No. B235372

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

SUSAN SCHROEDER NEVARREZ,

Plaintiff and Respondent,

v.

SAN MARINO SKILLED NURSING AND WELLNESS CENTRE, et al.,

Defendants and Appellants.

Appeal from a Judgment Of the Los Angeles County Superior Court
LASC Case No. GC045033, Hon. C. Edward Simpson, Judge

APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING; AMICUS CURIAE BRIEF

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Consumer Attorneys of California • Consumer Federation of California
Center for Medicare Advocacy, Inc. • Congress of California Seniors
The National Senior Citizens Law Center

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The following entities seek leave to file the attached amicus curiae brief in support of plaintiff and respondent Samuel Nevarrez's petition for rehearing:

AARP

California Advocates for Nursing Home Reform

Consumer Attorneys of California

Consumer Federation of California

Center for Medicare Advocacy, Inc.

Congress of California Seniors

The National Senior Citizens Law Center

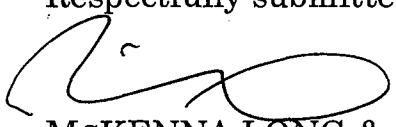
Each of the above entities is interested in protecting and promoting the rights, well-being, quality of life, and care of elderly or disabled adults. As a result, Part III of the court's decision is of particular interest to the proposed amici because that portion of the opinion holds that under Health and Safety Code section 1430, subdivision (b) (section 1430(b)), skilled nursing facilities can never be liable for more than $500 in statutory damages "regardless of how many rights are violated or whether such rights are violated repeatedly." (Typed Opn., p. 25.)

This narrow construction of section 1430(b) directly impacts the rights and well-being of tens of thousands of individuals that the proposed amici serve and represent.

The proposed amici curiae brief will assist the court by outlining the purpose, background, and legislative history of section 1430(b) (none of which was previously before the court), and showing the court that the court's new construction of section 1430(b) undermines the statute's purpose, contradicts the legislative intent, and creates absurd results that the Legislature never intended. The proposed amici curiae brief also explains why labeling section 1430(b)'s monetary remedy a "penalty" will create unintended consequences and unnecessary confusion.

No party or counsel for a party in this appeal authored the proposed amici curiae brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the proposed amici curiae brief.

Respectfully submitted,



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INTRODUCTION

Part III of the court's decision holds that under Health and Safety Code section 1430, subdivision (b) (section 1430(b)), skilled nursing facilities can never be liable for more than $500 in statutory damages "regardless of how many rights are violated or whether such rights are violated repeatedly." (Typed Opn., p. 25.)

The opinion incorrectly examines statutory language "in isolation" rather than "in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724 (*Bruns*).) It fails to "ascertain the intent of the Legislature so as *to effectuate the purpose of the law.*" (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 976 [italics added].)

The "main purpose" of section 1430(b) is to protect nursing home residents by granting them standing in court to enforce their " 'rights under the Patients (sic) Bill of Rights, or other federal and state laws and regulations. . . .' " (*Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609, 624.) The opinion does not mention this purpose. When examined in the context of its purpose, section 1430(b)'s remedy provision can mean only one thing: nursing facilities can be held liable for up to $500 for each infringement of a resident's right.

The opinion's contrary conclusion leads to "absurd consequences the Legislature did not intend." (*Bruns, supra,* 51 Cal.4th at p. 724.) Instead of deterring facilities from violating resident rights, the opinion creates an incentive for facilities to violate multiple rights if doing so is profitable. Contrary to the

"main purpose" of section 1430(b), it also suppresses private enforcement. At $500 per nursing home stay, the remedy for even a heinous series of violations would be too trivial for any patient or attorney to pursue. These absurd consequences foreclose the opinion's view of section 1430(b).

At a minimum, the conflicts between the statute's purpose and the opinion's constricting interpretation of section 1430(b), compel the court to consider legislative history. That history confirms that the Legislature intended section 1430(b) to provide damages of up to $500 for each infringement of a resident's right. For example, the Senate Judiciary Committee's summary of the bill that enacted section 1430(b), states: "[f]or *each violation*, the patient could recover a maximum of $500. . . ." (RJN 49.) And the enrolled bill report emphasizes that section 1430(b) provides a "meaningful private right of action" because it does not "restrict[] damages to present amounts for 'A' . . . citations." (RJN 98.) At the time, an A citation could result in a fine of up to $5,000. (Stats. 1973, ch. 1057, § 1, p. 2090.) Thus, section 1430(b) was meaningful precisely because the damages were *not* limited to $500. Rather, where there were multiple violations, the potential damages could exceed $5,000. (RJN 98.)

