No. S241431

IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

JANICE JARMAN,

Plaintiff and Appellant,

vs.

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

Defendants and Appellants.

SUPPLEMENTAL BRIEF OF DEFENDANTS/APPELLANTS HCR MANORCARE, INC. AND MANOR CARE OF HEMET CA, LLC [Cal.R.Ct. rule 8.520(d)]

After a Published Opinion
of the Fourth District Court of Appeal, Division Three
Case No. G051086

Superior Court of the State of California
County of Riverside
Hon. Phrasel Shelton and Hon. John Vineyard
Case No. RIC10007764

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I. INTRODUCTION

Defendants HCR ManorCare, Inc. and Manor Care of Hemet CA, LLC (ManorCare) submit this Supplemental Brief pursuant to California Rules of Court, rule 8.520(d) to draw the Court's attention to the following four new cases and two new law review articles that would have been cited in ManorCare's merits briefing had they existed at the time:

- *Kim v. Reins Int'l Cal., Inc.* (2020) 9 Cal.5th 73.
- *People v. Guzman* (2019) 8 Cal.5th 673.
- *RSCR Inland, Inc. v. State Department of Public Health* (2019) 42 Cal.App.5th 122.
- *Franklin v. Ocwen Loan Servicing, LLC* (N.D. Cal. Nov. 13, 2018) 2018 WL 5923450, clarified by *Franklin v. Ocwen Loan Servicing, LLC* (N.D. Cal. Feb. 5, 2019) 2019 WL 452027.
- Judge Curtis E.A. Karnow, *Primary Rights* (2018) 28 S.Cal. Interdisc. L.J. 45.
- K. LaBerge, *Delusive Exactness in California: Redefining the Claim* (2017) 50 Loy. L.Rev. 365.

II. ARGUMENT

A. Under Fundamental Interpretive Principles, the Legislature's Choice Not to Provide That a Statutory Remedy is "Per Violation" Is Dispositive.

Health & Safety Code section 1430, subdivision (b) ("Section 1430(b)") provides that a plaintiff may recover "up to $500" in "a civil action." The Court of Appeal held that the statute permits a plaintiff to recover up to $500 for each "cause of action," and Plaintiff contends that the statute allows a maximum $500 for each "violation" of residents' rights.

But, as ManorCare's briefs explained, application of established principles of statutory interpretation demonstrates that the statute plainly authorizes a single award of up to $500 in a plaintiff's lawsuit, along with other statutory remedies, and the Legislature chose not to add a per-violation or per-cause-of-action standard into the statute. (See ManorCare's Opening Brief, pp. 21-35; Reply Brief, pp. 10-23; see also *Kim v. Reins Int'l Cal., Inc.* (2020) 9 Cal.5th 73, 85 [rejecting interpretation of PAGA that "would add an expiration element to the statutory definition of standing. . . . Of course, the Legislature said no such thing. . . . 'That [the Legislature] did not [add the requirement] implies no such . . . requirement was intended.'"] [citation omitted][1]; *id.* at 90 ["Although the meaning of PAGA's standing requirement is plain, . . . [legislative history] further supports our conclusion . . ."]; *id.* at 90, fn. 6 ["policy arguments that the statute should have been written differently are more appropriately addressed to the Legislature"]; *People v. Guzman* (2019) 8 Cal.5th 673, 680 [reviewing legislative history that "buttress[es] our reading of the statute"] [quoting *Scher v. Burke* (2017) 3 Cal.5th 136, 148].)

