Case No. S241431

IN THE SUPREME COURT OF CALIFORNIA

JANICE JARMAN,

Plaintiff and Appellant,

v.

HCR MANORCARE, INC., et al.,

Defendants and Appellants.

Court of Appeal of the State of California, Fourth Appellate District
Division Three, Civil No. G051086
Superior Court of the State of California, County of Riverside
Case No. RIC10007764
Hon. Phrasel Shelton and Hon. John Vineyard

APPELLANT JANICE JARMAN'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Title 22 of the California Code of Regulations, section 72527, known as the Patients' Bill of Rights provides specifies rights of patients and residents of skilled nursing or intermediate care facilities. Health and Welfare Code section 1430, subdivision (b), gives a resident or patient in such a facility the right to bring an action against the license off such a facility for violation of the Bill of Rights and other federal and state laws and regulations. "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."

The issues before the Court are (1) whether the statute limits the plaintiff's recovery to $500 for the lawsuit, or allows plaintiff to recover $500 for each violation proven, and (2) whether punitive damages are available in an action under the statute. The answers turn on the Legislature's intent in enacting the statute.

This brief will show that the legislative intent of subdivision (b) of section 1430 is to make the facility liable for up to $500 for each violation of a patient's or resident's rights under the Bill of Rights and applicable federal and state laws and regulations. Properly read, that is what the statute provides on its face.

The legislative history, although sparse, also supports that interpretation, and does not show an intent to limit the facility's liability in a lawsuit to $500. Legislative history that ManorCare offers is the history of bills that proposed amendments to subdivision (b) that were not enacted. Such a history of failed bills proposed after the enactment of subdivision (b) shed no light on the Legislature's intent when it enacted the provision.

The construction of subdivision (b) to provide liability for up to $500 for each violation proven is fortified by principles of statutory construction, including liberal interpretation of remedial statutes,

consideration of the object of the statute and the evils it was intended, and the avoidance of an interpretation that would thwart the purpose of the statute and lead to absurd consequences.

The primary right theory, which the court of appeal applied, also supports the interpretation of subdivision (b) to provide liability for up to $500 per right violated. This Court has continuously applied the theory to define a cause of action for 140 years, and it properly applies in an action under subdivision (b).

With respect to punitive damages, subdivision (b) does not forbid them. On the other hand, subdivision (c) of section 1430 is explicit that the remedies the statute provides "shall be in addition to any other remedy provided by law." ManorCare's arguments to the contrary do not withstand analysis.

The decision of the court of appeal should be affirmed.

Section 1430 is in the Long-Term Care, Health, Safety, and Security Act of 1973. (Health & Saf. Code § 1417.) (Long-Term Care Act.) The object to be achieved by the Act is "'to protect one of the most vulnerable segments of our population, "nursing care patients ... who are already disabled by age and[/or] infirmity," and hence in need of the safeguards provided by state enforcement of patient care standards.'" (*State Dept. of Public Health v. Superior Court* (*Center for Investigative Reporting*) (2015) 60 Cal.4th 940, 995, quoting *California Assn. of Health Facilities v. Department of Health Services*, *supra*, 16 Cal.4th at p. 295.)

SUMMARY OF FACTS

ManorCare brusquely disposes of the facts by stating merely that John resided at a ManorCare skilled nursing facility for three months in 2008 and the jury found 382 violations of his rights. (AOB at p. 15.) ManorCare implies that the violations were inconsequential. "At issue in this case," ManorCare asserts, "are lower-level violations called Class 'C,'

that have 'only a minimal relationship to the health, safety or security of the skilled nursing facility patients.'" (AOB at p. 19, quoting 22 Cal. Code Regs., § 72701, subd. (a)(4) [italics in brief omitted].)

The facts are obviously to the contrary.[1]

John Jarman

In March 2008, John (Jack) Jarman, then 91 years old, fractured his left hip when he slipped and fell while climbing out of a swimming pool. (2 RT 174:28-175: 6; 3 RT 363:4-6.) The fracture required surgery, after which he was transferred to ManorCare of Hemet, CA, LLC a skilled nursing facility of HCR ManorCare, Inc. (1 RT 107:24-27, 2 RT 176:6-177:14, 3 RT 446:3-7.) (Manor Care of Hemet, CA, LLC and HCR ManorCare, Inc. will be referred to collectively as ManorCare.)

Prior to the injury, John lived independently and had an active life. He walked without assistance, had swimming exercise classes at a health club, and did many projects around his home. (2 RT 175:4-20.) He had no health conditions that prevented him from living a normal life. (2 RT 176:3-5.) As Melody Jarman, his daughter-in-law, described him, "He couldn't just sit around. He wasn't ready for the rocking chair, he said." (2 RT 175:12-14.)

But after the surgery to repair his broken hip, which included implanting a rod in his leg, John required the maximum assistance with everything from two people. (*Ibid.*; 2 RT 220:5-7.) He could not really move or get up. (2 RT 183:7-11.) He could not even turn on his side without someone to assist him. (2 RT 183:12-15.)

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[1] The facts are summarized following the long-standing principle that an appellate court views the evidence in the light most favorable to the verdict and indulges all reasonable inferences that support the verdict. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

John was admitted to ManorCare on March 17, 2008. (2 RT 203:21-23.) He and his family understood he would be there for three to six months to recuperate and receive rehabilitation services so he could resume his normal daily activities at home. (2 RT 178:25-179:9.) ManorCare represented to John that it was the preeminent care provider with a commitment to standards of performance that serve as the hallmark of the industry. (3 RT 415:23-416:11.)

Stroke

On March 26, 2008, John's daughter, Janice, arrived about 5:00 and found him lying in bed corner-to-corner, legs spread wide, genitals exposed and an odd expression on his face. (2 RT 180:14-27, 217:2-4.) He was lying in his own excrement. (*Ibid.*) She tried to clean him, but when she rolled him on his side his right arm kept falling back; he couldn't move it. (2 RT 181:2-13.) She went out to the hall to find a nurse, but no one was there. (2 RT 181:23-28.) After she cleaned John herself, an aide came in and Janice ran to the nurses' station to tell them that she thought that John had had a stroke. (2 RT 182:16-24.) ManorCare had him taken to an acute care hospital. (2 RT 182:25-183:3.)

At a subsequent family conference with two ManorCare staff members, Janice told one of them, Rita, that she was disappointed that no one noticed that her father had had a stroke before she arrived around 5:00. (2 RT 216:15-217:4) Rita said he hadn't been at ManorCare long enough for staff to know what was "normal" for him. (2 RT 217:20-25.) "In other words, his being caddywompus [*sic*] on the bed and fully exposed and so forth, they wouldn't know if that was normal or not for him." (*Ibid.*)

Care needs totally change

John returned to ManorCare from the acute care hospital on March 29, 2008. (Exh. 38; 2 CT 363.) His care needs had totally changed. (2 RT 241:3-11.) When he entered ManorCare after the surgery to repair his

fractured left hip, he couldn't bear weight on his left leg. (*Ibid.*) After the stroke, he had problems with his right leg as well and he had lost the use of his right arm. (*Ibid.*) He needed assistance with bathing, dressing, brushing his teeth, toileting, and feeding. (3 RT 448:10-16.) He required someone to turn him. (2 RT 241:9-11.) Someone had to help cut up his food and feed him. (*Ibid.*; 2 RT 183:22-23.) But staff did not always cut his food and Janice had to cut it. (2 RT 183:24-184:4.)

Water had to be kept within reach because he could reach for a drink. (2 RT 183:12-17.) But staff would often push his tray aside in performing tasks such as taking his blood pressure, then not put the tray back so he could get water. (2 RT 183:18-22.) "[T]hat never ended. It would always be -- when I [Janice] would go in there, it would be to the side, and I'd have to pull it over so he could reach his water and pour him fresh water." (2 RT 184:5-8.)