A smaller but important concern arises from the opinion's labeling section 1430(b)'s monetary remedy a "penalty." (Typed Opn., pp. 2, 4, 25.) The "penalty" label is dictum on an issue not briefed by the parties. Contrary to the dictum, section 1430(b) authorizes "a civil action for damages." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 143.) And in other contexts, the label

can make a difference; for example, it could affect the choice of a statute of limitations.

ARGUMENT

I.

Rehearing Is Necessary To Correct the Multiple-Violations Error

Rehearing is warranted "to correct a mistake of law that might otherwise have led to confusion in later cases. . . ." (*Alameda County Management Employees Association v. Superior Court* (2011) 195 Cal.App.4th 325, 339, fn. 10; *In re Jessup* (1889) 81 Cal. 408, 471 [rehearing may be granted to correct "mistake of law" in court's opinion].)

A. Statutes should be construed with their purpose in mind.

Statutory construction begins "with the fundamental rule that [the court's] primary task is to determine the lawmaker's intent." (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1095.) To do this, the court " 'must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.' " (*Shamsian v. Atlantic Richfield Co.*, *supra*, 107 Cal.App.4th at 976-977 [statutes "must be construed in context, keeping in mind the statutory purpose"]; *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1253; *Bruns*, *supra*, 51 Cal.4th 717, 724.) And if two constructions are possible "that which leads to the more reasonable result should be adopted." (*Granberry v. Islay Investments* (1984) 161 Cal.App.3d 382, 388.)

The court's duty to interpret section 1430(b) in the context of its purpose is particularly important here because section 1430(b) is a remedial statute. And remedial statutes "should be construed broadly to accomplish [their] protective purpose." (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 294-295, 304; *Kizer v. Waterman Convalescent Hospital, Inc.* (1992) 10 Cal.App.4th Supp. 8, 15 ["Remedial statutes must be liberally construed to effectuate their purpose."].)

B. The purpose of section 1430(b) is to protect residents.

The main purpose of section 1430(b) is to protect nursing home residents. The statute does this by granting residents the right to sue in court to enforce their " 'rights under the Patients Bill of Rights, or other federal and state laws and regulations. . . .' " (*Shuts v. Covenant Holdco LLC, supra*, 208 Cal.App.4th at p. 624.)

This was necessary because the state's limited resources made it impossible to ensure that nursing homes were respecting residents' rights. (RJN 22-25; Stats. 1982, ch. 1455, § 1, p. 5599.) This concern was heightened because—like today—the State was "making major cuts in services," which made it "more important than ever" to give residents the ability to redress violations of their rights and thereby motivate compliance. (RJN 23; *Shuts v. Covenant Holdco LLC, supra*, 208 Cal.App.4th at p. 624 [section 1430(b) was designed "to supplement administrative action with private enforcement," which was particularly important given the concern that State enforcement "would be constrained by

financial and demographic pressures in the coming years"]; *Wehlage v. EmpRes Healthcare, Inc.* (N.D. Cal. 2011) 791 F.Supp.2d 744, 788-789 [same].) In 2004, the Legislature expanded the scope of section 1430(b) to allow residents to bring private enforcement actions based on the violation of the Patients Bill of Rights or "any other right provided for by federal or state law or regulation." (Stats. 2004, ch. 270, § 2.)

Facilities that violate a resident's right "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." (§ 1430(b) [italics added].)

In short, the purpose of Section 1430(b) is to protect the health and safety of people residing in nursing homes by providing a private right of action with remedies large enough to encourage facilities to respect resident rights and encourage residents to bring private enforcement actions when facilities violate their rights. (See *Shuts v. Covenant Holdco LLC*, *supra*, 208 Cal.App.4th at p. 624; see also *Kizer v. County of San Mateo*, *supra*, 53 Cal.3d at pp. 143 [the Long-Term Care, Health, Safety, and Security Act of 1973, into which the Legislature inserted section 1430(b), is designed to "provide the highest level of care possible"], 148 ["protect patients from actual harm, and encourage health care facilities to comply with the applicable regulations"].)

