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May 19, 2017

Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Jarman v. HCR Manor Care, Inc.*, S241431

Association of Southern California Defense Counsel's Letter in Support of Appellants' Petition for Review (Cal. R. Ct., Rule 8.500(g))

Honorable Justices:

The Association of Southern California Defense Counsel (ASCDC) submits this letter pursuant to Rule 8.500(g) in support of the petition for review filed on April 24, 2017 by Defendants/Appellants HCR Manor Care, Inc., et al. ASCDC urges this court to grant review of the Court of Appeal's published opinion in *Jarman v. HCR Manor Care, Inc.* (March 14, 2017, G051086) 9 Cal.App.5th 807 (*Jarman*).

IDENTITY AND INTEREST OF ASCDC

ASCDC is a voluntary membership association comprised of approximately 1,000 attorneys, among whom are some of the leading trial lawyers of California's civil defense bar. ASCDC members routinely defend professionals (including health care providers), businesses and civic institutions who provide the goods, services, jobs and investments vital to the country's economic health and prosperity. The association is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation and trial practice in this State.

ASCDC's member-attorneys often represent healthcare providers in professional negligence cases, as well as nursing homes and custodial care facilities charged with "elder abuse" and actions seeking statutory damages similar to the claims in this litigation. The Association and its members have participated before this court as amicus curiae in many prior cases involving questions of statutory interpretation affecting health care and custodial care providers and other professionals—including, *Winn v. Pioneer Medical Group, Inc*. (2016) 63 Cal.4th 148 (*Winn*), *Lee v. Hanley* (2015) 61 Cal.4th 1225, *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541 and *Kibler v. Northern Inyo County Hosp. Dist*. (2006) 39 Cal.4th 192, among others. ASCDC and its members therefore have substantial interests in the proper resolution of the important questions of statutory interpretation raised by the petition.

REASONS WHY REVIEW SHOULD BE GRANTED

In light of the Court of Appeal's recent published decision these issues are the subject of conflicting opinions by intermediate appellate courts that can only be resolved by this court—(1) Does Health and Safety Code section 1430(b) authorize a maximum award of $500 *per "cause of action,"* as *Jarman* held, or $500 *per lawsuit*, as held in prior decisions?[1] (2) Does Section 1430(b) authorize an award of punitive damages?

The *Jarman* opinion expressly "disagrees" with prior interpretations of the Legislature's intent regarding the amount and nature of damages recoverable under section 1430(b). (See typed opn. at pp. 18-20, rejecting and declining to follow *Nevarrez* and *Lemaire*.) This court should grant review to conclusively settle important questions of California law and provide guidance to the courts and the bar in this area; until such clarity is provided, this split in authority will produce inconsistent outcomes and continued uncertainty in the resolution of similar future disputes that are likely to recur.

A. Background

John Jarman (later represented by his daughter, Janice Jarman, as successor in interest), sued HCR Manor Care, Inc., and Manor Care of Hemet CA, LLC (collectively referred to by the Court of Appeal as "Manor Care"), which own and operate a nursing home facility in Hemet, California. Jarman was a patient at the Hemet nursing facility for three months in 2008. He alleged claims for violations of patient's rights pursuant to section 1430, elder abuse, and negligence, arising from the care he received at the nursing home. (Typed opn. at p. 2.)

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[1] See, e.g., *Nevarrez v. San Marino Skilled Nursing & Wellness Centre* (2013) 221 Cal.App.4th 102, 137 (*Nevarrez*) ($500 statutory damages per action, not per claim); *Lemaire v. Covenant Care Cal., LLC* (2015) 234 Cal.App.4th 860, 868 (*Lemaire*) (same).

The jury returned a special verdict finding that Manor Care committed 382 violations of Jarman's rights, and that its conduct was negligent. The jury awarded Jarman $95,500 in statutory damages under section 1430 (calculated at a rate of $250 for "each violation" of his rights) plus $100,000 in damages caused by the negligence. The jury also made a finding that Manor Care had acted with malice, oppression or fraud. However, the trial court granted Manor Care's oral motion to strike the punitive damage claim, agreeing with Manor Care that there was insufficient evidence to support the jury's finding of malice, oppression or fraud. Both sides appealed. The Manor Care parties disputed liability and the "per violation" measure of statutory damages awarded by the jury under section 1430; Jarman sought reinstatement of his punitive damages claim. (Typed opn. at pp. 2-3.)

