ASCDC Association of Southern California Defense Counsel

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January 20, 2015

AMICUS LETTER IN SUPPORT OF REVIEW
(California Rules of Court, rule 8.500(g)(1))

Honorable Tani Cantil-Sakauye, Chief Justice
Honorable Kathryn Mickle Werdegar, Associate Justice
Honorable Ming W. Chin, Associate Justice
Honorable Carol A. Corrigan, Associate Justice
Honorable Goodwin Liu, Associate Justice
Honorable Mariano-Florentino Cuéllar, Associate Justice
Honorable Leondra R. Kruger, Associate Justice
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Izell v. Union Carbide Corp.*, No. S223511

Dear Honorable Justices:

I write on behalf of the Association of Southern California Defense Counsel to urge this Court to grant review in this case.

The Association's Interest. The Association is amongst the nation's largest and preeminent regional organizations of lawyers who routinely defend civil actions, comprised of over 1,000 leading civil defense bar attorneys in Southern California. It is active in assisting courts on issues of interest to its members. It has appeared numerous times as amicus curiae in this Court and the Court of Appeal. It provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and

multi-faceted support, including a forum for the exchange of information and ideas.

The Association's members regularly defend civil cases in which punitive damages are sought, especially in jury trials. They are concerned that clear and even-handed rules apply to such damages. And, its members have a direct concern that they be allowed the opportunity to argue punitive damages to juries based on a correct view of what the underlying compensable harm has been.

No party has paid for or drafted this letter.

A Defendant's Right To A Jury's Determination Of Punitive Damages. A civil defendant is and should be as much entitled to a *jury's* verdict as a civil plaintiff. The award of punitive damages – both whether to award any punitive damages and the amount – is in the first instance in the jury's hands. It is indisputable that one of the factors that the jury must consider is the "reasonable relationship" of punitive damages to the compensable harm. (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 571-572, 580, 116 S.Ct. 1589, 134 L.Ed.2d 809 [jury cannot punish for out-of-state harm; punitive damages must bear "reasonable relationship" to compensatory harm].) What is the "reasonable relationship" between punitive damages and compensatory damages is, in the first instance, for the jury to decide. (See, e.g., CACI No. 3940.) Whether even to award punitive damages at all, even though the conditions for punitive liability have been found, is within the jury's complete, unfettered discretion. (*Sumpter v. Matteson* (2008) 158 Cal.App.4th 928, 930.)

No one would suggest that if a jury determined an amount of punitive damages and, on appeal, it were determined that the plaintiff was entitled to certain erroneously stricken undisputed compensatory amounts (e.g., collateral source payments), the plaintiff would not be entitled to retry punitive damages. Of course the plaintiff would be entitled to do so. That is because the *jury* would need to redetermine, in the first instance, the "reasonable relationship" between punitive damages and the newly minted compensable harm as determined on appeal.

The Threefold Split In Appellate Authority. A complete split in authority has developed, exemplified by the Court of Appeal opinion in this case

and detailed in the petition for review (Petn. at 4-5, 20-25), as to whether defendants are equally entitled to have a jury revisit the amount of punitive damages and their "reasonable relationship" to compensable harm when the jury has improperly awarded compensatory damages that should not have been awarded. On the one hand, this case and *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 536-537, hold that the appellate court gets to substitute its judgment for *a jury's* as to whether, in the first instance, a punitive award bears a "reasonable relationship" to necessarily reduced compensable harm. This is not a question of what the constitutional limit of punitive damages might be, but what amount a factfinder (a jury) might, in its discretion, award in the first instance, before constitutional limits are applied or even whether, given reduced compensable harm, the jury would be inclined to award *any* punitive damages at all.

In direct conflict, other published Court of Appeal authority recognizes that if compensatory damages are to be retried or reduced as a matter of law, it is *a jury's* function, in the first instance, to determine whether the punitive damage award bears a reasonable relationship to the reduced compensable harm, indeed, whether *any* punitive damages are justified. (See *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1190 ["We cannot . . . simply reduce the damages and modify the award on the fraud cause of action at this stage. Because the jury was misled about the amount of compensatory damages it could award, its punitive damage award is suspect"]; *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120, 1144 [reversing judgment on "the issue of damages with directions to the trial court to set the matter for retrial as to the issue of damages, both compensatory and punitive"].)

