of stages, e.g.: whether a punitive damages claim may be pleaded against a healthcare provider or religious institution (Code Civ. Proc., §§ 425.13 & 425.14), on an anti-SLAPP motion (Code Civ. Proc., § 425.16) involving a defamation claim brought by a public figure, on motions for summary judgment, summary adjudication, nonsuit, directed verdict, and judgment notwithstanding verdict. Yet the minority rule appears to be the appellate judges, who routinely set aside their personal views in determining whether evidence meets a preponderance standard or whether a trial court has properly exercised discretion, are uniquely incapable of evaluating evidence according to a clear and convincing evidence yardstick.

This Court should adopt the majority rule. That rule is that courts—trial, when acting in a nonfactfinding capacity, and appellate—evaluate the sufficiency of evidence through the prism of the applicable standard of proof. Evaluating evidence through evidentiary proof and standard of review prisms is what both trial and appellate judges do day in and day out. They are as

capable of doing so when the standard is clear and convincing evidence as they are in any other context.

## ARGUMENT

### A. Trial And Appellate Courts Are Perfectly Capable Of Looking At The Evidence Through The Prism Of An Evidentiary Standard.

If not the seminal case, perhaps the best encapsulation of a court's nonfactfinder role (e.g., on summary judgment motion) in evaluating evidence pursuant to a heightened standard of proof is the United States Supreme Court's holding in *Anderson v.*

*Liberty Lobby*: “[T]he judge must view the evidence presented *through the prism* of the substantive evidentiary burden.”

(*Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 254-255

(*Anderson*), italics added.) *Anderson* involved a summary

judgment motion (i.e., a judge not acting as factfinder) and a *New*

*York Times v. Sullivan* “clear and convincing” substantive

evidentiary burden. (See *Perry v. Bakewell Hawthorne* (2017) 2

Cal.5th 536, 542 [California summary judgment statute amended

to bring it closer to federal counterpart, thereby liberalizing the

granting of summary judgment].)

Numerous California courts have followed the United States Supreme Court's "prism" approach in a variety of procedural postures. (E.g., *In re Angelia P.* (1981) 28 Cal.3d 908 [substantial-evidence challenge to termination of parental rights; "termination of parental rights is appropriate based on clear and convincing evidence" that a reasonable trier of fact could find]; *Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, 333 [affirming grant of judgment notwithstanding verdict as to punitive damages using heightened standard in reviewing the evidence]; *Pacific Gas and Electric Company v. Superior Court* (2018) 24 Cal.App.5th 1150, 1159, 1174-1176 [mandating summary adjudication of a punitive damages claim]; *Food Pro Internat., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 993 [affirming grant of summary adjudication on claim for punitive damages]; *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 62 [citing *Anderson*; "No reasonable jury could consider this clear and convincing proof of malicious conduct"; affirming nonsuit on punitive damages]; *Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 481-482 ["the trial court (in granting a nonsuit) properly viewed the evidence presented by (the plaintiff) with that higher burden in mind"]; *Looney v.*

*Superior Court* (1993) 16 Cal.App.4th 521, 539 [citing *Anderson*; Code. Civ. Pro., § 425.13 determination whether to allow punitive damages to be sought against healthcare provider; “the evidence and all inferences which can reasonably be drawn therefrom must meet that higher (clear and convincing) standard”].)

