S241431

**IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA**

SUPREME COURT
FILED

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Deputy

JANICE JARMAN

Plaintiff and Appellant,

v.

HCR MANOR CARE, INC. and MANOR CARE OF HEMET CA, LLC

Defendant.

On Review From The Court Of Appeal For the Fourth Appellate District, Division Three, 4th Civil No. G051086

After An Appeal From the Superior Court For The State of California, County of Riverside, Case Number RIC10007764, Hon. Phrasel Shelton and Hon. John Vineyard

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NOTICE OF ERRATA AND APPLICATION TO FILE AMENDED AMICUS BRIEF

HOOPER, LUNDY & BOOKMAN, P.C.
*Mark E. Reagan (State Bar No. 143438)
E-Mail: mreagan@health-law.com
Jordan Kearney (State Bar No. 305483)
E-Mail: jkearney@health-law.com
575 Market Street, Suite 2300
San Francisco, California 94105
Telephone: (415) 875-8500
Facsimile: (415) 875-8519

Attorneys for Proposed *Amicus Curiae* California Association of Health Facilities

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Facsimile: (415) 875-8519

Attorneys for Proposed *Amicus Curiae* California Association of Health Facilities

NOTICE OF ERRATA AND

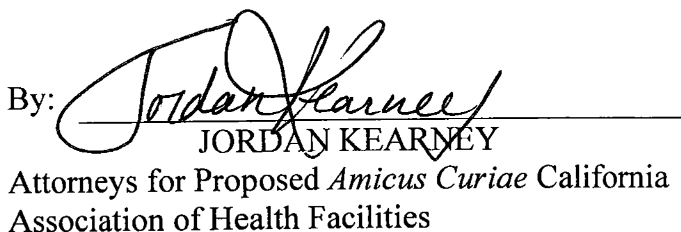
APPLICATION TO FILE AMENDED AMICUS BRIEF

PLEASE TAKE NOTICE that on October 17, 2018, Counsel for *amicus curiae*, the California Association of Health Facilities ("CAHF"), caused to be filed in this Court a brief that inadvertently misquoted the text of Assem. Bill No. 1160 (1999-2000 Reg. Sess.) as introduced on Feb. 25, 1999 and subsequently amended on Apr. 8, 1999 (Defendant's Motion for Judicial Notice ("Def. RJN") Ex. 18, pp. 69–70) on pages 15, 18, and 20. The prior filing indicated that, in 1999, the Legislature considered a bill that would have added punitive damages as a remedy authorized under Health and Safety Code, Section 1430(b). This was incorrect. At that time, the Legislature considered and rejected a proposed increase of the $500 maximum statutory award to $25,000. We apologize for this error.

Counsel for *amicus curiae* CAHF respectfully requests that this Court accept the attached Amended Brief In Support Of Defendants And Appellants By *Amicus Curiae* California Association Of Health Facilities, which corrects the citation error but does not change the substantive argument.

Dated: November 5, 2018

HOOPER, LUNDY & BOOKMAN, P.C.



By: ______________________
JORDAN KEARNEY
Attorneys for Proposed *Amicus Curiae* California Association of Health Facilities

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AMENDED BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS BY PROPOSED *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF HEALTH FACILITIES

HOOPER, LUNDY & BOOKMAN, P.C.
*Mark E. Reagan (State Bar No. 143438)
E-Mail: mreagan@health-law.com
Jordan Kearney (State Bar No. 305483)
E-Mail: jkearney@health-law.com
575 Market Street, Suite 2300
San Francisco, California 94105
Telephone: (415) 875-8500
Facsimile: (415) 875-8519

Attorneys for Proposed *Amicus Curiae* California Association of Health Facilities

TABLE OF CONTENTS

Page

I. INTRODUCTION 5

II. SECTION 1430(b) ESTABLISHES A $500 LIMIT PER LAWSUIT..7

A. The Plain Language of the Statute Provides a Maximum Remedy of $500. 7

B. The Context of Section 1430(b) Also Supports the Application of the Cap to the Entire Cause of Action. 8

C. The Maximum Award of $500 is Supported by the Legislative History of Section 1430(b). 10

III. SECTION 1430(b) CANNOT BE THE BASIS FOR A PUNITIVE DAMAGES AWARD..19

A. The Legislature's Purposeful Rejection of Punitive Damages Controls. 19

B. Punitive Damages Are Not Available for Rights Created by Statute. 20

IV. EXISTING LAW PROTECTS RESIDENTS' RIGHTS..........................21

V. CURRENT ABUSE OF SECTION 1430(b) EXTORTS LARGE ATTORNEY FEE AWARDS WITH NEGLIGIBLE BENEFIT TO RESIDENTS. 24

A. Section 1430(b) Funds Tort Actions Against SNFs. 24

B. Before *Nevarrez* and *Lemaire*, Lawyers Manipulated Allegations to Maximize Section 1430(b) Penalties.....................25

C. Since the Court of Appeal Decision in *Jarman*, Abusive Section 1430(b) Practices Have Resurfaced. 28

VI. CONCLUSION..29

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Ag Seal Beach,
No. B228683, 2011 Cal. App. 25

Cal. Assn. of Health Facilities. v. Dep't. of Health Svcs.
(1997) 16 Cal.4th 284 .... 21, 22

Commodore Home Systems, Inc. v. Superior Court
(1982) 32 Cal.3d 211 19

De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates (2001)
94 Cal.App.4th 890 20

Hunt v. Superior Court
(1999) 21 Cal.4th 984 7

Jarman v. HCR ManorCare, Inc.
(2017) 9 Cal.App.5th 807, 816-817 .... 21, 28

Lemaire v. Covenant Care Cal., LLC
(2015) 234 Cal.App.4th 860 .... *passim*

Lipow v. Regents of Univ. of Cal.
(1975) 54 Cal.App.3d 215 9

Moyer v. Workmen's Comp. Appeals Bd.
(1973) 10 Cal.3d 222 8

Nevarrez v. San Marino Skilled Nursing & Wellness Centre
(2013) 221 Cal.App.4th 102 .... 7, 25, 28

People v. One 1940 Ford V8 Coupe
(1950) 36 Cal.2d 471 8

People v. Tingcungco
(2015) 237 Cal.App.4th 249 20

Roberts v. City of Palmdale
(1993) 5 Cal.4th 363 7

Santa Cruz v. Mun. Court
(1989) 49 Cal.3d 74 20

TABLE OF AUTHORITIES

Page

Statutes and Regulations

Cal. Code Regs., tit. 22
§ 72517 26
§ 72543 26
§ 72701 12

Health & Saf. Code
§ 1424 .... 9, 10, 11, 12
§ 1424.5 .... 10, 11
§ 1425 9
§ 1430 .... *passim*
§ 1599 to 1599.4 11