Eschewing the prior interpretations of section 1430 provided by *Nevarrez* and *Lemaire*, the Court of Appeal affirmed the jury's verdict on damages and the award of statutory attorney fees against both Manor Care entities. (Typed opn. at pp. 18-20.) The case was "remanded to the trial court with directions to conduct further proceedings to *establish the amount of punitive damages* Jarman is entitled to recover *as a result of Manor Care's 382 violations of his rights*." (*Id*. at pp. 4, 31, italics added.)

Neither party raised or briefed what turned out to be the determinative issue of the Court of Appeal's decision—i.e., whether a section 1430(b) statutory damage award should be made on a "per cause of action" basis? Manor Care's petition for rehearing was denied. (Petition at pp. 7, 9 and App. B; cf. typed opn. at p. 21.)

B. Review is Necessary to Resolve the Existing Conflict Over the Proper Interpretation of Section 1430(b) Regarding the Amount of Damages Available to a Private Litigant in "A Civil Action" Under That Statute

Manor Care argued that section 1430, subdivision (b), authorizes a maximum of $500 in statutory damages *per lawsuit*, without regard to how many violations of a patient's rights are proved in that civil action. (Typed opn. at p. 17; petition at pp. 7-9.) Prior published decisions by other Courts of Appeal agreed with Manor Care's position regarding the "per lawsuit" cap on statutory damages. (*Nevarrez, supra,* 221 Cal.App.4th at pp. 131-136 (District Two, Div. Four); *Lemaire, supra,* 234 Cal.App.4th at pp. 867-868 (District Two, Div. Six).)

Section 1430, subdivision (b) provides: "A current or former resident or patient of a skilled nursing facility, as defined in subdivision (c) of Section 1250, or intermediate care facility, as defined in subdivision (d) of Section 1250, *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

Patients Bill of Rights in Section 72527 of Title 22 of the California Code of Regulations, 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.)

The Court of Appeal in this case disagreed with *Nevarrez/Lemaire's* interpretation of section 1430(b) as imposing a $500 "per lawsuit" statutory damage cap. On the other hand, the opinion ostensibly rejected Jarman's "per violation" theory. (Typed opn. at pp. 17-21.) Instead, citing *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988 (*Miller*), *Jarman* held that "a third option exists, which is to award statutory damages on a "per *cause of action"* basis." (Typed opn. at p. 21.)

Respectfully, *Jarman's* analysis concerning the nature and scope of the $500 damage remedy provided in "a civil action" under section 1430(b) cannot be reconciled with the rules governing statutory interpretation. California courts are tasked with construing "the ordinary meaning of the statutory language, its relationship to the text of related provisions, terms used elsewhere in the statute, and the overarching structure of the statutory scheme." (*Winn, supra,* 63 Cal.4th at pp. 155-156; accord *Nevarrez, supra,* 221 Cal.App.4th at p. 129; *Lemaire, supra,* 234 Cal.App.4th at p. 867.)

Nevarrez and *Lemaire* consistently adhere to these principles; *Jarman* does not. In the context of the statutory purpose of section 1430, a resident or patient of a custodial care provider may bring "a civil action" for violation of "any rights" of the private plaintiff under regulations governing the operation of the caretaker. In that *suit*: "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." (Health & Safety Code, § 1430, subd. (b); see *Nevarrez, supra,* 221 Cal.App.4th at p. 129-135 ["The statute allows a single award of up to $500 per lawsuit"—detailing the Legislative History and purpose]; *Lemaire, supra,* 234 Cal.App.4th at pp. 865-868.) In the context of the $500 private party damage remedy, those prior cases persuasively addressed the identical "ambiguity" argument raised by Jarman in the trial court and on appeal; namely, that "up to $500" should be assessed on a "per violation" basis.