Wet, dirty diapers

John was continent while he came to ManorCare; he knew when he needed to use the bathroom. (2 RT 186:12-15, 4 RT 557:3-6.) With assistance in getting to the bathroom, he could toilet himself. (4 RT 528:13-27.) Nevertheless, ManorCare assessed him as incontinent and put him in diapers. (2 RT 264:26-265:3.) But nursing staff did not attend to his needs to urinate or defecate. (2 RT 264:18-25.) They left him in wet diapers with feces. (*Ibid.*)[2]

Nurses unresponsive to calls

In a long, written complaint, Janice said, "The call button was a joke." (Exh. 38; 2 CT 365, ¶ 7.) No one would respond for as long as 45 minutes. (*Id.*) Janice saw several staff sitting and standing around the

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[2] Even had John been incontinent, ManorCare failed to establish a bowel and bladder program in which he could be retrained to toilet on his own. (2 RT 265:2-3.)

nursing station with one or more buzzers buzzing but the people acted like they couldn't hear it. (*Id.*)

Once when John's daughter-in-law Melody was visiting, he was in a lot of pain and he pushed the call button for a nurse to bring his pain medication. (1 RT 108:22-24.) It took "quite a while" for a nurse to answer. (*Ibid.*) Janice remembered an occasion when she had to go to the nurses' station and say, "Somebody better get a bedpan to Mr. Jarman's room stat or their [*sic*] going to have a big mess to clean up." (2 RT 179:24-28.)

On at least one occasion, when Melody and her husband, John's son, were visiting, there was no response to the call light at all; her husband eventually had to go look for help. (1 RT 109:2-6.)

The indifference to John's needs when he pushed the call button was as bad, if not worse, when he finished using a bedpan and needed to have it picked up. He would be left on the bedpan for long periods after pressing the call light. "And they just wouldn't get there in a timely manner. It would be anywhere from 20 to 45 minutes." (2 RT 180:1-4.) John "would be left on it so long that he was in terrible pain." (2 RT 180:11-12.)

Assessment and care plan

ManorCare's records documented ManorCare's repeated inattention to John's needs and failures to provide care that he required and ManorCare took on the duty to provide.

Upon admission to a long-term care facility, the facility is responsible to conduct a head-to-toe assessment of the patient's capabilities and deficits—what the patient can and cannot do—to develop a care plan. (2 RT 235:25-236:24.) The care plan is the basis of the facility's care. (2 RT 237:2-4.) It is the tool that staff work with to provide the care the patient needs. (2 RT 238:19-20.)

So, the assessment is comprehensive, including such matters as the patient's ability to walk, to turn, to eat, to swallow, how much fluid the patient is taking in, how much the patient is putting out, the patient's medications, whether the patient is in pain and what can be done about it. (2 RT 237:13-23.) "Literally the entire person's life is in that care plan." (2 RT 237:24.)

Assessment is ongoing. Every aspect of the patient's condition must be monitored; the assessment and the care plan must be updated every month and whenever a patient has a change in condition. (2 RT 236:23-24, 238:8-10.) Every need a resident has should be in the care plan. (2 RT 238:21-23.)

Patient charts should also include nursing notes that give a picture of patients' activities of daily living (ADLs), such as eating by themselves, being able to turn over, to dress themselves, bathe themselves, and so forth. (2 RT 239:2-14.)

UTI

Failing to frequently change diapers increases the risk of bacteria growing in the urine, thereby increasing the risk of a urinary tract infection (UTI). (2 RT 244:1-9, 245:11-20.) A UTI is of serious concern because it can lead to kidney infection and, at the least, cause burning urination. (2 RT 243:24-27.)

In John's case, since ManorCare put him in diapers, there should have been an indication in the assessment and care plan that he was at risk for developing a UTI. (2 RT 244:1-15, 245:11-24.) The care plan did not address that risk. (2 RT 244: 16-22.)

Around May 15, 2008, John acquired a UTI. (2 RT 241:12-27; 2 CT 378.) John's doctor ordered a laboratory test of his urine. (2 RT 241:14-20.) The laboratory report found over 100,000 bacteria colonies, including bacteria found in fecal matter. (*Ibid.*; Exh. 12, p. 7-243; 2 CT 378.)

A UTI is a change of condition that warrants comment in a patient's nursing notes, progress notes, and patient care plan. (2 RT 243:2-10.) There was nothing about a UTI in John's care plan. (2 RT 241:21-25.)

Bed sores

On May 29, 2008, about two weeks after the laboratory report showed that John had a UTI, he was found to have what staff labeled an "excoriation" on his sacral area, the area at the base of the spine just above the buttocks. (3 RT 350:25–351:14; Exh. 12, p. 7-135; 2 CT 375.) An excoriation can be only redness of the skin or a rash. (2 RT 163:3-7.) John's was many times worse, a significant skin breakdown. (2 RT 161:3-9.)

John had complained of his bottom hurting about a week after he arrived at ManorCare. (2 RT 184:9-23; Exh. 38; 2 CT 364.) He complained so much that Janice finally looked and saw the skin was red; there was no breakage and she put some lotion on it. (*Ibid.*) But, at the end of March he was still complaining and she looked again. (2 RT 184:24-185:2.) This time she saw "horrible, open bed sores on his bottom." (*Id.*; Exh. 38; 2 CT 364.) She reported to the nurses' station that John had bed sores and had to be rotated. (*Id.*)

An aide came to his room to turn him on his side. (Exh. 38; 2 CT 364.) She botched it. She would turn him but he would roll back. (*Id.*) Janice finally told her she needed to put a pillow behind him for support. The aide put a pillow behind him, but at his posterior. (*Id.*) She left and Janice propped him up with two pillows behind his back. (*Id.*)

That was the only time someone from staff rotated him. (*Id.*)

Failure to care for bed sores

To treat John's bed sores, his physician, Dr. Cheng, ordered staff to clean his sacral area, pat dry and apply Calmoseptine; a cream that protects reddened skin from excoriation, twice daily and as needed after every

urination. (2 RT 245:26–246:6, 3 RT 353:22– 354:1, 354:23-355:3; Exh. 12, p. 7-164; 2 CT 377.) Dr. Cheng also ordered the nurses to "monitor excoriation on sacral area" every shift. (3 RT 360:9-13; Exh. 12, p. 7-164; 2 CT 377.)

ManorCare's records showed that the doctor's orders were not followed. Staff did not perform daily head-to-toe assessments, clean John's sacral area, or monitor his wound every shift. (2 RT 258:20–260:13; Exh. 12, p. 7-123; 2 CT 373.) Calmoseptine was applied, but not as regularly or frequently as the doctor ordered. (2 RT 258; Exh. 12, p. 7-123; 2 CT 373.)

The "excoriation" was a change of condition that should have gone into the care plan and nursing notes. (3 RT 247:9-14.) The plan should have noted that his diaper was to be changed after every urination, his posterior washed scrupulously clean, and to be sure that he was not in a wet diaper. (2 RT 249:20-26.) But there was nothing in the care plan on dealing with the excoriation. (2 RT 264:4-6.)

The care plan should also have provided for weekly reassessment of the wound with documentation of whether it was progressing or regressing, and the doctor should have been kept informed, particularly if it was getting worse. (*Ibid.*; 253:28-254:12) There were no reassessments in John's charts. (2 RT 251:8-15.) Nor were there any indications that the staff notified the doctor about the wound after the initial contact with him. (2 RT 254:13-17.)

In fact, the care plan did not even indicate that John had the excoriation, much less set out a plan to deal with it to inform everyone involved in providing care to John what to do. (2 RT 263:4-20.)

Bed sores uncured, worse

On June 16, 1982, John left ManorCare and Melody took him to his home and began getting him ready for bed. (1 RT 115:24-116:3.) As she was undressing him she saw "a terrible sore, terrible raw sore on his

behind." (*Ibid.*) Janice was there and heard her say, "Oh, my God" and call her to look. (2 RT 188:11-17, 221:7-13.) Janice "saw these horrible ulcerations on my dad's bottom and the testes and some of them were kind [of] oozing some kind of liquid." (2 RT 188:11-16; Exh. 38; 2 CT 364.)