Other new cases reconfirm this conclusion. The Court of Appeal in *RSCR Inland, Inc. v. State Department of Public Health* (2019) 42 Cal.App.5th 122 applied the basic interpretive principle—a statute's plain

[1] *Kim* also exposes the error in the Opinion's assumption that the injunctive relief provided by Section 1430(b) is "largely a chimera" because residents aggrieved by rights violations presumably would leave the facility and therefore not be likely to suffer future harm. (Op., p. 20.) The Legislature chose in Section 1430(b) to expressly provide standing to "[a] current *or former* resident." As *Kim* explains, statutory standing is based on the Legislature's express words. (*Kim*, 9 Cal.5th at 85 ["If the Legislature intended to limit PAGA standing to employees with unresolved compensatory claims . . . , it could have worded the statute accordingly."].)

language is the focal point of statutory interpretation—in the specific context of the penalty provisions of the Long-Term Care Act, the statutory scheme of which Section 1430(b) is a part. The court there interpreted Health & Safety Code section 1424, subdivision (c)'s "reasonable licensee defense," which permits a skilled nursing facility to demonstrate that a regulatory citation should be dismissed where the facility can prove that it "did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the regulation." The court rejected the agency's attempt to read limitations into the statute that were not expressed in its plain language,[2] holding that the Legislature:

> could have added an express limitation of the sort advocated by the Department to the statutory language of section 1424, but it chose not to do so. "It is not the role of the courts to add statutory provisions the Legislature could have included, but did not." . . . In sum, the *correct test for the reasonable licensee defense is the one given by the statutory language* . . . . We reject the additional, non-statutory limitations proposed by the Department.

(*RSCR Inland*, 42 Cal.App.5th at 136 [citations omitted; emphasis added].)

In *Franklin v. Ocwen Loan Servicing, LLC* (N.D. Cal. Nov. 13, 2018) 2018 WL 5923450, the court applied the same interpretive principle to another statute that provides a monetary award but does not state that the award is "per violation." The court considered a motion to dismiss a putative class action alleging that the defendant unlawfully recorded customer phone calls in violation of California Penal Code section 632.7.

[2] The agency argued that the reasonable licensee defense was limited to emergencies or other special circumstances beyond the control of the licensee. (*RSCR Inland*, 42 Cal.App.5th at 125.)

The complaint sought injunctive relief and statutory damages of $5,000 per violation.

At the time of the events in question, that statute provided:

> (a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:
>
> 1) Five thousand dollars ($5,000).
>
> 2) Three times the amount of actual damages, if any, sustained by the plaintiff.

(*Franklin*, 2018 WL 5923450, at *4.) Effective January 2017, the statute had been amended to provide:

> (a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:
>
> 1) Five thousand dollars ($5,000) *per violation*.
>
> 2) Three times the amount of actual damages, if any, sustained by the plaintiff.

(*Ibid.* [emphasis in *Franklin*].) The plaintiffs argued the amendment clarified existing law and showed that the statute had always allowed up to $5,000 per violation; the defendant argued that the amendment changed the law, and that, before the amendment, a plaintiff could recover only $5,000 per lawsuit.

The court rejected the plaintiff's argument and agreed with two recent federal district court cases involving the same statute and the same dispute, which had concluded that "the language of the statute was *unambiguous*" that the maximum $5,000 award in the pre-amendment statute was *not* on a per-violation basis "and that the legislative history of

the 2017 amendment to § 637.2 did not support a per violation interpretation." (*Franklin*, 2018 WL 5923450, at *5 [citing *Lal v. Capital One Financial Corporation* (N.D. Cal. April 12, 2017) 2017 WL 1345636, appeal dismissed (9th Cir. Mar. 27, 2018) 2018 WL 2292446, and *Ramos v. Capital One, N.A.* (N.D. Cal. July 27, 2017) 2017 WL 3232488, appeal dismissed (9th Cir. Nov. 14, 2017) 2017 WL 5891737] [emphasis added].) The *Franklin* court disagreed with a third, contrary case cited by the plaintiff. (See *Franklin*, 2018 WL 5923450, at *5s [discussing *Ronquillo-Griffin v. TELUS Commun., Inc.* (S.D. Cal. June 27, 2017) 2017 WL 2779329].) *Franklin* also cited the Opinion here, noting that it was to the contrary but that this Court had granted review and it had no precedential effect. (*Franklin*, 2018 WL 5923450, at *5, fn. 3.)