In *Lemaire*, plaintiff's successor sued for wrongful death and statutory damages under section 1430 alleging six violations of the California Code of Regulations by the caretaker. The jury found that the defendant did not provide (1) "complete and accurate health records" and (2) "meaningful and informative nurses' progress notes as often as the

patient's condition warrants." (*Lemaire, supra*, 234 Cal.App.4th at pp. 863.) It found 468 violations in the first category of inadequate record-keeping, 72 in the second. The verdict awarded $500 statutory damages for each "violation" under section 1430(b). The trial court entered judgment for $270,000 as statutory damages, and awarded Lemaire over $866,000 in attorney fees and costs. (*Id*.) The Court of Appeal reversed.

Responding to Lemaire's claim that the statutory language and legislative history showed that lawmakers intended this statutory damage provision to be applied to each violation: "[T]he words of the statute do not support this result. The phrase 'up to five hundred dollars" refers to '[t]he suit' to 'be brought.' (§ 1430, subd. (b).) It is a liability cap for the action. Had the Legislature intended an award of statutory damages for each violation it would have used the phrase 'up to $500 *per violation.*' (See *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC, supra*, 221 Cal.App.4th at p. 132.)" (*Lemaire*, *supra*, 234 Cal.App.4th at pp. 866-867.)

Bolstering this interpretation, *Lemaire* judicially noticed later-proposed amendments to *increase* the $500 "per lawsuit" cap on the statutory damage award as declarative of the Legislature's intent about "existing law":

> The proponents of Assembly Bill No. 1160 (1999-2000 Reg. Sess.) noted that "[e]xisting law" made the licensee "liable for up to $500." (Legis. Counsel's Dig., Assem. Bill No. 1160 (1999-2000 Reg. Sess.).) Assembly Bill No. 1160 provided, in relevant part, "This bill would authorize, instead, this civil action for violations of any rights of the resident or patient as set forth under state and federal law and *would increase the maximum liability* to $25,000." (Italics added.) This supports Covenant's position that lawmakers intended the $500 figure to be a maximum liability cap.
>
> Consequently, where the statutory damage award exceeds the $500 limit, as here, the damage award must be reversed. (*Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC, supra,* 221 Cal.App.4th at p. 129.)
>
> *Lemaire*, *supra*, 234 Cal.App.4th at p. 868.

Jarman found those prior interpretations of the statute's plain meaning, and either party's resort to the legislative history, unpersuasive. (Typed opn. at pp. 20-23; cf. petition at pp. 14-15.) Instead, the Court of Appeal adopted a "third option" based upon its "per cause of action" treatment of another statutory damage remedy in *Miller*, *supra*, 159 Cal.App.4th 988. (Civ. Code,§ 3344, subd. (a) [misappropriation of name or likeness].)

Adding the words "per cause of action" to the $500 statutory limit runs afoul of the rule that "a court 'is not authorized to insert qualifying provisions not included [in a statute] and may not rewrite the statute to conform to an assumed intention which does not appear from its language.' (*Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1549.)" (*Lemaire, supra*, 234 Cal.App.4th at p. 867, brackets original.)

The Legislature presumptively knows how to qualify a private right to statutory damages on a "per violation" or "per cause of action" basis. (*Lemaire, supra,* 234 Cal.App.4th at pp. 866-867 [rejecting "per violation" as unsupported by the plain language]; *Nevarrez, supra,* 221 Cal.App.4th at pp. 132, 137 [rejecting *Miller's* "per cause of action" approach].) In the decades since enacting section 1430(b), it has not done so.

And contrary to *Jarman*, the private right of action under section 1430 affords substantial legal remedies to a potential plaintiff to deter future regulatory violations—e.g., attorney fees and injunctive relief. (*Nevarrez, supra,* 221 Cal.App.4th at p. 135; compare typed opn. at p. 19 [a $500 damage cap is "suitable only for those who like litigating far more than they like money"] with *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1148 ["the fact that attorney fees and damages, including punitive damages, are not available under the UCL is clear evidence that deterrence by means of monetary penalties is not the act's sole objective"].) "The fact that the private monetary remedy 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, supra*, 221 Cal.App.4th at p. 132.)