A physician with extensive experience and certification in geriatrics, and particular experience and expertise in treating and preventing skin breakdown and pressure ulcers among patients in skilled nursing homes (2 RT 153:6-158:16), examined John's records from ManorCare and photographs that Melody took of the open sores the night he came home. (2 RT 117:16-27; 2 RT 159:1-12, 161:10-19; Exh. 84.) In his opinion, John's "excoriation" was actually ulcers that resulted from pressure, feces or other materials or fluids that could break down the skin, and some movement over sheets or a diaper. (2 RT 161:20-162:2, 163:25-28.)

ManorCare staff did not give John anything to treat the bed sores when he was discharged. (1 RT 114:3-5.) As soon as Melody and Janice saw them the day he came home, Janice called his doctor who recommended a cream that she and Melody bought and began applying that night. (1 RT 114:9-12, 116:4-15.) The bed sores took about three months to heal. (1 RT 120:16-18.)

Jarman's lawsuit

Jarman alleged three causes of action: violation of the Patient Bill of Rights, elder abuse, and negligence. (1 CT 1-12.) The prayer asked for general, special, and punitive damages and other relief. (1 CT 12.) The prayer for punitive damages was not limited to any specific cause of action.

In settling the jury instructions, the court initially rejected Jarman's request for instructions regarding punitive damages. (4 RT 624:21-25, 627:16-18.) The court reconsidered, however, and gave instructions allowing the jury to find whether punitive damages were justified, the amount, if any, to be determined later. (4 RT 679:28-681:7.)

Verdict

The jury found 382 violations of John's rights under federal or state law or regulation and awarded $250 per violation, a total of $95,500. (1 CT 183-184, questions 1 through 3.) The jury also found that ManorCare acted with malice, oppression or fraud, justifying punitive damages. (1 CT 185.) But the trial judge granted partial judgment notwithstanding the verdict and struck that finding. (4 RT 699-1:26-699-2:3.)

Jarman appealed, arguing that the court erred in striking the punitive damages finding. (See Appellant's Opening Brief and Combined Appellant's and Cross-Respondent's Brief in court of appeal.) ManorCare cross-appealed on a number of grounds, including that section 1430(b) does not allow an award of up to $500 for each violation of the Patient Bill of Rights, but only a single award of up to $500 in any lawsuit regardless of the number of violations. (See Respondent's Brief and Cross-Appellant's Opening Brief in court of appeal.)

The court of appeal affirmed the award of $95,500 under section 1430(b). The court disagreed with other cases holding that section 1430(b) only authorizes an award of $500 per lawsuit, *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLP* (2013) 221 Cal.App.4th 102 (*Nevarrez*) and *Lemaire v. Covenant Care California, LLC* (2015) 234 Cal.App.4th 860. (Opn. at p. 18) The court held that "a third option exists, which is to award statutory damages on a 'per *cause of action* basis." (Opn. at p. 21 [court's italics].) The court concluded that it had to be presumed that the jury's finding of 382 violations of John's rights reflected circumstances that established that many separate causes of action and ManorCare had not carried its burden on appeal to make an affirmative showing to the contrary. (Opn. at p. 25-26.)

The court also held that the trial court erred in granting partial JNOV and striking the jury's finding that ManorCare acted with malice,

oppression and fraud as there was sufficient evidence to support an award of punitive damages. (Opn. at pp. 9-17.) Accordingly, the court affirmed the award of $95,500 under section 1430(b) and partially reversed the judgment with directions to conduct further proceedings to determine the amount of punitive damages. (Opn. at p. 31.)

ARGUMENT

I.
SECTION 1430(b) AFFORDS FUNDAMENTAL HUMAN RIGHTS FOR ALL NURSING HOME PATIENTS AND RESIDENTS IN A SKILLED NURSING OR INTERMEDIATE CARE FACILITY

A. Rights Conferred and Guaranteed By the Bill of Rights and Other State and Federal Laws It Incorporates.

The Legislature has expressly stated its intent to set forth the rights provided in the Bill of Rights as among the "fundamental human rights which all patients shall be entitled to in a skilled nursing, intermediate care facility." (Health & Saf. Code § 1599.) These rights include:

"The facility shall ensure that these rights are not violated" and "shall establish and implement written policies and procedures which include these rights...." (Health & Saf. Code section 1599.1, subd. (a) [Section 1599.1].) Rights conferred by the Bill of Rights "may only be denied or limited if such denial or limitation is otherwise authorized by law." (*Id.*, subd. (b).) Violation of a patient's or resident's rights is significant enough that "[r]easons for denial or limitation of such rights shall be documented in the patient's health record." (*Ibid.*)

B. Section 1430 provides a remedy for violations that directly affect patients' and residents' health and well-being.

ManorCare trivializes section 1430(b), repeating throughout its brief that it provides a remedy only for Class "C" violations that "[have] only a minimal relationship to the health, safety or security of skilled nursing

facility patients." (OBM at pp. 11, 14, 40, 56.) ManorCare is wrong for several reasons.

First, the section does not state that it is limited to Class "C" violations or words to that effect. To the contrary, the provision gives patients and residents the right to sue for violation of "any rights of the resident or patient as set forth in the Patients Bill of Rights ... or any other right provided for by federal or state law or regulation."

Second, a violation of the Bill of Rights can be a class "B" violation when it causes, or is likely to cause, "significant humiliation, indignity, anxiety, or other emotional trauma," and if serious enough the violation may be class "A." (Health & Saf. Code § 1424.5, subd. (a)(4).)

And, most significantly, many rights guaranteed by the Bill of Rights have a direct relationship to health, safety, and security of patients—for example, the rights "to be free from mental and physical abuse" (Bill of Rights, subd. (a)(10); to be given care to prevent bed sores (*ibid.*); to have the facility use measures to prevent and reduce incontinence (§ 1599.1, subd. (b)); to receive food of the quality and quantity to meet the patient's need in accordance with physician's orders (*id.*, subd. (c)); to have a nurses' call system and for it to be maintained in operating order in all nursing units so calls may be readily responded to (*ibid.*, subd. (f)); to be provided required pain management. (42 C.F.R. § 483.25, subd. (k).)

Like the federal Civil Rights Act (42 U.S.C. § 1983), subdivision (b) gives nursing home residents a means to assert claims for the violation of rights established by other laws and regulations affecting patient health, welfare, and security. (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 302; accord, *Wehlage v. EmpRes Healthcare, Inc.* (N.D. Cal. 2011) 791 F.Supp.2d 774, 787–788; *Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609, 623, citing *Wehlage*.)

Subdivision (b), thus, encompasses a broad spectrum of violations of residents' and patients' fundamental rights, up to and including the most serious violations for which a facility may be subject to the most severe penalties. (See *Nevarrez*, 221 Cal.App.4th 102, 132.) "The importance of this private right of action is demonstrated by the Legislature's expression that 'under no circumstances may a patient or resident waive his or her right to sue ...' under section 1430, subdivision (b), 'for violations of rights under the Patients Bill of Rights, or other federal and state laws and regulations....'" (*Shuts*, *supra*, 208 Cal.App.4th at p. 624.)

II.
THE LEGISLATIVE INTENT OF SECTION 1430(b) IS THAT A NURSING HOME THAT VIOLATES THE BILL OF RIGHTS SHALL BE LIABLE FOR UP TO $500 FOR EACH VIOLATION

A. A court's task in interpreting a statute is to determine and effectuate the intent of the Legislature.

The "overarching principle" of statutory interpretation is that a court "is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent." (*In re R. V.* (2015) 61 Cal.4th 181, 192 [internal quotation marks omitted].) This is "the primary rule of statutory construction, to which every other rule as to interpretation of particular terms must yield...." (*Dickey v. Raisin Proration Zone No. 1* (1944) 24 Cal.2d 796, 802.) "'Indeed, it has been said that the legislative intent in enacting a law is the law itself.'" (*Ibid.*)

The Legislature's intent must be effectuated even if doing so is not consistent with the strict letter of the statute. (*Ibid.*) "'We need not follow the plain meaning of a statute when to do so would 'frustrate[ ] the manifest purposes of the legislation as a whole or [lead] to absurd results.' [Citations.]" (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340 [Court's bracketing].)