So have courts in other states. (E.g. *Ex parte McInish* (Ala. 2008) 47 So.3d 767, 773-778; *id.* at p. 778 [“Put another way, the quantum of proof necessary to sustain on appeal, as supported by substantial evidence in the record, a finding of fact based on a clear-and-convincing-evidence standard is greater than the quantum of proof necessary to sustain on appeal, as supported by substantial evidence in the record, a finding of fact based on the lesser standard of a preponderance of the evidence”]; *Woody v. Stapp* (Wash.Ct.App. 2008) 186 p.3d 807, 810 [“we must determine whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the nonmoving party supported his or her claim with clear, cogent, and convincing evidence”]; *Williams v. Precision Coil, Inc.* (W.Va. 1995) 459 S.E.2d 329, 339 [adopting *Anderson*]; *Matter of Welfare of D.T.J.* (Minn.Ct.App. 1996) 554 N.W.2d 104, 107–108 [“In other words the applicable quantum of evidence

defined by 'substantial evidence' in a given case on appeal from a nonadministrative decision will vary according to the burden of proof that a party is required to satisfy in the district court for such a case. [Citation to *Anderson*.] In a case where the district court's decision is governed by a 'preponderance of the evidence' burden of proof, for example, we will review the record for substantial evidence that the preponderance of the evidence burden was met. We require a different quantum of 'substantial evidence' on appeal before we may uphold a decision for a case where a 'clear and convincing' burden of proof applies in the district court. Similarly, our review of a district court decision made according to a 'beyond a reasonable doubt' burden of proof will require yet another quantum of evidence to satisfy the 'substantial evidence' standard on review. Thus, substantial evidence as a review standard will vary according to the burden of proof applicable at the district court level"].)

The minority of California cases that hold to the contrary do not discuss *Anderson*. (See *Morgan v. Davidson* (2018) 29 Cal.App.5th 540, 548-550; *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 603-604; *Sheila S v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881). They are premised on the assumption

that judicial officers and reviewing courts cannot put aside their own personal weighing of the evidence. But those decisions do not explain why that is so only when courts are reviewing matters subject to a clear and convincing burden of proof. They do not explain why judges can put aside their personal evaluations of circumstances when reviewing whether a trial court properly exercised discretion or why courts' ability to judge whether a reasonable jury could find that evidence met a preponderance of evidence standard is qualitatively different from putting aside such personal evaluations in determining whether a reasonable jury could find the evidence to have been clear and convincing.

Indeed, in reviewing the sufficiency of evidence to sustain a criminal conviction under a beyond a reasonable doubt standard, this Court follows a comparable "prism" standard: "[T]his court 'reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Jackson* (2016) 1 Cal.5th 269, 345, citation and internal quotation marks omitted.) It does not look for "any

substantial evidence” of guilt, even if such evidence might support a preponderance of evidence finding. It requires “reasonable, credible, and of solid value” evidence that a reasonable jury could find rises to a “beyond a reasonable doubt” level.

The clear and convincing standard of proof, likewise, requires an elevated quantum of evidence (although not quite to the beyond-a-reasonable-doubt standard) to support a finding. “Clear and convincing’ evidence requires a finding of *high probability*.... [It] requir[es] that the evidence be ‘so clear as to leave *no substantial doubt*’; ‘sufficiently strong to command the *unhesitating assent* of every reasonable mind.” (*In re Angelia P.*, *supra*, 28 Cal.3d at p. 919, italics added, citation and internal quotation marks omitted.) This standard has been around for 120 years. (*Ibid.*, citing *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193.) In many instances, this heightened standard is statutorily required (e.g., Civ. Code, § 3294), not just a matter of judicial choice. The Legislature is properly presumed to have known such a long-established standard in imposing it. If the standard does not apply to judicial review—on appeal, on motion for judgment notwithstanding verdict, on summary judgment—it



becomes watered down and effectively undercut. The Legislature's choice to require the particular elevated level of proof becomes effectively negated whenever a factfinder disregards it or errs in applying it.

**B. A Clear And Convincing Evidence Prism Of Review Does Not Mean That A Court Usurps A Factfinder's Role.**

The premise of the few cases that suggest that the clear and convincing evidentiary standard has to be thrown out on appeal (and presumably, contrary to *People v. Jackson, supra*, a beyond a reasonable doubt standard would have to be thrown out in a criminal appeal), is that using the prism of a clear and convincing standard of proof would mean that reviewing courts (or trial courts on summary judgment, nonsuit, judgment notwithstanding the verdict, and the like) would be substituting their own judgments for a factfinder's. But that is not the prism standard.