Welf. & Inst. Code
§ 14126 23
§ 14126.022 23
§ 15657 25

42 C.F.R.
§ 483.20 26

42 C.F. R. § 483.25 25

42 C.F.R.
§ 483.75 26

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Stevenson, D.G. and Studdert, D.M., *The Rise of Nursing Home Litigation: Findings from a National Survey of Attorneys* 16, 17

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I. INTRODUCTION

Proposed *amicus curiae* California Association of Health Facilities ("CAHF") respectfully submits this brief to the Court on behalf of Defendants and Appellants on the issues of the maximum allowable damages award under Health and Safety Code section 1430, subdivision (b) ("Section 1430(b)") and whether the statute authorizes an award of punitive damages. CAHF is a non-profit association representing more than 1,300 licensed skilled nursing, intermediate care, ICF-DD, ICF-MR and subacute facilities (collectively referred to as "long-term care facilities") in the State of California. As an instrumental stakeholder in the legislative enactment of Section 1430(b), CAHF provides insight on the legislative background and intent behind Section 1430(b), the reasons why the Plaintiff's interpretation is erroneous, and the broad implications of the Court's ruling in this matter.

The plain language of Section 1430(b) authorizes a maximum $500 award in a civil action for violations of resident rights and does not allow for punitive damages. The statute permits current or former residents of skilled nursing facilities ("SNFs") or intermediate care facilities to bring "a civil action against the licensee of a facility who violates any rights of the resident[,]" while providing that in such a civil action, the licensee "shall be liable for up to five hundred dollars ($500), and for costs and attorney fees, and may be enjoined from permitting the violation to continue."

This interpretation is consistent with the legislative intent and purpose behind Section 1430(b). In the Long-Term Care, Health, Safety, and Security Act of 1973 (the "Act"), the Legislature established a regulatory scheme for the California Department of Health Services, now the California Department of Public Health (the "Department"), to assess civil penalties on long-term care facilities for violations of licensure requirements that had a relationship to resident health and safety. In 1979,

the Legislature enacted the Residents Bill of Rights to establish the "rights" of residents in long-term care facilities, such as the right to be treated with consideration, respect, and dignity and the right to visiting hours.

In 1982, the Legislature enacted Section 1430(b) as a method of private enforcement of these "rights." CAHF was actively involved with this process and can attest that the Legislature intended for Section 1430(b) to provide a quick remedy for residents to pursue awards for intangible harms of nominal value arising from rights violations and to prevent them from occurring again via injunction. The Legislature established a global $500 cap on such cases in lieu of any standard of proof on actual damages or punitive damages, which had each previously been proposed. This interpretation is supported by the text of the statute and voluminous references in the legislative history of Section 1430(b).

Importantly, Section 1430(b) also gave residents the ability to obtain an injunction to prevent any future violation of their rights and to be reimbursed for all of their attorneys' fees for bringing the action. Therefore, even in the absence of administrative enforcement, the injunctive relief provided by Section 1430(b) is a powerful tool to ensure the protection of residents' rights.

Section 1430(b)'s ancillary monetary award is not intended to act punitively against facilities. Over the years, the Legislature has considered and rejected several versions of Section 1430(b) that would have given residents the authority to pursue actions for more than $500 for violations of residents' rights. The Legislature rejected these proposals armed with evidence that the increased costs of litigation and skyrocketing insurance premiums impaired access to care and impeded efforts to improve quality of care. This court should not amend Section 1430(b) to authorize awards that the Legislature intentionally rejected.

The impact of the permissible damages under Section 1430(b) has broad implications beyond this case. Aggressive trial lawyers have undermined the plain language, intent, and policy behind Section 1430(b) by "stacking" awards, either by: (1) alleging multiple violations of the same right, by defining a "violation" based on separate days, shifts, administrations of medication, or other easily multiplied units; (2) alleging violations of multiple rights for the same conduct; or (3) using the class action mechanism to allege violations for a class of residents. This strategy contradicts the language used by the Legislature in Section 1430(b), as well as the legislative history.

Based on the above and the arguments set forth herein, *amicus curiae* CAHF requests that this court overturn the Court of Appeal's decision and provide published guidance to the lower on the proper interpretation of Section 1430(b).

II. <u>SECTION 1430(b) ESTABLISHES A $500 LIMIT PER LAWSUIT.</u>

CAHF served as an *amicus curiae* to the courts in *Nevarrez v. San Marino Skilled Nursing & Wellness Centre* (2013) 221 Cal.App.4th 102 and *Lemaire v. Covenant Care Cal., LLC* (2015) 234 Cal.App.4th 860. *Nevarrez* and *Lemaire* correctly held that Section 1430(b) permits a single award of up to $500 per civil action, upon review of Section 1430(b)'s language, the statutory scheme, and the legislative history. CAHF urges this Court to adopt the reasoning in *Nevarrez* and *Lemaire.*

A. <u>The Plain Language of the Statute Provides a Maximum Remedy of $500.</u>

The Court must "look first to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs." (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000; *see also Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372

["It is not [a court's] function...to add language...to statutes."]; *People v. One 1940 Ford V8 Coupe* (1950) 36 Cal.2d 471, 475 ["In construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language."])

Section 1430(b) specifically contemplates a maximum award of $500 per civil action. The relevant portion of the operative statute states:

> A current or former resident or patient of a skilled nursing facility...may bring a civil action against the licensee of a facility who violates any rights of the resident...The licensee shall be liable for up to five hundred dollars ($500), and for costs and attorney fees, and may be enjoined from permitting the violation to continue.

(Section 1430(b) [emphasis added].) This language grants a resident the authority to "bring a civil action" against a long-term care facility for violations of his or her "rights," meaning that the action may encompass multiple violations of a resident's rights. The provision then sets forth that the maximum liability for the licensee is $500 in any such action.

The statute is not ambiguous. It does not include any per violation or per primary right award. The law provides recovery of up to $500 for a civil action brought by a current or resident.

B. The Context of Section 1430(b) Also Supports the Application of the Cap to the Entire Cause of Action.

A comparison of the language of Section 1430(b) to the language of other provisions of the Act supports the interpretation that Section 1430(b) provides for penalties on a per-lawsuit basis. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 231 ["[T]he various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole."])

First, Health and Safety Code Section 1430, subdivision (a) ("Section 1430(a)"), which the Legislature adopted nine years before 1430(b), explicitly provides for penalties that scale based on the number of violations:

> The amount of civil damages that may be recovered in an action brought pursuant to this section may not exceed the maximum amount of civil penalties that could be assessed on account of the violation or violations.