In interpreting a statute, the court may employ rules of grammar and canons of construction as "tools, 'guides to help courts determine likely legislative intent.'" (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1017; see also *City of Palo Alto v. Public Employment Relations Board* (2016) 5 Cal.App.5th 1271, 1294 [canons "are tools to assist in interpretation, not the formula that always determines it."].) A court must "'approach an interpretive problem not as if it were a purely logical game, like a Rubik's Cube, but as an effort to divine the human intent that underlies the statute.'" (*Burris, supra*, 34 Cal.4th at p. 1017-1018, quoting *J.E.M. AG Supply v. Pioneer Hi–Bred* (2001) 534 U.S. 124, 156, 122 S.Ct. 593, 151 L.Ed.2d 508 [dis. opn. of Breyer, J.].)

When the meaning is unclear or ambiguous, the court may "look to a variety of 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." (*In re R .V.*, *supra*, 61 Cal.4th at p. 192 quoting *People v. Scott* (2014) 58 Cal.4th 1415, 1421 [internal quotation marks omitted].)

B. The language of section 1430(b) states that liability is up to $500 for a single violation.

The first step in statutory construction is to look to the words of the statute, "'because the statutory language is generally the most reliable indicator of legislative intent.'" (*Klein v. United States of America* (2010) 50 Cal.4th 68, 77, quoting *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) Section 1430(b) states that, in a resident's action for violation of the Bill of Rights, "[t]he 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." (Emphasis added.) It is difficult to read that language to mean anything other than the plaintiff

may recover up to five hundred dollars for each violation. The nursing home is liable for up to $500 for "the violation" (singular), not "violations" (plural).

The court in *Nevarrez* rejected this reading because the sentence also refers to costs and attorney fees, and "these are awarded to the prevailing party in a civil action, but not on a 'per violation' basis." (*Id.*, 221 Cal.App.4th at p. 131.) The reasoning is unsound; it conflates two separate matters. A plaintiff may recover damages for each violation of his or her primary rights. Costs are awarded to compensate expenses of the litigation as a whole. The fact that plaintiff may recover only a single award of costs and attorney fees for the action does not in any way diminish plaintiff's right to damages for each violation.

ManorCare makes much of the fact that section 1430(b) does not expressly provide for an award of up to $500 "per violation" while other sections of the Health and Safety Code include the phrase or words to that effect. ManorCare offers the analysis of the *Nevarrez* court, which noted that "[w]hen subdivision (b) was added to section 1430, administrative penalties were expressly to be assessed 'for each and every violation,'" from which the court concluded that "the absence of this phrase from subdivision (b) supports the inference that the phrase was intentionally left out of that subdivision...." (*Nevarrez*, 221 Cal.App.4th at p. 132.)

The rule of statutory construction that *Nevarrez* applied—that the use of certain language in one part of a statute but omission of that language in another part of the statute indicates that different meanings were intended—"like other canons of construction, is 'no more than [a] rule of thumb' that can tip the scales when a statute could be read in multiple ways. (*Sebelius v. Auburn Regional Medical Center* (2013) 568 U.S. 145, 155–156.) It does not apply when the statute under consideration does not contain language found in another statute but the other statute is not facially

applicable to the same subject. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.)

The statute providing that a skilled nursing facility may be held civilly liable in a civil action "for each and every citation" is Health and Safety Code section 1424.5. It is directed solely at Class AA, A, and B violations. It has no facial application to the subject of section 1430(b), violations of the Bill of Rights. "'The Legislature is not required to use the same language to accomplish the same ends.'" (*Alatriste v. Cesar's Exterior Designs, Inc.* (2010) 183 Cal.App.4th 656, 670–671, quoting *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 783.)

C. The legislative history of section 1430(b) does not disclose an intent to restrict a nursing home's liability to $500 per action.

1. The history of failed bills that proposed amendments to section 1430(b) sheds no light on the intent of the Legislature when it was enacted.

ManorCare argues that the legislative history of section 1430(b) supports an interpretation that it provides liability for no more than $500 in a lawsuit. In fact, ManorCare does not discuss the legislative history of the bill that became section 1430(b), SB 1930 (1981-1982 Reg. Sess.) ManorCare relies on histories of subsequent bills that proposed amendments to subdivision (b), but failed. The argument is wide off the mark.

"'Unpassed bills, as evidences of legislative intent, have little value.' [Citations.]" (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 746.) To paraphrase, the Legislature's failure to enact the proposed amendments "'demonstrates nothing about what the Legislature intended' when it previously enacted [section 1430(b)] with the language we are now construing. (*People v. Mendoza* (2000) 23 Cal.4th 896, 921, quoting *Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal.3d 209, 230; see also *Nevarrez,* 221 Cal.App.4th at p. 133, citing *Mendoza* ["We do

not consider unsuccessful subsequent bills to be helpful in determining the Legislature's earlier intent."].)

The history of failed amendments proposed after the enactment of section 1430(b) "'[a]t most ... might arguably reflect'" the intent of the Legislatures as to the amendments. (*Mendoza*, *supra*, 23 Cal.4th at p. 921.) But they provide "very limited, if any, guidance even as to that intent," because the failure to enact a proposed amendment to an existing statute may result from such things as the pressure of other business or political considerations. (*Ibid.*) "'We can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law.'" (*Ibid.* [footnotes and citations omitted.].)

2. The legislative history of subdivision (b) does not disclose an intent to limit liability in a section 1430(b) action to $500.

The relevant history, that of SB 1930, is comprised largely of documents submitted to the Legislature stating views of parties advocating for and against the bill. Only one document from within the Legislature itself addresses whether the bill would entitle a nursing home resident who sues for violation of the Bill of Rights to recover up to $500 per violation or per action. The Assembly Judiciary Committee Minority analysis of SB 1930 stated, "*For each violation* the patient could recover a maximum of $500 plus attorneys' fees at [*sic*] costs." (RJN 239 [italics added.].)

There is not a single word to the contrary in the almost 100 pages of the bill's history. (See RJN, Exh. 1, pp. 200-290.)

The *Nevarrez* court dismissed that analysis, citing the analysis of the Assembly Judiciary Committee itself, which the court described parenthetically as "stating that in 'action for damages,' licensee 'would be liable for damages up to $500 and for costs and attorney fees'...." (*Nevarrez*, *supra*, 221 Cal.App.4th at p. 133.) That is not what the committee analysis said. It stated only that the bill would authorize a

patient or resident "to bring an action for damages or an injunction" against a licensee that violates any of the rights protected by the Bill of Rights, and "A licensee would be liable for damages up to $500...." (RJN 232.) The analysis did not say that the patient or resident could recover $500 "in" the action.

The *Nevarrez* court also quoted Legislative Counsel's Digest of the amended version of the final version of the bill that passed, "stating only that licensee was made liable for up to $500." (*Nevarrez, supra*, 221 Cal.App.4th at p. 133.) But that is all that Legislative Counsel stated. He did not state that the "licensee was made liable for up to $500 *in the action*."

When the bill passed, the Department of Aging recommended in an enrolled bill report that the Governor sign the bill. (RJN 289.) "This bill should help assure better quality of care and provide recourse for long-term care residents by creating a more meaningful private right of action, by specifying the amount of damages, and by not restricting damages to present amounts for 'A' or 'B' citations." (*Ibid.*)

Nevarrez dismissed the report on the ground that was "incorrect" in stating that recovery under SB 1930 could exceed the $5,000 maximum for a Class "A" violation "because the $500 limit in Senate Bill 1930 was significantly below that maximum." (*Nevarrez, supra*, 221 Cal.App.4th at 133-134.) That shortsighted view disregards the fact that liability of $500 for each violation will exceed $5,000 when a resident proves ten or more violations.