The present opinion dismisses these conflicting cases as premised on constitutional principles prohibiting excessive punitive damages. (See Opn. at 29-30 & fn. 9.) But that is not the case. As the Opinion itself recognizes, these opinions did not rely on constitutional principles. (*Ibid.*) Rather, they were premised on the fundamental right of both sides – plaintiff *and* defendant – to the *jury's* determination, in the first instance, of the appropriate punitive damage amount. That includes a calculus premised on a reasonable relationship between punitive damages and compensable harm, based on a *legally accurate measure of compensable harm.*

Under the Opinion's construct, the courts in *Auerbach* and *Ramona Manor* could have simply reduced the amount of punitive damages to a constitutionally permissive maximum and left it at that. That might be more efficient, avoiding a retrial, but it would not be fair. That approach denies a defendant the right to a jury determination based on a *correct* premise as to the compensable harm involved. This is no different than if the jury had been prejudicially misinstructed that it could award the wrong measure of compensatory damages. If error in the instruction is found, the judgment cannot be affirmed on the basis that the total damages that the jury awarded – having been prejudicially misinstructed – were within the range of amounts that the evidence would have supported had it been properly instructed.

But the conflict and confusion does not stop with the Opinion/*Behr* (affirm punitive damages without retrial when compensatory damages are reduced as excessive as a matter of law) versus *Auerbach/Ramona Manor* (retry punitive damages when compensatory damages are reduced, at least substantially so). There is a *third* conflicting precedent: *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1255. *Las Palmas* rejects both such approaches. It creates a third path. Under *Las Palmas*, when compensatory damages are reduced as a matter of law, punitive damages are reduced proportionally.

Thus, there currently exists no rhyme or reason as to how punitive damages are to be treated when a compensable harm award is reduced as legally unsupportable. This issue obviously affects numerous appeals where punitive damages are involved and compensatory damages are challenged as legally excessive. It has resulted in multiple published, conflicting appellate opinions in that regard. But it is not limited to appeals. This same issue arises repeatedly in post-trial motions. What is a trial court to do when it finds on a post-judgment motion that certain compensatory damages are legally unsupportable? Is it to order a retrial of punitive damages as *Auerbach* and *Ramona Manor* direct it to do? Is it to let the punitive damages stand unaffected as *Behr* and the Opinion here direct? Or is it to reduce the punitive damages proportionally as *Las Palmas* mandates? A conscientious trial judge has no consistent appellate direction. Whatever way the trial court rules can be deemed wrong on appeal.

The bottom line is that civil defendants, as much as civil plaintiffs, should be entitled to *a jury's properly informed* determination of a "reasonable

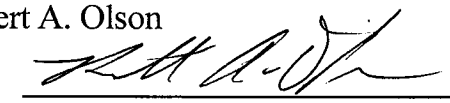
relationship" between punitive damages and compensable harm. The Opinion/*Behr* approach discriminates against defendants. Under that approach defense counsel is never given the opportunity to argue to the jury what, if any, punitive award is appropriate based on *a correct view of compensable harm.* Plaintiffs, on the other hand, are allowed to argue punitive damages premised on a reasonable relationship either to the actual compensatory damages or based on an *inflated* view of compensable harm. That is unfair. But under the confused state of the law as exemplified by the Opinion here that is the result in at least some cases.

The Conflict Will Persist. The conflict here is not going away. There are multiple published authorities going each way. This issue arises every time there is a punitive damages award and the compensatory damages are challenged. The principle that a defendant as well as a plaintiff is entitled to a jury's properly informed views remains a part of the fabric of the law and, indeed, of any fair legal system. So does or should the rule that defense counsel should be allowed to argue to the jury based on a proper view of the case.

Conclusion: Grant Review. This Court should grant review to resolve the conflict and to restore equity in jury punitive damages determinations as between defendants and plaintiffs.

Respectfully submitted,

ASSOCIATION OF SOUTHERN
CALIFORNIA DEFENSE COUNSEL
Robert A. Olson

By: 

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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 90036-3697.

On January 20, 2015, I served the foregoing document described as: **AMICUS LETTER IN SUPPORT OF REVIEW** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

I deposited such envelope(s) in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

(X) BY MAIL: As follows: 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 the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on January 20, 2015, at Los Angeles, California.

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

JOYCE McGILBERT

Izell v. Union Carbide Corp., No. S223511

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