Case No. S241431

Case No. **S241431**

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JANICE JARMAN,
Plaintiff and Appellant,

v.

HCR MANORCARE, INC. and
MANOR CARE OF HEMET CA, LLC
Defendants and Appellants.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G051086; RIVERSIDE COUNTY SUPERIOR COURT, CASE NO. RIC10007764, THE HON. PHRASEL SHELTON AND HON. JOHN VINEYARD, JUDGES.

AMICI CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANTS AND APPELLANTS

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INTRODUCTION: INTEREST OF AMICI AND IMPORTANCE OF ISSUE

The Civil Justice Association of California ("CJAC") and the California Chamber of Commerce ("CalChamber") welcome the opportunity as *amici curiae*[1] to address the two issues this case presents:

(1) Does H & S Code § 1430(b) authorize a maximum award of $500 for a "civil action" filed for violation of the Patient's Bill of Rights ("PBR") applicable to nursing homes, or does it permit an award of $500 for each and every violation of the PBR; and

(2) Does the maximum statutory penalty recoverable under § 1430(b) permit the addition of punitive damages?

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[1] By separate application accompanying the lodging of this brief, CJAC and CalChamber request that it be filed.

The appellate opinion here held, contrary to the holdings of two published appellate opinions on the first issue,[2] that 20 individual violations of the PBR may be aggregated under the $500 maximum award specified in section 1430(b) for a total of $100,000 instead of the $500 ceiling applicable to the entire "action." As further "icing on the cake" for plaintiff, the opinion sanctioned a punitive damage award on top of the $100,000 award, an augmentation which, if left undisturbed by this Court, could amount to $1,000,000 more. See, *e.g*, *Simon v. San Pablo U.S. Holding Co., Inc*. (2005) 35 Cal.4th 1159, 1188 (approving under due process analysis a punitive damage award of up to "10 times the compensatory award").

Amici believe this extrapolation to the stars of monetary penalties authorized under § 1430(b) violates the plain language and meaning of the statute, common sense and sound public policy. For close to 40 years, CJAC's membership of businesses, professional associations and financial institutions has worked to make our civil liability laws more fair, economical, uniform and certain. Toward this end, we regularly petition government for redress when it comes to determining who owes, how much, and to whom when the conduct of some is alleged to occasion harm to others. This case affords the Court an opportunity to confirm and clarify the plain meaning and intent of

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[2] *Lemaire v. Covenant Care California, LLC* (2015) 234 Cal.App.4th 860 ("*Lemaire*") and *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102 ("*Nevarrez*").

section 1430(b), and repel the mistaken notion that judicial displeasure of what may be felt to be an "anemic statutory remedy" is sufficient reason to judicially rewrite a statute to provide for a more draconian remedy.

CalChamber is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For more than a century, CalChamber has been a leading voice for California business. While CalChamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues, including as amicus curiae in cases like this one that adversely impact businesses.

ARGUMENT

I. H & S CODE SECTION 1430(b) ALLOWS A MAXIMUM AWARD OF $500 FOR ANY "CIVIL ACTION" OR LAWSUIT FILED PURSUANT TO IT.

A. The Plain Language of this Statutory Provision is Unambiguous.

The starting point for ascertaining the meaning of a statute is its words, as these "generally provide the most reliable indicator of legislative intent." *Bernard v. Foley* (2006) 39 Cal.4th 794, 801. Section 1430(b)'s plain language provides that a current or former

resident of a skilled nursing facility

> may bring *a civil action* against the licensee of a facility who violates any rights of the resident or patient as set forth in the Patient Bill of Rights . . . or any other right provided for by federal or state law or regulation. The *suit* shall be brought in a court of competent jurisdiction. The licensee shall be liable for the acts of the licensee's employees. 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. (Italics added.)

In parsing this language, the italicized phrase "civil action" in the first sentence of § 1430 is tied to and equated with the word "suit" in the second sentence and limited, by the fourth sentence, to a maximum liability of $500, plus costs and attorney fees.

Equating the term "civil action" with the entire lawsuit or "suit" is the ordinary meaning and manner accorded by the Legislature when it uses this nomenclature. For example, a "civil action" is defined as a lawsuit "prosecuted by [a] party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong." Code of Civ. Proc. § 30. In other words, the term "civil action" does not, unless specifically and expressly provided otherwise, have a different meaning from a "civil suit." *People v. Yartz* (2005) 37 Cal.4th 529, 538.