Further disdaining the Department of Aging's report, the court added, "Enrolled bill reports 'do not take precedence over more direct windows into legislative intent such as committee analyses, and cannot be used to alter the substance of legislation....' [Citation.]" (*Id.* at p. 134.) But there is no direct window through which an intent to limit the

maximum amount recoverable in a section 1430(b) action to $500 is clearly visible.

D. Additional relevant considerations support interpreting section 1430(b) to provide liability of $500 for each violation of a patient's or resident's rights.

1. In light of the object of the statute and the evils it was intended to remedy, it must be read to impose liability of up to $500 for each violation of a patient's or resident's rights.

Particularly when legislative history throws little light on the intended meaning of a statute, the court may consider other factors in construing it, including "ostensible objects to be achieved, the evils to be remedied, ... public policy ... and the statutory scheme of which [section 1430(b)] is a part." (*In re R.V.*, *supra*, 61 Cal.4th at p. 192.) These considerations support the interpretation that section 1430(b) does not limit a nursing home resident or former resident whose rights have been violated to recover no more than $500 per lawsuit.

Section 1430 is in the Long-Term Care, Health, Safety, and Security Act of 1973. (Health & Saf. Code § 1417.) (Long-Term Care Act.) The object to be achieved by the Act is "'to protect one of the most vulnerable segments of our population, "nursing care patients ... who are already disabled by age and[/or] infirmity," and hence in need of the safeguards provided by state enforcement of patient care standards.'" (*State Dept. of Public Health v. Superior Court* (*Center for Investigative Reporting*) (2015) 60 Cal.4th 940, 995, quoting *California Assn. of Health Facilities v. Department of Health Services*, *supra*, 16 Cal.4th at p. 295.)

The evil to be prevented by section 1430(b) is physical and mental harm and danger to the patient's health, safety and well-being posed by the failure to afford the care, services and other residents' rights provided in the Act. The focus of the Act is to "protect patients from actual harm, and

encourage health care facilities to comply with the applicable regulations and thereby *avoid* imposition of the penalties" that the Act provides. (*State Dept. of Public Health v. Superior Court, supra*, 60 Cal.4th at p. 951, quoting *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 148 [italics in original].)

Section 1430(b) is, thus, among the Act's provisions that are intended "'to encourage regulatory compliance and prevent injury.'" (*Lemaire v. Covenant Care California, LLC, supra*, 234 Cal.App.4th at p. 866, quoting *Nevarrez,* 221 Cal.App.4th at p. 135.)

That purpose is not furthered, much less accomplished, by reading section 1430(b) to provide a maximum liability of $500 per action, regardless of the number of violations of a patient's or resident's rights. A nursing home subject to a liability of $500 or less for violating a patient's or resident's rights has no incentive to perform its corresponding duty to afford those rights. A facility may ignore, indeed trample on, patients' and residents' rights to be treated with consideration, respect and dignity (Bill of Rights, subd. (a)(10); 42 C.F.R. § 483.10, subd. (a)), subjecting them to "significant humiliation, indignity, anxiety or other emotional trauma...." (Health & Saf. Code § 1424.5, subd. (a)(4). It may blithely ignore its duty to afford patients and residents other rights immediately related to their health, safety and welfare. (Bill of Rights, subd. (a)(10); 42 C.F.R. §§ 482.13, subd. (c)(3), 483.12); the right to care to prevent bedsores (§ 1599.1, subd. (b)); the right to the quality and quantity of food to meet his or her needs (*Id.*, subd. (c)); and the right to required pain management. (42 C.F.R. § 483.25, subd. (k).)

2. The rule of strict construction of a statute imposing a new liability does not apply.

Section 1430(b), a remedial statute, "'is to be liberally construed on behalf of the class of persons it is designed to protect.'" (*State Dept. of*

Public Health v. Superior Court, *supra*, 60 Cal.4th at pp. 950–51, quoting *California Assn. of Health Facilities v. Department of Health Services*, *supra*, 16 Cal.4th at p. 295.) Remedial statutes "are not construed within narrow limits of the letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished." (*California Grape and Tree Fruit League v. Industrial Welfare Commission* (1969) 268 Cal.App.2d 692, 698.) "'[W]herever the meaning is doubtful, it must be so construed as to extend the remedy.' [Citation.]' [Citations.]" (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269.)

In *Muller*, the Court also acknowledged the contrary rule that ManorCare invokes, "'requiring strict construction of statutes which impose new liability" but held that it "does not apply where strict construction would thwart '"'the palpable intent of the Legislature to impose a new liability consonant with new conditions."'" (*Ibid.*) SB 1930 was enacted to meet new conditions. It gave patients and residents the right to bring a private action to enforce their rights under the Bill of Rights because the state was no longer able to enforce them.

The Senate Judiciary's analysis of SB 1930 stated the purpose of the bill was "to protect and ensure the rights of people residing in nursing homes." (Exh. 1 to RJN at p. 213, Sen. Com. On Judiciary, Analysis of Sen. Bill No. 1930 (1981-1982 Reg. Sess.) as amended April 26, 1982.) The analysis explained that existing law authorized the Attorney General to bring an action against a licensee that violated licensing provisions. (*Ibid.*) But, quoting the bill's author, Senator Petris, "'[S]ince the State is making major cuts in services to people, it is more important than ever to allow the institutionalized individual the ability to protect their [*sic*] own rights in the private sector.'" (*Ibid.*)

Both the Senate Democratic and Republican caucuses repeated that statement of the reason for the bill. (Exh. 1, pp. 228, 230, Senate

Democratic Caucus analysis of SB 1930 as amended May 12, 1982; Senate Republican Caucus analysis of SB 1930 as amended May 12, 1982.).

The Legislature, thus, enacted SB 1930 to meet the new condition of cutbacks in state services and give nursing home patients and residents the right to do what the state could no longer do for them: bring civil actions to enforce their rights.

3. Construing section 1430(b) to limit liability to $500 in a section 1430(b) action is contrary to the rules of liberal construction of remedial statutes and avoidance of absurd consequences.

The rule of liberal construction of remedial statutes applies "'in favor of granting relief unless absolutely forbidden by statute.'" (*Draper v. City of Los Angeles* (1990) 52 Cal.3d 502, 507, quoting *Tammen v. County of San Diego* (1967) 66 Cal.2d 468, 480; *Viles v. State of California* (1967) 66 Cal.2d 24, 32–33; see also, e.g., *Nordahl v. Dept. of Real Estate* (1975) 48 Cal.App.3d 657, 663, quoting *Viles*; *Rousseau v. City of San Carlos* (1987) 192 Cal.App.3d 498, 502, quoting *Tammen*.)

Subdivision (b) does not absolutely forbid awarding $500 for each violation. Nor does it compel the construction that a resident may recover only $500 per action.

Another factor to be considered in construing a statute is "the likely effects of a proposed interpretation because '"[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation."'" (*Klein v. United States of America* (2010) 50 Cal.4th 68, 78, quoting *Mejia v. Reed* (2003) 31 Cal.4th 657, 663, quoting *Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) "'We must ... give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.

[Citation.]'" (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744, quoting *Marshall M. v. Superior Court* (1999) 75 Cal.App.4th 48, 55-56.)

Here, the jury awarded $100,000 for negligence. (1 CT 185.) Five hundred dollars is a miniscule 0.5 percent of that. To pay a $100,000 negligence award but only $500 more under section 1430(b) is to pay virtually nothing for violating the Bill of Rights. From the standpoint of ratio, $100,00 plus $500 is the same as ten dollars plus a nickel.