The opinion likewise ignores that all of the "remedies specified in [section 1430] *shall be in addition* to any other remedy provided by law"; such as claims for elder abuse, which Jarman additionally pleaded. (*Lemaire, supra*, 234 Cal.App.4th at p. 867; *Winn, supra,* 63 Cal.4th at pp. 155-160 [clarifying the statutory criteria to recover "enhanced" remedies for elder abuse under Welf. & Inst. Code, § 15600 et seq.)].)

Jarman nevertheless maintains that its "per cause of action" approach will avoid "manipulation" of section 1430(b) damage claims. (Typed opn. at p. 23.) How so? Assuming such "policy" considerations are within the province of the courts, rather than the Legislature, this case illustrates why the opposite is true.

Manor Care opposed any statutory damage award above the $500 per lawsuit cap. Jarman countered (just like the plaintiffs in *Nevarrez/Lemaire*) that $500 per violation is proper. The Court of Appeal opted for the "cause of action" approach, then admonished the Manor Care parties for not accurately predicting the adoption of this new test by arguing for a reduction of the verdict based on *Miller*: "For all we know, the 382 violations found

by the jury reflect circumstances establishing 382 separate causes of action; and in the absence of an affirmative showing to the contrary, we are obligated to presume they do." (Typed opn. at p. 26.) Thus, affirming the jury's "per violation" damage award by other means. That speculative outcome cannot be reconciled with the statutory purpose.

C. Section 1430(b) Does Not Authorize Punitive Damages

Incongruously, *Jarman* then takes its "per cause of action" analysis one step farther—deciding as a matter of first impression that section 1430, subdivision (b) additionally supports the imposition of liability against the defendants for *punitive* damages. (Typed opn. at p. 25; criticizing and declining to follow *Nevarrez, supra*, 221 Cal.App.4th at pp. 135-136 [raising due process concerns that plaintiff's "per violation" argument would "result in an unreasonable or oppressive statutory penalty"].)

The order remanding the case "to establish *the amount of punitive damages* Jarman is entitled to recover *as a result of Manor Care's 382 violations of his rights*" under section 1430 is not supported by the statute or legislative history. (Typed opn. at p. 31, italics added.) As the petition aptly points out, the legislative history of section 1430(b) reflects that the enactment of the $500 statutory damage cap *did not* contemplate additionally imposing "punitive damages" under *that* statute. (Petition at pp. 23-26.) Nor can a jury's finding of "negligence" or "breach" of a custodial care contract support punitive liability. (*Id.* at pp. 21-22; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572.)

Due process considerations require a court reviewing a defendant's liability for punitive damages to independently assess the legal basis for the punitive award in relation to the factual circumstances of each case—including the nature and availability of civil penalties or other remedies that could arbitrarily result in duplicative "punishment" for the same alleged harm. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1185-1187 [reducing punitive damages awarded from $1.7 million to $50,000 on due process grounds, citing *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 436-443]; see also *Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 376-377 [more recently discussing the "constitutional calculus" of punitive damage jurisprudence].)

Jarman creates irreconcilable conflict under California law that will not be lost on practitioners who represent patients, those representing custodial care providers—and the trial courts who must now "choose" between these diametrically-opposed legal standards in the handling of section 1430 actions. Without guidance from this court, the risk of inconsistent and arbitrary outcomes in such cases is all too apparent.

CONCLUSION

This court should grant review to settle the existing conflict in California law over the damage remedy afforded to a private litigant in "a civil action" under section 1430(b), and conclusively resolve these important questions of statutory interpretation.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL
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I am over the age of 18 and not a party to the within action. I am employed by Buchalter, A Professional Corporation with offices located in the Counties of Los Angeles and Sacramento, State of California at 1000 Wilshire Boulevard, Suite 1500, Los Angeles, CA 90017 and 500 Capitol Mall, Suite 1900, Sacramento, CA 95814.

On the date set forth below, I served the within document(s) entitled:

ASCDC Rule 8.500(g) Letter in Support of Petition for Review

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

Executed this 19th day of May 2017 at Sacramento, California.

HARRY W.R. CHAMBERLAIN II

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