C. Section 1430(b) makes sense only if a resident has a remedy for every infringement of an incorporated right.

Does the use of the word "rights" in the phrase "violates any *rights* of the resident . . . set forth in the Patients Bill of Rights . . ." (§ 1430(b)) compel the interpretation that "the maximum that can be recovered in a civil action under this provision, regardless of how many rights are violated or whether such rights are violated repeatedly"? Considering the full text of the statute in the context of its purpose to protect nursing home residents, the answer is no. (See *Bruns*, 51 Cal.4th at p. 724; *Shamsian v. Atlantic Richfield Co.*, *supra*, 107 Cal.App.4th at pp. 976-977.)

The constrictive interpretation of section 1430(b) quantitatively diminishes the incentive for nursing home operators to comply voluntarily with patient rights. That is common sense. Worse, it encourages facilities that violate one right of a patient to violate multiple rights, and persistently so. For example, a facility that fails to provide adequate staffing violates the rights of its residents. (*Shuts v. Covenant Holdco LLC*, *supra*, 208 Cal.App.4th at pp. 620-621.) Under the opinion's interpretation, the operator of such a facility would incur no additional financial exposure by either continuing to understaff its facility or by violating other resident rights. So if operators could improve their bottom lines by violating the right to adequate meals or the right to reside in a clean facility, for example, at least some would do so. That perverse incentive flies in the face of the Legislature's purpose.

The constrictive interpretation of section 1430(b) also makes private enforcement infeasible unless a patient has suffered personal injury grievous enough to warrant an independent claim. But the Legislature's purpose was to combine the voluntary-compliance carrot with the private-enforcement stick to minimize the occurrence of such injuries. Few residents or their families will choose to endure the stress of litigation to recover $500. And those motivated by pure principle will encounter new difficulty finding counsel willing to risk the investment of suing an institutional health care provider for trivial damages in the hope of an attorney fee multiplier.

This twin gutting of compliance and private enforcement incentives frustrates the purpose of section 1430(b). Abstract textual analysis could not stand against that frustration of legislative purpose. (*Bruns*, *supra*, 51 Cal.4th at p. 724.)

Abstract textual analysis also fails from its own flaws. First, the word "rights" does not modify or qualify the statute's remedies. Rather, the word "rights" refers to the rights conferred by California's Patients Bill of Rights. (§ 1430(b).) "Rights" identifies the scope of the interests of residents that, if infringed, give rise to a cause of action. That sentence of section 1430(b) says nothing about the remedies available under such a cause of action.

Second, the 2004 amendment to section 1430(b) made a textualist's approach to "rights" impossible. As amended, section 1430(b) grants a cause of action for violation of "any other *right* provided for by federal or state law or regulation." (*Ibid.*,

emphasis added.) So, if "rights" can be assigned a literal meaning that it grants only one cause of action for violation of multiple rights "set forth in the Patients Bill of Rights," "right" by the same literalism grants a distinct cause of action for each infringement of any "other right provided for by federal or state law or regulation." No sensible reason exists for the Legislature to grant but one cause of action for multiple, repeated violations of California's own Patients Bill of Rights while granting multiple causes of action for violations of other laws. What this shows is that textualism does not work as a method to decide the pending question.

There is more. The remedies sentence, which is separate from the sentence creating the cause of action, provides for a distinct remedy for each "violation": "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." (§ 1430(b).) By using the singular "violation," the Legislature made the remedies language inconsistent with constricting a resident to a single $500 remedy, regardless of how many times the facility violated the resident's rights.

Nothing else in the opinion supports the textual analysis. Comparing section 1430(b) to Health and Safety Code section 1424 (Typed Opn., p. 25) fails. Section 1430(b) "is distinct from the administrative enforcement of the Act with which section 1424 is concerned." (*California Assn. of Health Facilities v. Department of Health Services*, *supra*, 16 Cal.4th at p. 302.) And unlike section 1430(b), section 1424's citation scheme has

meaning because even one violation could result in a $100,000 fine, and multiple citations can put the facility's license in jeopardy. (Health & Saf. Code § 1424.5, subd. (a)(1).) Relying on *Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1238, 1243 and *Kizer v. Waterman Convalescent Hospital, Inc., supra,* 10 Cal.App.4th Supp. at p. 12 for the per-patient limit violates the principle that opinions are not authority for points not raised. (*People v. Johnson* (2012) 53 Cal.4th 519, 528; *Styne v. Stevens* (2001) 26 Cal.4th 42, 57.) As to the relationship of citations to violations, each opinion merely recites facts.