A statute "'must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.'" (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992.) Yet mischief and absurdity are what result from reading subdivision (b) to limit a nursing home's liability under section 1430(b) to no more than $500 per action, irrespective of the number of violations of the patient's or resident's rights.

Such a construction would not promote the object of the Long-Term Care Act: to protect vulnerable patients of nursing homes against the danger of physical and mental harm resulting from the failure to afford them the care, services and residents' rights in accordance with the Act. (*Kizer, supra*, 53 Cal.3d at p. 148; *State Dept. of Public Health v. Superior Court, supra*, 60 Cal.4th at p. 951.) A long-term care facility could violate patient's and resident's rights with impunity, knowing that, regardless of the number or seriousness of the violations, flouting the resident's rights will not cost more than $500.

The only interpretation that avoids that absurd result, effectuates the protective purpose of the statute and promotes the object of the Long-Term Care Act is that the liability under section 1430(b) is up to $500 for each violation of a patient's and resident's rights under the Bill of Rights and any other state or federal law. ManorCare's proffered interpretation that a

resident or patient can recover no more than $500 in a section 1430(b) action would render the statute toothless.

III.
CONSTRUING SECTION 1430(b) TO IMPOSE LIABILITY OF UP TO $500 FOR EACH VIOLATION IS ALSO SUPPORTED UNDER THE PRIMARY RIGHT THEORY

A. The primary right theory is fundamental to the existence of a civil action.

The court of appeal held that section 1430(b) does not provide for an award of up to $500 per violation, as such, but per cause of action under the primary right theory. (Op., at pp. 21-26.) ManorCare first argues that the primary right doctrine is irrelevant because it applies to issues of res judicata or claim splitting. While those tend to be the most frequent uses of the doctrine, the theory serves a more fundamental purpose. It determines whether a plaintiff has a lawsuit at all.

Code of Civil Procedure section 425.10 requires a complaint to contain "[a] statement of the facts constituting the cause of action...." Under Code of Civil Procedure section 430.10, subdivision (e), a defendant may demur to the complaint on the ground that "[t]he pleading does not state facts sufficient to constitute a cause of action." If a demurrer is sustained without leave to amend the complaint, or leave is granted and plaintiff fails to amend, the action is dismissed. (*Rudolph v. Fulton* (1960) 178 Cal.App.2d 339, 343.) The court may also grant a defendant's motion for judgment on the pleadings on the ground of plaintiff's failure to state a cause of action. (Code Civ. Proc. § 438, subd. (c)(1)(B)(ii).) The appellate court reviews a dismissal after sustaining a demurrer or a judgment on the pleadings by determining "whether the complaint states, or can be amended to state, a cause of action." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672 [dismissal after demurrer]; *People ex rel. Harris v. Pac*

Anchor Transportation, Inc. (2014) 59 Cal.4th 772, 777 [judgment on the pleadings].)

The question, then, is what must a plaintiff allege to state a cause of action, to have the right to be in court?

It has long been the law in California that what constitutes a cause of action is determined using the primary right theory. (See *Atkinson v. Amador and Sacramento Canal Co.* (1878) 53 Cal. 102, 104, overruled on another ground *Wilson v. Bittick* (1965) 63 Cal.2d 30, 36-38. "California courts have 'consistently applied'" the theory. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797, quoting *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.)

Under the theory, "a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.]" (*Crowley v. Katleman, supra*, 8 Cal.4th at p. 681; *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 630, quoting *Crowley.*) To state a cause of action, therefore, plaintiff must plead "'the facts from which the plaintiff's primary right and the defendant's corresponding duty have arisen, together with the facts which constitute the defendant's delict or act of wrong.'" (Witkin, Cal. Procedure (5th ed. (2008) Pleading, § 34, p. 98 [Witkin Procedure], quoting Pomeroy, *Code Remedies* (5th ed. 1929) p. 528; *Atkinson v. Amador and Sacramento Canal Co., supra*, 53 Cal. at p. 104 ["'Every action, however complicated or however simple, must contain these essential elements.'"])

If plaintiff does not allege facts showing a primary right and defendant's wrongful violation of that right, plaintiff has no lawsuit. (E.g., *Lodi v. Lodi* (1985) 173 Cal.App.3d 628, 631 [complaint that does not state cause of action under primary right theory subject to *sua sponte* motion to strike]; *Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1161, 1176.)

B. This Court has repeatedly restated and applied the primary right theory.

ManorCare attacks the primary right theory, quoting the Court's recent comment that application of the theory in particular contexts "is notoriously uncertain...." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 395 [Baral], quoting 4 Witkin Procedure, Pleading, § 35, p. 100.) In *Baral*, the Court held that the theory does not apply in the context of a special motion to strike under the anti-SLAPP statute, Code of Civil Procedure section 425.16. (*Baral*, *supra*, at pp. 394-396.) At the same time, the Court restated the primary right doctrine as the general rule. "In theory, the right of an injured party to seek legal relief may be analyzed in terms of the plaintiff's """primary right,""" the defendant's """primary duty,""" and a breach of that duty entitling the plaintiff to a remedy." (*Id.*, 1 Cal.5th at p. 381, quoting 4 Witkin Procedure, Pleading, § 34, p. 98.)

ManorCare cites no authority—and Jarman is unaware of any—that would make the theory inapplicable in determining the existence or nature of a cause of action and, in particular what cause or causes of action a nursing home resident or patient has under section 1430(b) in enforcing the Bill of Rights or other federal or state law.

C. Violation of the Bill of Rights causes injury that supports a cause of action.

ManorCare contends that "the primary right doctrine focuses on *harm* suffered by the plaintiff," but "a suit for rights violations under section 1430(b) has nothing to do with harm." (Opening Brief on the Merits at p. 40 [OBM].) ManorCare both misstates the doctrine and disregards the fact that violations of the Bill of Rights injure a nursing home patient or resident.

The fact that section 1430(b) was adopted as part of the Long-Term Care Act indicates the Legislature's perception that violations of the Bill of

Rights are injurious. The very purpose of the Act is "to encourage regulatory compliance and *prevent injury from occurring*...." (*Nevarrez, supra*, 221 Cal.App.4th at p. 135.)

Whatever ManorCare conceives to be "harm" necessary to a cause of action under the primary right theory, the theory does not require tangible harm. Liability may arise from injury to "any legally protected interest of another," and harm includes "loss or detriment in fact of any kind to a person...." (Rest. Second of Torts (1965) § 7.) Thus, violation of a person's rights, even without physical or other harm, can be sufficient. "Every person is bound, without contract, to abstain from injuring the person or property of another, or *infringing upon any of his or her rights*." (Civ. Code § 1708 [emphasis added].) "[T]he loss or diminution of a *right* or remedy is well recognized as constituting injury or damage." (*Adams v. Paul* (1995) 11 Cal.4th 583, 590 [emphasis added].)

For example, one of the rights guaranteed to a resident or patient of a skilled nursing facility under the Bill of Rights is the right to personal privacy. (*I*, subd. (12); 42 C.F.R. § 482.13, subd. (c)(1); 483.10(h)(2).) "[T]he right of privacy concerns one's feelings and one's own peace of mind...." (*City of Carmel-by-the Sea v. Young* (1970) 2 Cal.3d 259, 268, citing *Fairfield v. American Photocopy etc. Co.* (1955) 138 Cal.App.2d 82, 86.) Thus, as the court held in *Fairfield*, the violation of one's right of privacy *per se* supports an award of damages even though there is no tangible, pecuniary, or other harm. (*Id.*, 138 Cal.App.2d at p. 86; accord, *Operating Engineers Local 3 v. Johnson* (2003) 110 Cal.App.4th 180, 187.) "The injury is mental and subjective. It impairs the mental peace and comfort of the person and may cause suffering much more acute than that

caused by a bodily injury." (*Fairfield*, *supra*, 138 Cal.App.2d at pp. 86-87.)[3]

D. This Court's holding that the primary right theory applies should not result in uncertainty or further litigation.

There is a ready answer to ManorCare's contention that the primary right doctrine is so uncertain that applying it to define the cause of action under section 1430(b) would require additional litigation to determine whether each violation involves a primary right and warrants a separate award. That is a question now necessarily before the Court—the nature of a cause of action under the statute. The decision in the present case should eliminate any uncertainty on the point.