(*Id.* [emphasis added].) Section 1430(a), then, provides for an award that increases based on the number of violations proven. Section 1430(b) provides no such sliding scale.

Other provisions in the Act similarly demonstrate that the Legislature knows how to impose "per day" or "per violation" provisions and when it so intends, it does so explicitly. (*See Lipow v. Regents of Univ. of Cal.* (1975) 54 Cal.App.3d 215, 223 [where the courts have not previously interpreted a statute, they must "look for guidance . . . to the companion chapter"].) For example, Health and Safety Code section 1424, as initially enacted in 1973, assessed civil penalties for class "A" and class "B" violations "for each and every violation."[1] (Health & Saf. Code § 1424, as enacted by Stats. 1973, ch. 1057, § 1.) Health and Safety Code section 1425 similarly authorized and authorizes the Department to "assess the licensee a civil penalty in the amount of fifty dollars ($50) for each day that such deficiency continues" when a licensee fails to correct said deficiency.

The Legislature's explicit provision for per violation or per day damages in other provisions in the Act and its decision not to include such provisions in Section 1430(b) reflects the Legislature's intent and was not

[1] This provision now assesses civil penalties "for each and every citation."

made by accident. The Legislature's choice of language in Section 1430(b) creates a $500 cap per action.

C. **The Maximum Award of $500 is Supported by the Legislative History of Section 1430(b).**

1. Background and Evolution of Section 1430(b).

In 1973, the Legislature enacted Health and Safety Code section 1424, which authorized the Department to issue citations for long-term care facility violations of licensure requirements. These violations were classified as class "A" and class "B" citations based on the relationship of the violations to resident health and safety.

Class "A" violations were violations that the "department determines present an imminent danger to the patients or guests of the long-term health care facility or a substantial probability that death or serious physical harm would result therefrom." (Health & Saf. Code § 1424(a), as enacted by Stats. 1973, ch. 1057, § 1.) Class "A" violations were subject to civil penalties of $1,000–$5,000 "for each and every violation."[2] (*Ibid.*)

Class "B" citations encompassed all other violations which the "department determines have a direct or immediate relationship to the health, safety, or security of long-term health care facility patients[.]" (Health & Saf. Code § 1424(b), as enacted by Stats. 1973, ch. 1057, § 1.)

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[2] Class "A" penalty amounts on skilled nursing facilities or intermediate care facilities are currently $2,000–$20,000. (Health & Saf. Code § 1424.5(a)(2).)

Class "AA" penalty amounts on skilled nursing facilities or intermediate care facilities are currently $25,000–$100,000. (Health & Saf. Code § 1424.5(a)(1).) Class "AA" violations, currently defined as class "A" violations which the "department determines to have been a direct proximate cause of death of a patient or resident of a long-term health care facility[,]" were not introduced until 1985.

Class "B" violations were subject to civil penalties of $50–$250 "for each and every violation."[3] (*Ibid.*)

The Act also included current Section 1430(a), which provided that, in the absence of action by the Department, the Attorney General or any person had the authority to pursue a suit against a licensee who commits a class "A" or "B" violation for an injunction or civil damages, or both. (Health & Saf. Code § 1430, as enacted by Stats. 1973, ch. 1057, § 1; *see also* Section 1430(a).) The total amount of civil damages under Health and Safety Code section 1430(a) was limited to the maximum amount for "A" or "B" citations. (*Ibid.*) This provided a remedy to residents that was cumulative to other remedies provided by law, such as elder abuse or other tort remedies. (*Ibid.*)

In 1979, the Legislature enacted the Skilled Nursing and Intermediate Care Facility Patient's Bill of Rights, sections 1599 to 1599.4 of the Health and Safety Code. The Legislature intended to "set forth fundamental human rights" for long-term care residents.

2. In Enacting Section 1430(b), the Legislature Intended to Establish a Simple Mechanism for Residents to Address Intangible Harms of Nominal Value.

In 1982, Senator Petris introduced SB 1930, which would give residents a private right of action to enforce those rights acknowledged by the Patient's Bill of Rights. (*See* HRC ManorCare, Inc. and Manor Care of

[3] Class "B" penalty amounts on skilled nursing facilities or intermediate care facilities are currently between $100 and $2,000. (Health & Saf. Code § 1424.5(a)(4).) In 1985, the Legislature added to class "B" violations "any violation of a patient's rights as set forth in Sections 72527 and

of Title 22 of the California Administrative Code, that is determined by the state department to cause or under circumstances likely to cause significant humiliation, indignity, anxiety, or other emotional trauma to a patient[.]" (*See* Health & Saf. Code § 1424(e).)

Hemet CA, LLC's Motion for Judicial Notice ("Def. MJN"), Ex. 1, pp. 232 [Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1930 (1981-82 Reg. Sess.) as amended Aug. 2, 1982].) Unlike class "A" and "B" violations, class "C" violations did not have a direct or immediate relationship to the health, safety, or security of long-term health care facility residents and had no associated civil monetary penalty. (Cal. Code Regs., tit. 22, § 72701(a)(4); *Cf* Health & Saf. Code § 1424.) As described by Senator Petris' staff, "existing law does not provide adequate mechanisms to ensure" that residents' rights are not violated. (*Id.*) Prior legislation "failed to provide for any specific mechanism for either an individual resident to enforce his or her rights...or prevent violation of rights which were not directly related to health or safety within the facilities." (*Id.*) Section 1430(b) was designed to fill this gap by providing a simple mechanism for residents to address intangible harms of nominal value.

The Legislature considered a version of Section 1430(b) that would have permitted liability of the greater of $2,500 or three times the actual damages. (Def. MJN, Ex. 2, p. 10 [Sen. Bill No. 1930 (1981-82 Reg. Sess.) as amended Apr. 26, 1982].) CAHF opposed this proposal. (Def. MJN, Ex. 1, p. 0280 [Ltr. from Sen. Petris's staff to CAHF regarding amendments]; *Id.* at p. 0282 [Memo to Sen. Petris summarizing CAHF negotiations).

Ultimately, the Legislature enacted Section 1430(b) with a $500 maximum award for violations of residents' rights in lieu of any requisite proof of damages. (Def. MJN, Ex. 4, p. 19 [Stats. 1982, ch. 1455 (1981-82 Sess.)].) Section 1430(b) also explicitly authorized residents to obtain injunctive relief against ongoing violations of their rights.

By addressing "C" level-type violations, *i.e.*, those not causing actual harm to a resident, Section 1430(b) created a complimentary cause of action to Section 1430(a), which permitted private enforcement of class

"A" or "B" violations. Likewise, the Legislature did not intend to supplant administrative enforcement of the licensure requirements that adversely impacted the health, safety or security of residents. Where a resident suffered actual harm, he/she retained his/her traditional tort remedies to pursue damages for such harm. The establishment of a maximum $500 award for each suit for violations of residents' rights was, therefore, a reasonable ceiling for all such nominal awards.