Equation of the term "civil action" with the entire lawsuit or litigation is consistently used in numerous statutes. Code of Civ. Proc. § 391 explains that " '[l]itigation' means any *civil action* or proceeding

commenced, maintained or pending in any state of federal court." (Italics added.) It is also the way courts have construed analogous statutes where damage limitations are imposed for a variety of civil "actions." In *Yates v. Pollock* (1987) 194 Cal.App.3d 195, the damage ceiling for noneconomic loss in "any action" for professional negligence against a health care provider has been consistently read by courts to apply to the entire lawsuit regardless of the number or types of claims asserted in such an "action." "[U]se of the word 'action' in [Civ. Code] section 3333.2 represents [the Legislature's] conscious decision to limit the total recovery for noneconomic loss in such suits to $250,000." *Id.* at 201.

Reading § 1430(b), then, in context with all of its sentences, as well as alongside other statutes defining "civil action" and court opinions construing that term, makes clear the $500 damage ceiling in § 1430(b) applies to the entire lawsuit filed by a plaintiff to enforce any number of "rights" violated or claims asserted under the PBR.

B. The Legislative History of Section 1430(b) and Canons of Statutory Construction Support the Proposition that a Single, Maximum Monetary Award of not more than $500 Applies to a Lawsuit Brought under it Regardless of the Number of Violations of the PBR Asserted.

Assume *arguendo* there is ambiguity in the language of section 1430(b) and, as this Court's phrasing of the issue on its web page suggests, a distinction may arguably be made between a "maximum award of $500 per 'cause of action' in a lawsuit against a skilled

nursing facility for violation of specified rights" and "$500 per lawsuit." When a statute "is susceptible to more than one reasonable interpretation, then [courts] look to extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1158 (concurring opinion by J. Werdeger). Application of these indicia underscore that, regardless of the number of PBR violations, a "lawsuit" or "cause of action" pursuant to section 1430(b) for redress of all of them is limited to a single maximum award of $500, plus attorney fees and costs.

1. Section 1430(b) should be construed in relation to other provisions of the Act and harmonized with them.

Amici begin with the overall statute of which section 1430(b) is an integral part, the Long-Term Care, Health Safety and Security Act of 1973 (Act), and construe its related provisions with each other. That Act established a "citation system for the imposition of prompt and effective civil sanctions against long-term health care facilities in violation of the laws and regulations . . . applicable to nursing homes." H & S Code § 1417.1. Originally, the Act created two classes of citations – Class A and B – that the Department of Health Services (presently the Department of Public Health, or DPH) could issue under the Act to noncompliant nursing homes to assure the safety of their residents. "Class A" citations, the more severe, were for violations by

facilities that posed an "imminent danger that death or serious harm to the residents would result therefrom." H & S Code § 1424(d). These citations applied then "for each and every violation" and now "for each and every citation;" and have ranged over time from initial amounts of between $1000 to $5000 "each" to $2000 to $20,000 presently. H & S Code § 1425.5(a)(2). The Legislature later added a "Class AA" citation for violations constituting "a direct proximate cause of death of a patient or resident of a long-term health care facility." H & S Code § 1424(c). Penalty amounts for these citations presently range from $25,000 to $100,000 "for each and every citation." H & S Code § 1425.5(a)(1).

"Class B" citations are issued for violations that "have a direct or immediate relationship to the health, safety, or security of long-term health are facility residents, other than class 'AA' or 'A' violations." H & S Code § 1424(e). Today, these penalties range from $100 to $200 "for each and every citation." H & S Code § 1425.5(a)(4).

Significantly, the Act has always provided a private right of action for the Attorney General or "any person" to pursue a suit for injunction or civil damages or both against a nursing home that commits class "A" or "B" violations and for which the Department has not taken action. Civil damages under that provision are the maximum amount that could be assessed "on account of the [A and B] violation or violations." See H & S Code § 1430 as originally enacted, which is currently § 1430(a). These substantial damage remedies are in addition

to those plaintiffs may recover under the Elder Abuse Act against nursing homes that violate the broad rights conferred by it. *See, e.g., Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771.

In the midst of this aforementioned backdrop, section 1430(b) was added to the Act in 1982 as a means of enforcing the PBR, which was enacted in 1979 as H & S Code §§ 1599 through 1599.4 and 22 CCR § 75257. "It is the intent of the Legislature in enacting this chapter to expressly set forth fundamental human rights which all patients shall be entitled to in a skilled nursing, intermediate care facility, or hospice facility . . ., and to ensure that patients in such facilities are advised of their fundamental rights and the obligations of the facility." H & S Code § 1599. The regulatory PBR authorized issuance of "Class C" citations under the Act for transgressions by nursing homes that have "only a minimal relationship" to health and safety. When adding section 1430(b) to the Act, the author of the bill containing that language, Senator Nicholas Petris, explained it was needed because "existing law does not provide adequate mechanisms to ensure [that patient's] rights are not abused." He stated that "C-citations are not subject to fine or to the civil remedies available to private citizens and the Attorney General as set out in section 1430(a) of the [Act]." OBM 20.