E. A single act may violate multiple primary rights and give rise to multiple causes of action.

ManorCare also argues that many individual violations of residents' rights would be instances of violation of a single primary right rather than of multiple, separate rights. (OBM at p. 42.) ManorCare does not state what that single cause of action might be. Instead, ManorCare cites the complaint, asserting that ManorCare "is alleged to have violated multiple

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[3] In other contexts, as well, disturbance of peace of mind, discomfort, anxiety and other mental suffering is an injury that supports a cause of action with no showing of any other harm. Two examples are nuisance and trespass. (See, e.g., *Acadia, California, Limited v. Herbert* (1960) 54 Cal.2d 328, 337 ["It is settled that, regardless of whether the occupant of land has sustained physical injury, he may recover damages for the discomfort and annoyance of himself and the members of his family and for mental suffering occasioned by fear for the safety of himself and his family when such discomfort or suffering has been proximately caused by a trespass or a nuisance."]; see also *Herzog v. Grosso* (1953) 41 Cal.2d 219, 225; *Hensley v. San Diego Gas & Electric Company* (2017) 7 Cal.App.5th 1337, 1348–1349 [collecting cases]; 6 Miller and Starr, California Real Estate (4th ed. 2017) § 19:25 at p. 110].)

resident rights (1-CT-6-7) ¶ 23), which is not the same thing as causing multiple harms or violating multiple *primary* rights." (OBM at p. 42 [italics in original.) The argument is circular. It assumes its conclusion, that the Bill of Rights does not confer primary rights.

ManorCare complains that it is not clear (to ManorCare) whether the requirement of adequate staffing in subdivision (a) of section 1599.1 gives rise to a primary right distinct from the rights to assistance with the activities of daily living and dignity, receipt of adequate hygiene, prompt responses to call lights, and so forth. The Legislature has established that the rights guaranteed by the Bill of Rights and other federal and state laws are "fundamental human rights...." (Health & Saf. Code § 1599.) The Legislature makes no distinction between them. All are fundamental.

It is well settled that the same act or omission may breach multiple primary rights and provide multiple bases for liability; "different primary rights may be violated by the same wrongful conduct." (*Branson v. Sun–Diamond Growers* (1994) 24 Cal.App.4th 327, 343-344 [failure of corporation to indemnify employee may violate statutory indemnity right under Corp. Code § 317 and separate contractual or equitable right to indemnity]; see also *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954–955, disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4 [racial discrimination by employer violates primary right under federal Civil Rights Act and separate primary right under California law of slander and intentional infliction of emotional distress]; *Le Parc Community Assn. v. Workers' Comp. Appeals Board* (2003) 110 Cal.App.4th 1161, 1172 [failure of employer to carry workers' compensation insurance; employer's negligence violates employee's primary right under workers' compensation law and separate primary right under tort law].)

F. Allowing multiple awards under section 1430(b) does not deny due process.

ManorCare contends that awarding up to $500 for each violation of a patient's rights would implicate a facility's due process rights, citing *Nevarrez*, *supra*, 221 Cal.App.4th at pp. 135-136. In support of that statement, *Nevarrez* cited *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, overruled on other grounds in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184. In *Casa Blanca*, the trial court found a myriad of violations by defendant of nursing home regulations. The statutory penalty was up to $2,500 "'for each violation....'" The court of appeal held that imposing such a sanction for each of the violations—there were more than 1,000 record-keeping violations alone—"would result in an unreasonable or oppressive statutory penalty." (*Casa Blanca, supra*, 159 Cal.App.4th at p. 534.)

At the same time, the court rejected the nursing home's contention that all of the violations should be counted as only one violation as that "would be equally unreasonable." (*Ibid.*) The trial court, however, did not go to either extreme. Instead, "in seeking to effectuate the legislative purpose," the court considered a number of relevant factors and aggregated categories of violations into 67 single "acts," then imposed the maximum penalty for each of those acts. (*Id.*, at p. 535.) The court of appeal agreed that the trial court's procedure was "a more than reasonable interpretation of the statute's language," and affirmed. (*Ibid.*)

In the present case, as with the statute in *Casa Blanca*, by providing that a resident may recover "up to" $500, section 1430(b) allows the trial judge or jury to make an award that takes into account factors that reasonably bear on the amount. In the present case, for example, the jury

determined that, under the circumstances, assessing ManorCare $250 for each violation was appropriate.

A judge hearing a section 1430(b) action in a bench trial would be entitled to take into account the same types of considerations the trial judge took into account in *Casa Blanca*. (See *id.*, 159 Cal.App.3d at p. 534.) If a jury were to award an amount that might be considered oppressive, the facility would have a remedy in a motion for new trial on the basis of excessive damages. (Code Civ. Proc. §§ 657, subd. 5, 662.5, subd. (b); 8 Witkin Procedure, Attack on Judgment in Trial Court § 116, pp. 709-710.)

G. The District Court of Appeal was correct that a plaintiff subjected to multiple violations of the Bill of Rights could file a separate lawsuit for each violation.

ManorCare argues that the court of appeal was wrong in observing that, if section 1430(b) provided for only $500 per lawsuit, a plaintiff could circumvent the limitation by filing multiple lawsuits. ManorCare contends that this could not happen because once plaintiff sued for violation of one right, res judicata would bar subsequent actions.

But, again, that assumes that there is only one primary right in a section 1430(b) action. Where a plaintiff has separate primary rights, a judgment in one action does not bar a subsequent action, even for the same act or omission that gave rise to the first action. (*Branson v. Sun–Diamond Growers*, *supra*, 24 Cal.App.4th at pp. 343-344; *Agarwal v. Johnson*, *supra*, 25 Cal.3d at pp. 954–955; *Le Parc Community Assn. v. Workers' Comp. Appeals Board*, *supra*, 110 Cal.App.4th at p. 1172.) ManorCare cites no authority requiring a plaintiff who has suffered violations of more than one primary right to allege each and every cause of action in a single lawsuit.

Moreover, as the court of appeal held, a continuing violation of the same right provided in the Bill of Rights would qualify as a single cause of action. (Op'n. at p. 21, citing *Miller v. Collectors Universe, Inc.* (2008)

159 Cal.App.4th 988, 1006 [*Miller*].) At the same time, repeated acts or omissions constituting mental or physical abuse, invasion of privacy, failure to treat with dignity and respect, failure to provide adequate food, or violation of any of the other rights under the Bill of Rights will give rise to a separate cause of action and the resident or patient may bring a series of actions for each new injury that occurs. (See *Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 676; *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 84 [injury caused by abatable nuisance occurs at each continuation and gives rise to separate claim for damages].) This is particularly true when the violation could be discontinued at any time. (See *Gehr v. Baker Hughes Oil Field Operations, Inc.* (2008) 165 Cal.App.4th 660, 666–667.)

H. Under this Court's 140-year, unbroken line of cases, the primary right doctrine is the rule in California.

Finally, ManorCare invites the Court to adopt the transactional theory of the Restatement (Second) of Judgments, section 24. (OBM at pp. 41-45 and fn. 17.) ManorCare contends that the primary right theory is so uncertain and problematic that courts have, to some degree, already incorporated a transactional standard, citing *Federation of Hillside and Canyon Assn's v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1203.