1. The Legislature Has Consistently Rejected the Imposition of Greater Awards, Each Time Expressing Its Understanding that Section 1430(b) Allowed a Maximum Penalty of $500 per Action.

As shown in the figure at the end of this section, the Legislature has considered and consistently rejected the imposition of greater liability on the long-term care facilities for violations of residents' rights. In rejecting the imposition of higher penalties in subsequent bills, the Legislature repeatedly expressed its understanding that the existing statute imposed a $500 per lawsuit maximum penalty. CAHF – an active participant in the legislative process for the original 1982 bill and for each of the following – can attest that those involved operated under a common understanding that existing law imposed a $500 per lawsuit maximum penalty.

a. AB 2696 of 1990

In 1990, the Legislature rejected proposals in AB 2696: (1) to remove the cap altogether and provide for liability for damages, (2) to allow for a maximum award of damages of up to $25,000, and (3) to authorize a civil penalty of up to $10,000, but only if the resident gave timely notice to the facility and the facility failed to adequately respond. (Def. RJN, Ex. 10, p. 22; Ex. 14, p. 40; Ex. 15, p. 43 [Assem. Bill No. 2696 (1989-90 Reg. Sess.) as introduced Jan. 25, 1990, and as amended May 2, 1990 and June 13, 1990].)

The legislative history for AB 2696 is full of references to the fact that the maximum penalty under existing law was $500 per lawsuit. The initial Bill Analysis provided that the bill would "change[] the maximum recoverable amount from $500 to actual proven damages." (Def. MJN, Ex. 10, p. 23 [emphasis added].) The Legislative Counsel's Digest to AB 2696 as initially proposed stated:

> Under the Long-Term Care, Health, Safety, and Security Act of 1973, a resident or patient of a skilled nursing facility or intermediate care facility is authorized to bring a civil action against the licensee of the facility who violates any rights of the resident or patient provided in the Patients Bill of Rights.... A licensee is liable for up to $500 in damages in an action under these provisions. [¶] This bill would... eliminate the $500 damage limitation for a civil action maintained under these provisions."

(*Id.* at 22.) Various official legislative analyses reflected the author's statement that: "Current law allows patients to bring civil actions against any facility which violates their rights as specified in the Nursing Home Patients' Bill of Rights. There is a cap, however, on the civil penalty which can be awarded in such cases." (Def. MJN, Ex. 11, p. 26 [Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2696 (1989-90 Reg. Sess.) as amended May 2, 1990], ex. 12, p. 31 [Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2696 (1989-90 Reg. Sess.) as amended June 13, 1990], ex. 13, p. 38 [Assembly Third Reading on Assem. Bill No. 2696 (1989-90 Reg. Sess.) as amended July 5, 1990] [emphasis added].) "[A]ttorneys are reluctant to advise frail elderly clients to pursue cases where the maximum award is $500." (Def. MJN, ex. 11, p. 26, ex. 12, p. 31, ex. 13, p. 38 [emphasis added].)

After the Legislature amended the penalty provisions in AB 2696 on July 5, 1990, the Bill Analysis stated that a licensee "is liable for up to $500

in damages in an action under this provision" under existing law, but that the bill would "instead, make a licensee liable for a civil penalty of up to $10,000, payable to the resident or patient, the amount to be commensurate with the rights violated, in a civil action..." (Def. MJN Ex. 16, p. 47 [emphasis added].) Again, this statement clarifies that the $500 was understood to limit the licensee's total civil liability under Section 1430(b).

b. AB 1160 of 1999

In 1999, proposals were rejected in AB 1160 to increase the possible award under Section 1430(b) to $25,000 in damages. (Def. MJN, Ex. 17, p. 58; Ex. 18, pp. 69–70; Ex. 19, pp. 81; Ex. 18, 20, 22, 25 [Assem. Bill No. 1160 (1999-2000 Reg. Sess.) as introduced on Feb. 25, 1999 and subsequently amended on Apr. 8, 1999, Apr. 19, 1999].)

The Legislature's understanding of Section 1430(b) was again evident as it considered proposals to amend it in AB 1160 of 1999. For example, bill analyses explained that AB 1160 was intended to "[i]ncrease[] from $500 to $25,000 the amount a licensee is liable in a civil action based on violations of any rights of the resident under state and federal law." (Def. MJN, Ex. 18, p. 85 [Assem. Com. on Health, Analysis of Assem. Bill No. 1160 (1999-2000 Reg. Sess.) as amended on April 8, 1999] [emphasis added].)

c. AB 2791 of 2004

In 2004, the Legislature passed AB 2791, which amended Section 1430(b) but made no change to the $500 cap. The Legislature once again considered and rejected a proposal that would have increased the maximum award under Section 1430(b) to $5,000. (*See* Def. MJN, Ex. 2, pp. 8–30 [Assem. Bill No. 2791 (2003-04 Reg. Sess.), as introduced on Feb. 20, 2004, and amended on Apr. 1, 2004, May 11, 2004, and chaptered on Aug. 23, 2004].) The legislative history for AB 2791 restates the Legislature's understanding that $500 was the "maximum financial remedy for rights

violations." (Def. MJN, Ex. 21, p. 96 [Assem. Com. on Health, Analysis of Assem. Bill No. 2791) as amended Apr. 1, 2004] [emphasis added].)

The legislative history behind the Legislature's 2004 rejection of increased awards under Section 1430(b) is particularly instructive as to the Legislature's intent in maintaining the $500 cap on Section 1430(b) actions. The Legislature received overwhelming negative comments regarding the proposal to increase the maximum Section 1430(b) award to $5,000. (*See id.* at 278.) For example, the legislative intent file includes:

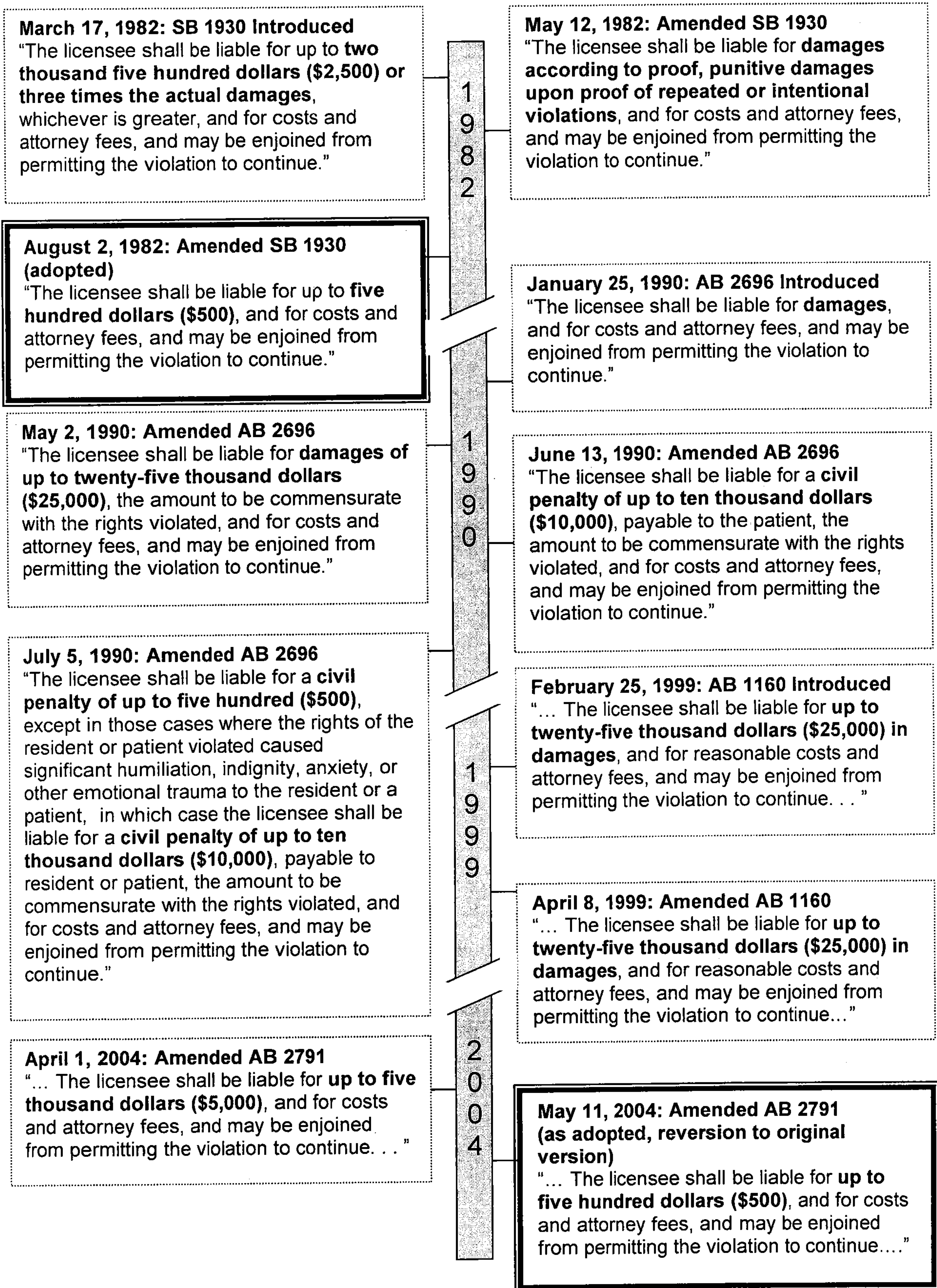
- A draft article, entitled "The Rise of Nursing Home Litigation: Findings from a National Survey of Attorneys," by David Stevenson and David Studdert. (Def. MJN, Ex. 2, pp. 151–189; *see also* Stevenson, D.G. and Studdert, D.M., *The Rise of Nursing Home Litigation: Findings from a National Survey of Attorneys*, 22 Health Affairs 219 (2003).) Based on a survey of attorneys who bring and/or defend lawsuits against nursing homes, the author's findings "indicate that litigation diverts substantial resources from resident care which may actually fuel quality problems."
- Various reports related to the liability insurance crisis for California SNFs. For example, "Long Term Care: General Liability and Professional Liability 2004 Actuarial Analysis" by Aon Risk Consultants, Inc. demonstrated that from 1995 through 2003, claim costs had increased on average 29% per year. (Def. MJN, Ex. 2, p. 278.) As a result, insurers were estimated to pay approximately $2,790 per nursing home bed in 2003. (*Id.*; *see also id.* at 234 [describing market premium increases from $100 per bed to $800 to $1,000 per bed with scarcity of policies with limits of $1 million per claim/$3

million in the aggregate].) The report further described increased frequency of claims against SNFs. (*Id.*)

- An article from the Daily Journal, which reported that "long-term care facilities are discovering that it's 'just about impossible to find professional liability or malpractice insurance.'" (*Id.* at 125.)
- A report entitled "Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System" prepared by the U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. (*Id.* at 123–185.) This report discussed the role of medical liability litigation in increasing healthcare costs, reducing access, and impeding improvements in quality of care.
- A "Health Care Industry Market Update" prepared by the Centers for Medicare and Medicaid Services ("CMS"), which described declining profit margins for nursing facilities and how "[r]ising insurance costs and aggressive litigation have led to the exit of many nursing facility chains from states where liability costs are high." (*Id.* at 117.)

With the fragile balance between long-term care facilities' financial well-being and ability to provide quality care and civil litigation, the Legislature made a conscious decision to maintain the $500 cap on Section 1430(b) actions. Despite numerous proposals,, the Legislature has chosen to cap Section 1430(b) awards at $500 to preserve the resources of these facilities for resident care. At no time has the Legislature considered making the $500 a cap on a per violation or other variable basis. The Court of Appeals erred when it added words to the statute, especially when doing so was contrary to the Legislature's express and consistent intent.

Legislative Proposals of Health and Safety Code Section 1430(b)



Source: Def. MJN (emphases added). Timeline not to scale.

III. SECTION 1430(b) CANNOT BE THE BASIS FOR A PUNITIVE DAMAGES AWARD.

In the 36 years since Section 1430(b) became law, CAHF is not aware of a single case that held that the provision could serve as the basis for a punitive damages award. This is for good reason: Section 1430(b) authorizes specific relief, and punitive damages is not part of the relief available. When developing the statute, the Legislature explicitly rejected a proposal to authorize punitive damages, indicating its clear intent not to allow them.

A. The Legislature's Purposeful Rejection of Punitive Damages Controls.

Here, because Section 1430(b) "recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available **unless a contrary legislative intent appears**." (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215 [emphasis added].) The Court of Appeals ignored this standard and refused to consider the clear legislative intent to prohibit punitive damages in actions under Section 1430(b).

CAHF is very familiar with the legislative history involving punitive damages in Section 1430(b) because CAHF worked closely with the bill's drafter, Senator Petris, to remove the punitive damages provision. An early version of SB 1930 allowed for "punitive damages upon proof of repeated or intentional violations." (Def. MJN, Ex. 3, p. 12) (Def. MJN, Ex. 3, p. 12 [Sen. Bill No. 1930 (1981-82 Reg. Sess.) as amended May 12, 1982].)