Accordingly, section 1430(b) provides that a resident may bring "a civil action" against a long-term care facility that "violates any rights" and that 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." Notably, this language says nothing about the $500 limitation applying to "each and every violation," in contrast to the immediately preceding section 1430(a) that initially provided a facility was liable for monetary penalties "for each and every violation" and now provides that those penalties apply "for each and every citation."

Inclusion of the phrase "for each and every violation" or "citation" in section 1430(a) and omission of that or any comparable phrase in section 1430(b) speaks volumes. "It is a basic canon of statutory construction that statutes in *pari materia* should be construed together so that all parts of the statutory scheme are given effect." *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1091. Statutes and statutory provisions "are considered to be in *pari materia* when they relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object." *Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4. By this definition, sections 1430(a) and (b) are in *pari materia*; and the inclusion of "each and every violation [or citation]" in subsection (a) but not in subsection (b) evinces an intention by the Legislature to give a different construction as to the meaning of each. "The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be

harmonized, both internally and with each other, to the extent possible." *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387. The only logical and sensible way to harmonize subsections (a) and (b) of section 1430 with each other while giving meaning to the reference to "each and every citation" in subsection (a) and its absence in subsection (b) is by concluding that subsection (b) does not, in contrast to subsection (a), permit the aggregation of a $500 maximum penalty for each and every violation. In this way, significance is given to every word of the Act, and the construction that renders the words "each and every citation" as surplusage in subsection (a) or as implicit in subsection (b) is avoided. *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798–799.

As *Nevarreze* clarifies, "that greater penalties or damages may be available in a public enforcement proceeding [pursuant to § 1430(a)] is not a reason to apply the $500 maximum in subdivision (b) 'per violation.'" 221 Cal.App.4th at 132.

2. The history of section 1430(b) confirms the Legislature's intent to confine violations prosecuted pursuant to it to a single maximum $500 award.

Since section 1430(b)'s enactment 36 years ago, numerous attempts have been made to increase the maximum amount recoverable under it for violations of the PBR. All of these attempts to either remove or increase the maximum award have failed. Petitioners have amply documented eight of these failures. OBM 26-28. As *Lemaire, supra*, 234 Cal.App.4th at 868 remarked about the

significance of these unsuccessful legislative attempts to eliminate or increase the $500 maximum award obtainable in a lawsuit for various class C-violations, "in some circumstances [failed legislation] may be a reliable indicator of existing legislative intent." "[T]he failure of the Legislature to enact the proposed bill[s], in one form or another, is some evidence that the Legislature does not consider it necessary or proper or expedient to enact such legislation." *California Chamber of Commerce v. State Air. Res. Bd.* (2017) 10 Cal.App.5th 604, 630.

Plaintiff argues the $500 maximum amount allowable for enforcement of the PBR under section 1430(b) is too low to achieve that statute's deterrence objective, that it is, in the appellate opinion's characterization, "anemic." This, however, ignores other remedies available to plaintiff under section 1430(a) of the Act and separate but related statutes such as the Elder Abuse Act. This Court must examine section 1430(b) in the context of the entire Act and in relation to other remedies the law provides plaintiff through analogous statutes and civil actions. It should not, "in the exercise of its power to interpret, rewrite the statute . . . in accord with [plaintiff's] presumed legislative intent. That is a legislative and not a judicial function." *Blair v. Pitchess* (1971) 5 Cal.3d 258, 282; accord: *Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 801 ("This court has no power to rewrite the statute as to make it conform to a presumed intention which is not expressed.").

Moreover, the Court should reject plaintiff's "spin" on how to interpret and apply section 1430(b) because, if accepted, it will lead to "absurd results." "Courts must avoid statutory constructions that lead to illogical or absurd results." *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 142. By allowing monetary penalties to be aggregated for numerous violations of the PBR under subsection (b) of § 1430, as plaintiff urges, the court would necessarily elevate that lesser provision to a level greater than what is intended and allowed under subsection (a). Subsection (a) applies to enforcement of Class A violations that are intended to provide relief to plaintiffs who suffer the most severe harm – *i.e.*, "imminent danger that death or serious harm to the residents [from violation of applicable nursing home laws] would result therefrom." H & S Code § 1424(d). Subsection (a) also applies to Class B violations, those that "have a direct or immediate relationship to the health, safety, or security of long-term health care facility residents, other than class 'AA' or 'A' violations." H & S Code § 1424(e). In sharp contrast, subsection (b) of section 1430 is intended for class-C violations, those that have "only a minimal relationship" to health and safety of patients.