Even if section 1430(b)'s language supported a literal-meaning argument for a per-patient limit of $500, gutting section 1430(b)'s voluntary compliance and private enforcement purposes is the type of absurd result that forecloses literalism. (See *Bruns,* 51 Cal.3d at p. 724; *Shephard v. Loyola Marymount Univ.* (2002) 102 Cal.App.4th 837, 846 [courts must construe statutes "so as to avoid absurd or unreasonable results"].) Interpreting other private enforcement statutes (expressly called penalties by the Legislature), California appellate courts have recognized that to be effective they must operate on a per-violation basis. (See *Gallamore v. Workers' Compensation Appeals Board* (1979) 23 Cal.3d 815, 823-824 [although workers compensation statute did not specifically authorize a penalty "for each violation," no other construction made sense]; *Davison v. Industrial Acc. Com.* (1966) 241 Cal.App.2d 15, 18 ["For deterrent effect a penalty must have a prospective operation. We give the penalty section its intended

deterrent effect and carry out the statute's basic policy of liberal construction by holding that successive delays in the payment of compensation may give rise to the imposition of successive penalties"].)

D. To make section 1430(b) meaningful, the Legislature intended residents to be able to recover up to $500 for each violation.

Amici have shown that the opinion's constricting interpretation of section 1430(b) cannot be supported by textual analysis, conflicts with the purpose of the statute, and produces absurd results. (*Ante*, pp. 3-10.) Therefore, the "s" in "rights" (see Typed Opn., p. 25) "does not definitively answer whether" (*Bruns*, 51 Cal.4th at p. 724) the Legislature intended to constrict a patient's remedy to $500 per nursing home stay. "Rights" is no better than "ambiguous in this context" (*id.* at p. 725), compelling a broad range of review that embraces legislative history (*id.* at p. 726).

The legislative history of section 1430(b) shows that the Legislature intended to allow residents to recover up to $500 in damages *each* time one of their rights was violated. This is reflected in the Senate Judiciary Committee's summary of the bill, which states: "For *each violation*, the patient could recover a maximum of $500 plus attorneys' fees [and] costs." (RJN 49.)

The enrolled bill also emphasizes this point.[1] It explains that the statute provides a "meaningful private right of action . . . by not restricting damages to present amounts for 'A' . . . citations [i.e., $5,000]." (RJN 98.) In other words, the available statutory damages were not limited to $500 "regardless of how many rights are violated or whether such rights are violated repeatedly." Rather, where there are multiple or repeated violations, the Legislature understood that damages under section 1430(b) could exceed $5,000. This is what makes the statute "meaningful." (RJN 98.)

In 2004, more than twenty years after enacting the statute, the Legislature still understood (and intended) for residents to recover up to $500 for *each violation* of their rights. This was made clear when Assembly Bill 2791 proposed to increase the cap on the potential statutory damages from $500 to $5,000. (AB 2791, as amended by Assembly Member Simitian on April 1, 2400.) One of the purposes of this proposed amendment was to encourage more private enforcement actions. (RJN 604-605.) But opponents to the bill complained that increasing the damages cap

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[1] As the Supreme Court has repeatedly explained, the enrolled bill report is a key indicator of legislative intent because it is "likely to reflect the understanding of the Legislature that enacted the statute, . . . particularly because it is written by a governmental department charged with informing the Governor about the bill so that he can decide whether to sign it, thereby completing the legislative process." (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1218; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn. 19)

from $500 to $5,000 was too dramatic because section 1430(b)'s damages provision authorized residents to recover up to $500 for *each violation*. For example, one bill analysis by the Assembly Republican Health Committee observed that because section 1430(b) provides for damages of $500 "per violation," the proposed amendment would "increase the financial penalty FOR EACH VIOLATION OF A PATIENT'S RIGHT BY 1,000 PERCENT. . . ." (RJN 502-503 [capitalization original].)