The prism standard does not mean that the reviewing court "weighs" the evidence, rejecting some and accepting some. Rather, it means that in evaluating the evidence the court has to

decide whether a reasonable factfinder *could* find that the evidence meets the relevant evidentiary standard hurdle. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891 [(S)ince the jury’s findings were subject to a heightened burden or proof, we must review the record in support of these findings in light of that burden”; reversing jury award of punitive damages].) In doing so, the court still construes the evidence most favorably to the party who is entitled to the factual presumption (e.g., the prevailing party after trial, the party opposing summary judgment, the party opposing an anti-SLAPP motion). The question for the court is whether a reasonable factfinder could find the evidence meets the evidentiary standard, when the facts are so construed.

The court’s task is to determine whether a reasonable factfinder could (not must, not should) find that the evidence met or meets that standard. A string of thin inferences might suffice to find that something is more probable than not, yet at the same time not suffice to find that something is “clear and convincing proof.” (*Hoch v. Allied-Signal, Inc.*, *supra*, 24 Cal.App.4th at p. 62.) The question is not what the appellate court (or trial judge

in a nonfactfinding capacity) would find, but what a *reasonable jury* could find under the appropriate standard.

According to *People v. Jackson*, this Court would reverse criminal convictions where the evidence, making every inference, credibility determination, and evidentiary conflict resolution in favor of the prosecution, is not so reasonable, credible, and of solid value to support a beyond a reasonable doubt determination. The result should be no different when it comes to clear and convincing evidence sufficient to support punitive damages, will reformation, termination of parental rights, or any of the myriad of other clear and convincing evidence issues. Rather than the court weighing the evidence, the court is determining an issue of law. The court determines whether, when the evidence is construed in the light most favorable to the party entitled to the factual presumption, the evidence would suffice to meet the applicable burden of proof.

## CONCLUSION

Amicus Association of Southern California Defense Counsel takes no position on how this case ought to ultimately come out. But the *path* that is followed to ultimate resolution is critical.

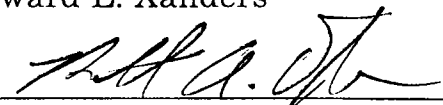
Review of issues requiring proof by clear and convincing evidence must be through the prism of that standard such that a finding can only be upheld if supported by reasonable, credible, solid value evidence that a reasonable factfinder *could* conclude meets a higher clear and convincing standard. This is the same standard that should apply both on appeal and in the trial court when it reviews the sufficiency of the evidence in a nonfactfinding context, e.g., motions for summary judgment, nonsuit, directed verdict, or judgment notwithstanding the verdict.

Date: September 6, 2019      Respectfully Submitted,

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By



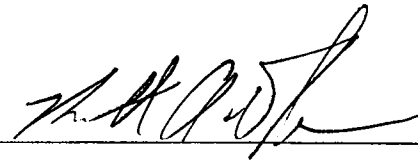
Robert A. Olson

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## CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF SUPPORTING DEFENDANT AS REGARDS THE APPROPRIATE APPELLATE STANDARD OF REVIEW** contains **2,199** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: September 6, 2019

A handwritten signature in black ink, appearing to read "R. O. Olson", is written above a horizontal line.

Robert O. Olson

## PROOF OF SERVICE

### STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On September 6, 2019, I served the foregoing document described as:

**APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF SUPPORTING DEFENDANT AS REGARDS THE APPROPRIATE APPELLATE STANDARD OF REVIEW and**

**PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF SUPPORTING DEFENDANT AS REGARDS THE APPROPRIATE APPELLATE STANDARD OF REVIEW**

on the parties in this action by serving:


#### SEE ATTACHED SERVICE LIST

(X) By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on September 6, 2019, at Los Angeles, California.

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

  
Francene Wilson

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