Citing *Nevarrez* and *Lemaire*—the two cases holding that a Section 1430(b) plaintiff is limited to a $500 award per civil action, contrary to the Court of Appeal's Opinion here—the *Franklin* court explained:

> In California, "courts are not permitted to insert qualifying provisions not included in the statute, nor edit it to conform to an assumed intention which does not appear from its language. *Nevarrez v. San Marino Skilled Nursing & Wellness Ctr., LLC*, 221 Cal. App. 4th 102, 130 (2013) (internal quotation marks and citation omitted). As such, *California courts generally deny per violation damages except when explicitly provided by statute*. *See, e.g., Lemaire v. Covenant Care California, LLC*, 234 Cal. App. 4th 860, 869 (2015) (construing Health & Safety Code § 1430(b) and reversing statutory damages awarded on a per violation basis where not expressly provided for by statute); *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, 1008 (2008) (limiting damages under Civil Code § 3344(a) to the statutory amount of $750 for the entire action, rather than per violation).

(*Franklin*, 2018 WL 5923450, at *5 [footnote omitted; emphasis added].)[3] The court explained that the statute's language was unambiguous, so that "the inquiry ends" with its plain language, and that a court should not read omitted language into a statute. (*Id.* at *6.) Thus, "[t]he Court agrees with Judge Freeman's finding in *Ramos* and *Lal* that the text of § 637.2(a) before 2017 was unambiguous and that it would be improper to read 'per violation' into the statute where the legislature did not include it." (*Ibid.*) Ultimately, "[statutory] construction can permit only one interpretation: that the statute before 2017 did not allow damages on a per violation basis." (*Ibid.*)

While not necessary to its decision, the *Franklin* court went on to consider the statute's legislative history and to reject the plaintiff's suggestion that the 2017 addition of "per violation" was merely a clarification of the pre-amendment law. (*Id.* at *7.)

Three months after the *Franklin* decision, the court issued a further clarifying order. (See *Franklin v. Ocwen Loan Servicing, LLC* (N.D. Cal. Feb. 5, 2019) 2019 WL 452027.) The court clarified that in a class action, the $5,000 provided by the statute is not a cap on *classwide* damages; rather, a class plaintiff could seek a recovery of up to $5,000 per class member. (*Id.* at *4.) This too is the case for potential class relief under Section 1430(b). If statutory violations are found, each class member could recover up to $500 in a "civil action" that is certified for class relief.

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[3] *Franklin* thus recognizes that *Miller*—on which the Court of Appeal heavily relied—does not support reading a per-violation qualifier into a statute that does not state that an award is per violation. (See ManorCare's Opening Brief, pp. 45-48 [explaining that *Miller* determined that only a single statutory award was justified in a case involving multiple violations].)

B. California's Primary Right Theory Is Difficult to Apply and Out of Step With the Majority of Jurisdictions.

The Court of Appeal held that Section 1430(b) provides a maximum award of $500 per *cause of action*. This interpretation is contrary to Plaintiff's interpretation urged in the trial court and Court of Appeal, as well as to ManorCare's interpretation. The Court of Appeal appeared to agree with *Nevarrez*'s rejection of per-violation recovery to the extent *Nevarrez* relied on the fact that the Legislature had chosen to prescribe per-violation liability in multiple other Health & Safety Code sections but not in Section 1430(b). (Op., pp. 23-24 [referring to *Nevarrez*'s point as "persuasive[] . . . *against* the inference of a 'per violation' measure," but not necessarily preclusive of per-cause-of-action liability] [emphasis in original].) The per-cause-of-action issue was never briefed in the Court of Appeal until ManorCare filed its post-Opinion rehearing petition.

The court explained that the number of "causes of action" is to be determined in accordance with the primary right theory. As ManorCare's briefs discuss, the primary right theory used in California to delineate causes of action is notoriously imprecise and difficult to apply and is "ill-suited" to application outside the res judicata context.[4] ManorCare also noted that, if the plain language, history, and purpose of Section 1430(b) do not control the inquiry, this Court might wish to revisit the question of whether the primary right theory should be maintained in California—one of the few American jurisdictions that still use it. (See ManorCare's Opening Brief, p. 44; see also Judge Curtis E.A. Karnow, *Primary Rights* (Fall 2018) 28 S.Cal. Interdisc. L.J. 45, 59-60 & fn. 109-110 ["Very few other states use the primary right doctrine. For most jurisdictions, we

[4] *Baral v. Schnitt* (2016) 1 Cal.5th 376, 395.