CAHF opposed this addition. (Def. MJN, Ex. 1, p. 264–68 ("Such legislation would open the door to punitive damages awards for consecutive acts of negligence...Excessive punitive awards might affect funds otherwise available for facility upgrading, expansion of offered services, or needed improvements.")

Senator Petris subsequently agreed to remove the punitive damages provision. (Def. MJN, Ex. 1, p. 0280 [Letter from Petris's Staff to Executive Vice President of CAHF ("These amendments would delete punitive damages language…as per our discussions.")]; Def. MJN, Ex. 1, p. 0282 [Memo from Petris's Staff to Petris ("We have worked and worked with the California Association of Health Facilities to get their support. We have it now.")].) As a result, a revised version of the bill deleted the punitive damages provision. (Def. MJN, Ex. 4, p. 14 [Sen. Bill No. 1930 (1981-82 Reg. Sess.) as amended Aug. 2, 1982].)

The Legislature's deletion of the punitive damages provision "supports the conclusion that the act should not be construed to include the omitted provision." (*People v. Tingcungco* (2015) 237 Cal.App.4th 249, 256; *see also Santa Cruz v. Mun. Court* (1989) 49 Cal.3d 74, 88-89 [holding that the court "need not speculate" as to legislative intent because, where the Legislature considered and rejected relevant language, the Legislature's intent is clear].) CAHF's institutional memory separately validates this conclusion; the Legislature intended to foreclose punitive damages when it deleted the provision that would have allowed them.

B. Punitive Damages Are Not Available for Rights Created by Statute.

Because the Legislature explicitly rejected punitive damages, the Court need not look further. This first step, which the Court of Appeals ignored, is outcome determinative here. However, even if the legislative history were unclear, punitive damages would still be inappropriate.

Where the legislative history is ambiguous, courts consider whether the rights at issue existed at common law. (*See De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates (2001)* 94 Cal.App.4th 890, 910 (considering whether the rights at issue existed at common law only after finding the legislative history to be inconclusive.)

CAHF joins in Defendant's argument that, even as to this second step, the Court of Appeals applied the wrong analysis. The Court of Appeal's error is readily apparent in the inconsistency between its statement and application of the law:

> Manor Care...assumes punitive damages are not available on a cause of action alleging violations of [Section 1430(b) because "[w]here a statute creates new **rights and obligations not previously existing in the common law,** the express statutory remedy is deemed to be the exclusive remedy available for statutory violations, unless it is inadequate." However... [Section 1430(b)], does not create new rights and obligations. It merely authorizes a private enforcement remedy for violations of **obligations established by other laws and regulations.**

(*Jarman v. HCR ManorCare, Inc.* (2017) 9 Cal.App.5th 807, 816-817 (citing *De Anza*, 94 Cal.App.4th at 912; emphasis added).)

Defendant correctly articulates that the rights for which a long-term care facility can be held liable under Section 1430(b) were not available at common law. (Opening Brief, IV.B.1.b.; Reply Brief, III.B.2.) In addition, this Court has explicitly held that, under Section 1430(b), "[t]he liability of licensees for their employees in a private action under the patients' bill of rights is not governed by common law precedent." *Cal. Assn. of Health Facilities. v. Dep't. of Health Svcs.* (1997) 16 Cal.4th 284, 302.

For these reasons, Section 1430(b) does not authorize the provision of punitive damages, and the Court of Appeals should be reversed.

IV. EXISTING LAW PROTECTS RESIDENTS' RIGHTS.

Plaintiff asks this Court to look at Section 1430(b) in isolation and argues that stacking penalties and providing for punitive damages is necessary to deter facilities from illegal practices. This argument wholly ignores the plethora of existing carrots and sticks that incentivize SNFs to

provide high-quality care and protect their residents. These mechanisms work. California boasts some of the best SNFs in the nation. A recent analysis of CMS quality data revealed that California SNFs are presently ranked first, second, or third in the nation in eight of the 24 quality metrics that CMS tracks. (CAHF, California Skilled Nursing Facilities: Five Year Quality Snapshot, *available at* http://www.cahf.org/Portals/29/Managed–%20Care–QualityMeasuresReportSmall.pdf?ver=2018-03-08-154530-953.)

Long-term care facilities are subject to a minefield of regulation, which consists of multiple layers of intertwined state and federal regulations and enforcement. These regulations generally focus on the quality of patient care, not on punishing SNFs. (*See Calif. Assn. of Health Facilities*, 16 Cal.4th at 294-95.) Various state and federal agencies monitor SNFs' compliance with applicable laws and regulations and any negative impacts on patient care. As a result, SNFs are subject to surveys at least every 15 months by the Department, investigations based on complaints from residents or others, and surprise inspections from the Attorney General's Bureau of Medi-Cal Fraud and Elder Abuse.

In addition to these inspections, various other governmental agencies or organizations established by the State monitor long-term care facilities, including, but not limited to the California Department on Aging's Long-Term Care Ombudsman Program, the Department of Health Care Services Audits and Investigations Branch, Protection and Advocacy, Inc., the U.S. Department of Health and Human Services, Office of the Inspector General, and the U.S. Department of Justice. These enforcement activities focus on compliance with licensure and reimbursement requirements, including quality of care and staffing standards, compliance with federal and state Medicaid/Medi-Cal laws and regulations, and patient safety and care generally.

A facility's level of Medi-Cal reimbursement is also impacted by quality metrics, which include many indicators of residents' rights. For example, SNFs are paid pursuant to a "Skilled Nursing Facility Quality and Accountability Supplemental Payment System" ("QASP"). (Stats. 2010, Ch. 717, sec. 152, enacting Welf. & Inst. Code, § 14126.022.) Under this system, the Department of Health Care Services ("DHCS") pays "supplemental payments to skilled nursing facilities that improve the quality and accountability of care rendered to residents . . . and to penalize those facilities that do not meet measurable standards." (*Id.*, subd. (a)(2).)

DHCS makes QASP payments according to statutory criteria and its own "performance measure benchmarks." (*Id.*, subd. (m).) The statutory criteria include, for example, compliance with the requirements for nursing hours per patient day and resident satisfaction. (*Id.*, subds. (i)(2)(A)(iv) & (i)(2)(A)(v).) DHCS's benchmarks include: (a) rates of pressure ulcers, (b) the use of physical restraints, (c) the prevalence of urinary tract infections, (d) the maintenance of bowel and bladder control, (e) the management of pain, (f) the maintenance of activities of daily living by residents, (g) the retention of facility staff, and (h) the rates of hospital re-admission from facilities. (*See* QASP Measures, available at https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/QASP_ExistingMeasures.aspx.) A facility that violates residents' rights will not meet the criteria and benchmarks to receive QASP payments.