Because section 1430(b)'s damages provision applied to "each violation," the Legislature declined to increase the per-violation cap to $5,000. But to further strengthen section 1430(b)'s private right of action, the Legislature expanded the scope of statute in two ways. First, it authorized former residents (not merely current residents) to bring a private right of action. Second, it authorized current and former residents to sue not merely for the violation of the Patients Bill of Rights, but to also sue for the violation of any other right set forth in "federal or state law or regulation." (See *Wehlage v. EmpRes Healthcare, Inc.*, *supra*, 791 F.Supp.2d at pp. 788-789 [AB 2791 was "intended to expand private enforcement of residents' rights"].)

In sum, the Legislature has repeatedly made it clear that it section 1430(b) is intended to allow residents to recover up to $500 for *each violation* of their rights. (See, e.g., RJN 49, 98, 503.) This is precisely what makes the statute "meaningful." (RJN 98.)

II.

Rehearing Is Necessary To Correct Mislabeling the Section 1430(b) Remedy as a Penalty

Labeling section 1430(b)'s monetary remedy a "penalty" (Typed Opn., pp. 2, 4, 25) is also incorrect. The label plays no role in the court's analysis. It was used, but not argued, in both sides' briefs. Because of the collateral consequences of an incorrect label, the court should correct the opinion.

The Legislature, the California Supreme Court, and other courts have consistently described section 1430(b)'s monetary remedy as "damages." (See, e.g., RJN 23, 25, 38, 40, 42, 49, 67, 69, 96, 98; *Kizer v. County of San Mateo*, *supra*, 53 Cal.3d at p. 143 [section 1430(b) authorizes "a civil action for damages"]; *Shuts v. Covenant Holdco LLC*, *supra*, 208 Cal.App.4th at p. 614 [section 1430(b) "authorizes statutory damages" and gives residents the "right to sue for damages"], 625; see also *Wehlage v. EmPres Healthcare, Inc.*, *supra*, 791 F.Supp.2d at p. 786 [section 1430(b) authorizes "claims for damages"].) In fact, this was a central part of the holding in *Shuts*, as the court concluded that because section 1430(b) authorized residents to recover "a damages award," equitable abstention was improper. (*Shuts*, 208 Cal.App.4th at p. 625.)

Labeling the remedy is not essential to the court's decision and was not the subject of briefing in this case. But the opinion's use of the "penalty" label will give rise to confusion in subsequent cases, as the label potentially affects statutes of limitations, insurance coverage, and a host of other issues. To avoid this

resulting confusion, the court should either use the same label used by the Legislature, the Supreme Court, and other courts—i.e., "damages"—or use a neutral label, such as "$500 remedy."

CONCLUSION

The court's conclusion that "$500 is the maximum that can be recovered in a civil action under [section 1430(b)], regardless of how many rights are violated or whether such rights are violated repeatedly," is incorrect. The court also mislabeled the remedy in section 1430(b) as a penalty, instead of damages. The court should grant rehearing to correct these aspects of its opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Charles A. Bird, counsel for amici curiae, certify that the foregoing brief was prepared in proportionally spaced Century Schoolbook 13 point type and, based on the word count of the word processing system used to prepare the brief, the brief is 3,320 words long.

Charles A. Bird

PROOF OF SERVICE

SUSAN SCHROEDER NEVARREZ v. SAN MARINO SKILLED NURSING AND WELLNESS CENTRE, et al.
Court of Appeal, Second Appellate District, Division Four, Case No. B235372
Los Angeles Superior Court, Case No. GC045033

I, Geralynn D. Vidmar, declare as follows: I am employed with the law firm of McKenna, Long & Aldridge LLP, 600 West Broadway, Suite 2600, San Diego, California 92101-3372. I am over the age of eighteen years, and am not a party to this action. On **June 20, 2013**, I served the foregoing document described as:

APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING; AMICUS CURIAE BRIEF

[X] **U. S. MAIL:** I placed a copy in a separate envelope, with postage fully prepaid, for each addressee named below for collection and mailing on the below indicated day following the ordinary business practices at McKenna, Long & Aldridge LLP. I certify I am familiar with the ordinary business practices of my place of employment with regard to collection for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit or mailing affidavit.

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

Executed at San Diego, California on **June 20, 2013**.

Geralynn D. Vidmar

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