Allowing a plaintiff to recover $500 for each Class C violation under subsection (b) when first enacted but only $250 maximum for each Class B violation under subsection (a) makes no sense. It would reverse the importance of the two subsections of the Act, allow plaintiffs to obtain twice the amount of penalties under subsection (b)

than what they could obtain for more serious violations under subsection (a). This is an obviously "absurd result" that should be eschewed in favor of the canon that "statutes are to be given a reasonable and common sense construction which will render them valid and operative rather than defeat them." *People v. Davis* (1968) 68 Cal.2d 481, 484.

II. PUNITIVE DAMAGES ARE NOT RECOVERABLE ON TOP OF THE STATUTORY PENALTIES PROVIDED BY SECTION 1430(b) OF THE ACT.

"[W]hen a new right, not existing at common law, is created by statute and a statutory remedy for the infringement thereof is provided, such remedy is exclusive of all others unless the statutory remedy is inadequate." *Orloff v. Los Angles Turf Club* (1947) 30 Cal.2d 110, 112-113.

Section 1430(b) was, as previously discussed, specifically enacted as a remedy to enforce the PBR (*ante* at p. 11). Rights created under the PBR did *not* exist at common law. Section 1430(b) "is not a substitute for the standard damage causes of action for injuries suffered by residents of nursing care facilities." *Lemaire*, *supra*, 234 Cal.App.4th at 867. The monetary award under section 1430(b) is not "damages" but a statutory penalty. *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147. Indeed, the Legislature specifically deleted the term "damages" in an earlier version of the bill enacting section 1430(b) while leaving the word "damages" in section 1430(a). Since

there can be no "damages" awarded pursuant to section 1430(b), there can be no "punitive damages" awarded under it because an award of "actual" or "compensatory damages" is an essential element to an award of punitive damages. *Id.*

Moreover, as originally introduced, the bill that eventually became section 1430(b) allowed for punitive damages, but was amended to eliminate that provision. OBM at 50. "[P]roposed legislative drafts may be helpful in interpreting a statute when its meaning is unclear . . .." *Estate of Wanamaker* (1977) 65 Cal.App.3d 587, 593. "Unpassed legislation . . . may be a reliable indicator of existing legislative intent." *Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 761; see also *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 177 ("here the predecessor bills are instructive").

Nor is there any "inadequacy" to the remedy afforded by section 1430(b) that would warrant judicial gloss to its language authorizing punitive damages. This section was specifically added to the Act to provide redress for lesser violations than those addressed by subsection (a) of section 1430, those with "only a minimal relationship" to patient health and safety. The Act "provides a comprehensive scheme for the attainment of its objectives, including both public and private remedies. . . [T]hat the private monetary remedy [of section 1430(b)] is not greater reflects a legislative choice with respect to that remedy, rather than a basis for a court to enhance the statutory scheme . . .." *Nevarrez*, 221 Cal.App.4th at 132.

Further, punitive damages cannot be recovered under section 1430(b) because it provides for statutory penalties. "Civil penalties under the Act, unlike damages, require no showing of actual harm per se. Unlike damage, the civil penalties are imposed according to a range set by statute irrespective of actual damage suffered." *Kizer, supra*, 53 Cal.3d at 147. A "plaintiff cannot recover both punitive damages and statutory penalties, as this would constitute a prohibited double penalty for the same act." *De Anza Santa Cruz Mobile Estate Homeowners' Ass'n v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 912.

Finally, permitting punitive damages under section 1430(b) would also produce "absurd results." Plaintiff's potential recovery under section 1430(a), while substantial, cannot "exceed the maximum amount of civil penalties that could be assessed on account of the violation or violations," which are $20,000 per citation for Class A violations and $2,000 per citation for Class B violations. H & S Code § 1424.5(a)(2) & (a)(4). If she succeeds in persuading this court she is entitled to $500 for each and every violation of the PBR, however, and punitive damages on top of that award, she and others similarly situated in the future will be able to obtain larger recoveries for the "minimal violations" of patient health and safety standards under subsection (b) of section 1430 than for the serious violations governed by subsection (a) of this same provision. "Principles of statutory construction . . counsel that we should avoid an interpretation that

leads to anomalous or absurd consequences." *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 278.

CONCLUSION

For all the aforementioned reasons, the Court should reverse the decision and hold that $500 is the maximum monetary award allowable in any section 1430(b) lawsuit and that punitive damages are not available under that section.

Dated: October 18, 2018

Respectfully submitted,

_____

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CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, less than 4,020 words.

Dated: October 18, 2018

_____

Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 3rd Avenue, Suite 1, Sacramento, CA 95817.

On October 18, 2018, I served the foregoing document(s) described as: *Amici Curiae* Brief of the Civil Justice Association of California and the California Chamber of Commerce in Support of Defendants and Appellants in *Jarman v. HCR ManorCare, Inc., et al.,* S241431 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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

Executed this 18th day of October 2018 at Sacramento, California.

_____
David Cooper