The Legislature has also created a financial incentive for long-term care facilities by basing Medi-Cal rates on actual facility costs, whereby a facility's labor costs impact its reimbursement amounts. (*See* Welf. & Inst. Code § 14126, *et seq.*) As a result of this reimbursement methodology, average staffing levels throughout the state have gradually increased, resulting in higher quality of care statewide.

Residents are also able to enforce their own rights and receive compensation for harms they suffer via traditional tort remedies, the Elder Abuse and Dependent Adult Civil Protection Act, Section 1430(a), and other causes of action they may bring against a long-term care facility. Finally, even without per-violation penalties or punitive damages, Section 1430(b) provides residents with an avenue for redressing their rights, enjoining future violations, and receiving attorneys' fees and costs.

Section 1430(b) does not exist in a vacuum; many other mechanisms exist to safeguard residents from violations that are related to resident health and safety.

V. CURRENT ABUSE OF SECTION 1430(b) EXTORTS LARGE ATTORNEY FEE AWARDS WITH NEGLIGIBLE BENEFIT TO RESIDENTS.

A. Section 1430(b) Funds Tort Actions Against SNFs.

For the reasons articulated in the previous section, SNFs have every incentive to provide quality care to their residents. Plaintiff's argument that Section 1430(b) is somehow central to protecting those rights obfuscates the actual purpose that Section 1430(b) serves for plaintiffs' attorneys. Because of the amorphous and subjective nature of various rights and Section 1430(b), attorneys use Section 1430(b) as a tactic to procure attorneys' fees to fund their entire litigation, regardless of the merits on other claims. These fee awards are often equal to and sometimes, many times greater than, the awards to their clients.

For example, in *Lemaire*, though the plaintiff lost on both elder abuse and negligence claims, the court issued fees to the attorney of $841,842. In another such case, the Section 1430(b) claim funded the attorneys fees to pursue a negligence claim and an unsuccessful elder abuse claim against the facility. On the Section 1430(b) claim, the jury determined that the facility had violated the patient's rights, but the trial court made no monetary award to the resident except $305,000 in attorneys

fees. The court reasoned that the plaintiff's negligence, failed elder abuse, and Section 1430(b) claims were too "interrelated for the court to 'parse out what type of attorney work went solely to the 1430(b) part of the case and what part went to anything else." *Anderson v. Ag Seal Beach*, No. B228683, 2011 Cal. App. Unpub. LEXIS 9573, at *58 (Dec. 13, 2011) (upholding district court). As a result, the attorneys received fees under Section 1430(b) even for their time spent pursuing their failed elder abuse claim. The Legislature never intended for Section 1430(b) to shift lawyers' fees for negligence and elder abuse claims to defendant SNFs.[4]

B. Before *Nevarrez* and *Lemaire*, Lawyers Manipulated Allegations to Maximize Section 1430(b) Penalties.

The *Nevarrez* and *Lemaire* decisions came as part of a surge of Section 1430(b) cases. During that time, trial lawyers attempted to maximize the potential award to their clients by identifying as many "violations" as they could or by asserting class action lawsuits. They alleged violations based on wholly amorphous "rights," such as the right to care and services needed to attain or maintain a resident's highest practicable physical, mental and psychosocial well-being pursuant to 42 C.F.R. section 483.25, which could be subjectively interpreted to encompass a wide array of alleged activity. On the other end of the spectrum, trial lawyers would delve into minutiae, masking the alleged

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[4] The Elder and Dependent Adult Civil Protection Act only permits the award of attorneys' fees in limited situations. (*See*, *e.g.*, Welf. & Inst. Code § 15657 [permitting fee shifting "[w]here it is proven by clear and convincing evidence that a defendant is liable for physical abuse. . . or neglect. . . and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse[.]"].) The use of Section 1430(b) to fund unsuccessful elder abuse claims conflicts with the Legislature's decision to only award fees in specified circumstances.

failures to provide ongoing education to facility personnel,[5] to ensure complete and accurate health records,[6] or to maintain resident assessments for specific time periods[7] as violations of patients' rights.

They also began creatively defining "violation" in as small a unit as possible to maximize rewards. For example, in *Lemaire* (which was ultimately reversed), the plaintiff lost on both elder abuse and negligence claims. On the Section 1430(b) claims, the jury found for the defendant on the staffing and dignity issues, but for the plaintiff on record keeping and adequate assessment of the resident issues. Counting violations on a *per shift basis* (most SNFs have three shifts per day), the jury found 540 violations of the two rights and made an award to the resident of $270,000.

The *Lemaire* case was not an anomaly. CAHF is aware of assertions by residents' lawyers that:

- Where a facility did not readmit a resident, the violations should be defined on a daily basis for every day after the resident was not readmitted until the date of judgment, even if the resident has subsequently found placement elsewhere.
- Where a facility owned and operated by a religious order allegedly failed to confirm that the physician had obtained informed consent for prescribed drugs, the violations for the class should be defined based on each pill that was administered without informed consent. This complaint suggested that if a resident received multiple pills at the same time, this would give rise to multiple violations and multiple $500 awards.

[5] *See* Cal. Code Regs., tit. 22, § 72517.

[6] *See* Cal. Code Regs., tit. 22, § 72543; 42 C.F.R. § 483.75(l).

[7] *See* 42 C.F.R. § 483.20(d).

- Each time a facility failed to check a single box with respect to the resident's assessment of Activities of Daily Living on the Minimum Data Set gave rise to a new $500 award. This assessment spans multiple pages of the Minimum Data Set and includes dozens of boxes to be filled.

Trial lawyers also filed at least ten class action complaints, of which CAHF is currently aware, against hundreds of defendants, including SNFs and their affiliated entities, based in part on Section 1430(b) claims. In what is the most infamous example, a Humboldt County jury awarded $677 million in a class action suit related to nurse staffing levels against twenty-two skilled nursing facilities, including the only five facilities in that county, without a single allegation of actual physical harm. (*See* Drange, *Jury Imposes Maximum Damages on Skilled Healthcare; Nursing Home Chain Faces Upwards of $600 Million for Health Code Violations*, Times-Standard (July 7, 2010), available at https://www.times-standard.com /2010/07/07/jury-imposes-maximum-damages-on-skilled-healthcare-nursing-home-chain-faces-upwards-of-600-million-for-health-code-violations/.)[8]

Emboldened by this Humboldt County case, plaintiffs' counsel filed numerous other class action suits in similar complaints based on allegations that the defendant SNFs understaffed their facilities. Without any concrete allegations of actual harm to residents, courts allowed named plaintiffs, some of whom have resided in facilities for a week or less, to proceed on fishing expeditions until they identified appropriate named plaintiffs or

[8] Ultimately, the parties settled the matter with court approval for approximately $50 million. Of this, the plaintiffs' counsel received approximately $25 million in attorneys fees while the settlement created a fund of $25 million for nursing center residents.

collected sufficient facts to assert claims against the defendants. Through this process, defendant SNFs were forced to choose between diverting resources from patient care to defend these cases or settling cases with large payouts to trial lawyers to minimize their defense costs and the plaintiffs' attorneys' fees. These class action abuses were lucrative to the trial lawyers but detrimental to the operation of long-term care facilities in California.