'know now, of course, that [the classification of causes of action based on primary rights] lost the intellectual debate over a century ago.'"] [citation omitted].)

A recent law review article urges that the doctrine be abandoned and replaced with the transactional approach to determining causes of action recommended in the Restatement (Second) of Judgments and used in federal courts and in most other states. (See K. LaBerge, *Delusive Exactness in California: Redefining the Claim* (2017) 50 Loy. L.A. L.Rev. 365.)[5] Another recent law review article, authored by a San Francisco Superior Court judge, explains the difficulty in applying the primary right doctrine, despite this Court's confirmation that the doctrine remains the law in California. (See Karnow, *supra*.)

Application of the doctrine in this and other courts "has been anything but simple." (LaBerge, *supra*, p. 368 [rather than serving the purpose of predictability, "California's primary rights approach is ambiguous to both litigants and the courts, resulting in an inconsistent and chaotic doctrine"]; see also Karnow, *supra*, p. 53 ["the primary rights doctrine has little predictive power; it's tough to tell, in advance, which way a court will come out unless there's a case on point"].)

Both articles discuss decisions of this Court and of the California Court of Appeal that apply primary right analysis but reach inconsistent and irreconcilable results. This problem arises from the primary right analysis's focus on discrete "harms" to various "rights"—malleable standards that can be defined in all manner of ways, narrow and broad, with unpredictable results. (See Karnow, *supra*, p. 50 [observing that "cases seeking to

[5] ManorCare's counsel has confirmed with Westlaw that this 2017 article was added to the Westlaw database on December 3, 2018.

implement the doctrine find 'harm' at a variety of levels of abstraction"]; *id.*, p. 51 ["But how do we know when we have met a distinct legally protected interest—as opposed to one which is essentially the same as another candidate? We don't."].) In contrast, under the mostly favored and more workable transactional approach, a cause of action is defined by a "group of operative facts," providing more predictability and certainty. (LaBerge, *supra*, p. 369.)

These articles' analyses demonstrate the struggle that California courts have experienced in applying the primary right theory. That struggle infected the decision here. The Court of Appeal reimagined the verdict as having supported 382 distinct "causes of action," a theory of relief that was never argued or mentioned to the jury and that did not surface in this case until the Opinion. The Court of Appeal did not address the difficulties in using a primary right analysis to determine when a plaintiff has alleged, or a jury has found, violations of multiple causes of action in a Section 1430(b) claim. The Court of Appeal never explained how discrete causes of action could be determined when a plaintiff brings a Section 1430(b) claim alleging multiple violations of multiple resident rights, many of which are based on a single set of facts regarding the resident's stay at a facility. The court failed to come to terms with that task, yet under its Opinion that is the analysis that dictates the size of a monetary award in a Section 1430(b) case.

III. CONCLUSION

For the reasons discussed in ManorCare's briefs and herein, ManorCare requests that this Court reverse the decision of the Court of Appeal.

Dated: May 8, 2020

MANATT, PHELPS & PHILLIPS, LLP

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WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, Rule 8.520(d)(2), I certify that this Supplemental Brief contains 2,577 words, not including the table of contents, table of authorities, the caption page or this certification page.

Dated: May 8, 2020 MANATT, PHELPS & PHILLIPS, LLP

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I, Brigette Scoggins, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, 2049 Century Park East, Suite 1700, Los Angeles, California 90067. On **May 8, 2020**, I served the within: **SUPPLEMENTAL BRIEF OF DEFENDANT/ APPELLANTS HCR MANORCARE, INC.AND MANOR CARE OF HEMET CA, LLC [Cal.R.Ct. rule 8.520(d)]** on the interested parties in this action addressed as follows:

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