C. Since the Court of Appeal Decision in *Jarman*, Abusive Section 1430(b) Practices Have Resurfaced.

Following the Court of Appeal's decision in the *Jarman* case, SNFs have seen a resurgence of the kinds of the Section 1430(b) abuses they saw before *Nevarrez* and *Lemaire*. Particularly in vogue are class actions relying on Section 1430(b). For example, CAHF is aware of the following class actions, which each allege Section 1430(b) violations:

- A class action alleging that the single act of discharging a resident violates at least 19 resident rights and arguing that each discharged class member is entitled to $500 per right violated.
- A class action alleging that, even though the facility complied with regulations establishing requirements for nurse staffing, the facility violated residents' rights by failing to provide higher staffing levels in light of patient acuity on certain days.
- A series of 20 class actions against one operator making similar staffing allegations.

CAHF is also aware of multiple cases in which plaintiffs' counsel has rejected a settlement offer for actions under Section 1430(b) by citing the appellate decision in *Jarman* for the proposition that their clients are entitled to an award of up to $500 for each federal or state regulation that was allegedly violated.

As a result of these abuses, SNFs find themselves facing escalating liability insurance costs, making this Court's ruling on this matter

especially relevant. The 2017 annual survey of civil liability costs commissioned by the American Health Care Association and performed by AON (a multi-national risk management and insurance broker company) details steadily increasing loss rates, which have now reached the highest point in an 11-year period of $3,590 per bed in California, as compared to a national average of $2,450 per bed. (Aon Risk Solutions, 2017 Long Term Care: General Liability and Professional Liability Actuarial Analysis, p. 18; *see also* 2017 Long Term Care General Liability and Professional Liability Actuarial Analysis, available at http://www.aon.com/risk-services/thought-leadership/report-2017-long-term-care.jsp) Claim severity has also increased to $333,000 per claim, as compared to the national average of $232,000 per claim.

This trend is even more troubling when viewed in light of research that suggests that more litigation does not result in higher quality of care. (Stevenson, *supra*.) In fact, research suggests that litigants are fairly indiscriminate when selecting defendant long-term care facilities. Facilities with the best quality indicators have an annual risk of being sued (40%) that is only slightly less than those with the worst quality indicators (47%). (Studdert, D.M., et al., *Relationship between Quality of Care and Negligence Litigation in Nursing Homes*, 364 New Eng. J. Med. 1243 (2011).) Defending lawsuits has simply become a part of doing business as a long-term care facility.

Litigation results in the diversion of resources away from patient care, which undermines the SNFs' ability to provide high quality care for their residents. The Legislature never intended this result when it enacted Section 1430(b).

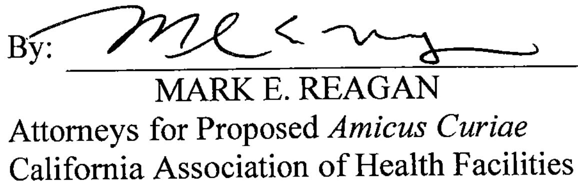
VI. <u>CONCLUSION</u>

Interpreting Section 1430(b) to allow a per violation or per "primary right" penalty of up to $500 and punitive damages would lead to results

even more absurd than the litigation abuses discussed above. Trial lawyers would become even more encouraged to expand the violations asserted in their complaints and to package their violations in as small units as possible to maximize their awards. This would simply add to the costs of operating long-term care facilities in California, especially because trial lawyers do not discriminate in filing suits against facilities.

CAHF, therefore, requests that this Court reverse the Court of Appeal and provide guidance to the trial courts as to the proper interpretation of Section 1430(b).

Dated: November 5, 2018 HOOPER, LUNDY & BOOKMAN, P.C.

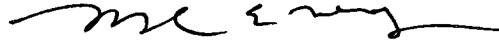


By: ______________________
MARK E. REAGAN
Attorneys for Proposed *Amicus Curiae*
California Association of Health Facilities

CERTIFICATE OF WORD COUNT

The text of this brief consists of 7,684 words according to the word count feature of the computer program used to prepare this brief.

Dated: November 5, 2018



MARK E. REAGAN

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

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 San Francisco, State of California. My business address is 575 Market Street, Suite 2300, San Francisco, CA 94105.

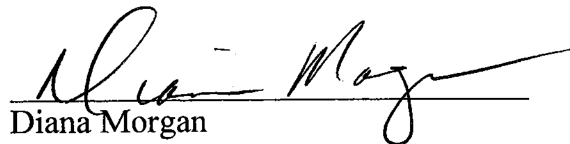
On November 6, 2018, I served true copies of the following document(s) described as **APPLICATION BY CALIFORNIA ASSOCIATION OF HEALTH FACILITIES TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF** on the interested parties in this action as follows:

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 Hooper, Lundy & Bookman, P.C.'s practice 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 San Francisco, California.

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

Executed on November 6, 2018, at San Francisco, California.



Diana Morgan

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John L. Jarman v. HCR Manor Care, Inc. and Manor Care of Hemet, CA, LLC
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John P. Petrullo, Carolyn Wu Petrullo, LLP Pacific Corporate Towers 222 N. Sepulveda Blvd., Suite 806 El Segundo, CA 90245	*Counsel for Defendants/Respondents/Cross-Appellants*
Michael M. Berger Barry S. Landsberg Joanna S. McCallum Manatt, Phelps & Phillips, LLP 11355 West Olympic Boulevard Los Angeles, CA 90064-1614	*Counsel for Defendants/Respondents/Cross-Appellants*
Jay-Allen Eisen Downey Brand LLP 621 Capital Mall, 18th Floor Sacramento, CA 95814-4731	*Counsel for Plaintiff/Appellant*
Anthony C. Lanzone Lanzone Morgan, LLP 5001 Airport Plaza Drive, Suite 210 Long Beach, CA 90815	*Counsel for Plaintiff/Appellant/Cross-Appeal Respondent John L. Jarman*
Clerk, Court of Appeal Fourth Appellate District, Division 3 601 W. Santa Ana Boulevard Santa Ana, CA 92701	
Clerk, Riverside Superior Court 4050 Main Street Riverside, CA 92501	