The Restatement transactional theory is plagued with its own uncertainty. The "dimensions" of a claim for issue or claim preclusion are measured by "all or part of the transaction, or series of connected transactions, out of which the action arose." (*Id.*, § 24, subd. (1).) But there is no specific definition of "[w]hat factual grouping constitutes a 'transaction', and what groupings constitute a 'series'" of transactions. (*Id.*, subd. (2).) The Restatement leaves these matters "to be determined pragmatically" and offers no clarification other than to list considerations that should be given weight in making the determination. (*Ibid.*)

In fact, the Restatement concedes, "The expression 'transaction, or series of connected transactions is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases." (com. (b) to § 24.) "However, as Professor Wright has observed concerning a similar definition of 'claim,' it 'is probably sound enough, but it shows the futility of all definitions: after studying the definition we have no more idea whether a particular claim is precluded than we had before we started.'" (Robert Ziff, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement* (1992) 77 Cornell L. Rev. 905, 908 [fn. omitted].)

And, although the *Hillside and Canyons Association* court 14 years ago detected what it considered a movement toward adoption of the transactional theory, since then this Court has restated and adhered to the primary right theory, most recently in *Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 394. (See also, e.g., *Boeken v. Philip Morris USA, Inc.*, *supra*, 48 Cal.4th at pp. 797-798; *Hayes v. County of San Diego*, *supra*, 57 Cal.4th at p. 631.)[4]

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[4] The court of appeal also asserted that, for the purpose of determining whether a prior action is res judicata, analysis had "shifted" from the primary right theory to the Restatement theory in which "only one claim is allowed to determination of the existence of a transaction involving a nucleus of facts upon which only one claim is allowed." The court in *Branson v. Sun-Diamond Growers*, *supra*, answered, "Wherever this perceived shift may have occurred, it is inconsistent with the controlling authority of the California Supreme Court and we therefore decline to apply a 'nucleus of facts' test." (*Id.*, at p. 340, fn. 6); see also *International Evangelical Church of Soldiers of the Cross of Christ v. Church of Soldiers of the Cross of Christ of State of Cal.* (9th Cir. 1995) 54 F.3d 587, 591, quoting *Branson*.)

I. *Miller* supports application of the primary right theory to section 1430(b) actions.

ManorCare contends that the court of appeal's decision in the present case is not supported by *Miller, supra*, 159 Cal.App.4th 988, which the court utilized in holding that 1430(b) establishes a cause of action under the primary right theory. (Opn. at 9 Cal.App.5th at pp. 825-826.) ManorCare first argues that the purpose of the statute at issue in *Miller* was to provide compensation to an injured plaintiff for harm that the defendant caused, but section 1430(b) does not mention injury, harm, compensation, damages or causation. Again, ManorCare ignores the rule that loss or diminution of a right, in and of itself, is actionable, even when the only injury is to one's peace of mind and comfort, with no tangible or other harm. (See p. 29, *supra*.)

ManorCare seizes on the fact that the damage amount provided by the statute in *Miller* is the minimum the statute requires and plaintiff may recover more on proof of tangible loss (*Miller, supra*, 159 Cal.App.4th at pp. 1005-1006), while a nursing home resident is entitled to no more than $500 under section 1430(b) even when he or she suffers actual harm. ManorCare does not explain why that should affect the determination that section 1430(b) establishes a cause of action. "The primary right must also be distinguished from the *remedy* sought: "... the relief is not to be confounded with the cause of action, one not being determinative of the other.' [Citation.]" (*Crowley v. Katleman, supra*, 8 Cal.4th at p. 682.)

ManorCare contends that a per-lawsuit and per-cause-of-action approach to a section 1430(b) action gives the same result because, according to ManorCare, section 1430(b) presents only a single cause of action arising from "a series of related acts...." That analysis might be appropriate under the transactional theory of Restatement section 24. But, as shown in the previous section, that theory is inconsistent with the

primary right theory that this Court has always held to be the rule in California.

The primary right theory does not look to a series of related acts, but to the injury suffered by the plaintiff. "As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904.) In the context of an action under section 1430(b), the injury suffered is at least the impairment or denial of a patient's or resident's rights spelled out in the Bill of Rights and other federal and state laws.

The court of appeal correctly concluded that section 1430(b) allows a resident or patient to recover up to $500 for each violation of his or her primary rights.

IV.
PUNITIVE DAMAGES ARE AVAILABLE IN A SECTION 1430(b) ACTION

Under Civil Code section 3294, "punitive damages are available in all noncontractual civil actions unless otherwise limited." (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 217 [*Commodore*].) So, "the provision of a statutory cause of action for violation of a right ordinarily includes all damages generally available to civil litigants." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22, citing *Commodore*.) This includes punitive damages "unless a contrary legislative intent appears." (*Commodore*, *supra*, 32 Cal.3d at p. 215.)

No statement of a contrary legislative intent appears in section 1430(b). Rather, subdivision (c) of section 1430 directly expresses the Legislature's intent that all relief available in a civil action is available in an action under subdivision (b). "The remedies specified in this section shall be *in addition to any other remedy* provided by law." (§ 1430, subd. (c)

[emphasis added].) Notably, subdivision (c) applies to section 1430 in its entirety. There is no exception for an action under subdivision (b).

Nevertheless, ManorCare argues that punitive damages are not available. ManorCare's arguments fail.

A. Deletion of the amendment to SB 1930 that would have provided for punitive damages does not demonstrate n legislative intent to disallow them in a section 1430(b) action.

ManorCare first points to the fact that at one point in its journey through the legislative process, SB 1930 was amended to add punitive damages. (MJN, Exh. 3, p. 12.) The amendment was subsequently deleted. (MJN, Exh. 4, p. 14.) ManorCare contends that this shows the Legislature's "knowing and deliberate" and "unequivocal intent to foreclose punitive damages." (Opening Br. at p. 51.)

The principle that the Legislature's rejection of a specific provision in a proposed act can be "'most persuasive to the conclusion that the act should not be construed to include the omitted provision.'" (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.) But it is not conclusive. It cannot apply when general language in the statute includes the specific instance. (*Id.,* at pp. 17-18.)

Here, section 1430 contains general language more than broad enough to encompass punitive damages. Subdivision (c) explicitly provides that the remedies that section 1430 provides are "in addition to any other remedy provided by law." Further, Health and Safety Code section 1433 provides, "The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party."

The Legislature, therefore, may well have stricken the punitive damages amendment to SB 1390 because it was unnecessary and superfluous. (See *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 314.)

ManorCare points out that deletion of the punitive damages amendment was the result of discussions between the office of Senator Petris, SB 1930's author, and industry groups. (MJH, Exhs. 7, p. 19; 8, p. 20.) The Senator and his staff may have agreed to eliminate the punitive damages amendment because they realized that they would not be giving up anything in light of subdivision (c) and section 1433. (*Yu*, *supra*, 103 Cal.App.4th at pp. 314-315.)

ManorCare contends that subdivision (c) and section 1433 cannot be construed to authorize punitive damages because they both existed before subdivision (b) was added to section 1430, and "[h]ad the Legislature believed these statutes supported punitive damages under Section 1430(b), it would not have added, and later deleted the specific provision in Section 1430(b) that authorized punitive damages." (OBM at pp. 52-53.) There never was such a "specific [punitive damages] provision in Section 1430(b)." The punitive damages provision was briefly an amendment to the bill, SB 1390, not the statute. And, although the legislator or legislative body that added the amendment may have thought at the time that it was necessary, subsequent deliberation may have been convincing that the amendment was superfluous in light of subdivision (c) and section 1433.

B. The rule that punitive damages are not generally available in a new statutory cause of action does not apply.

ManorCare invokes another general principle, that remedies provided in a statute are exclusive "unless the right set forth in the statute previously existed in the common law." (OBM at p. 53.) ManorCare does not fully state the rule.

> [W]here a statute creates a right that did not exist at common law *and provides a comprehensive and remedial scheme for its enforcement*, the statutory remedy is exclusive. But where a statutory remedy is provided for a pre-existing common law

> right, the newer remedy is generally considered to be cumulative, and the older remedy may be pursued at the plaintiff's election.

(*Rojo v. Kliger* (1990) 52 Cal.3d 65, 79.)

Subdivision (b) of section 1430 does not provide a "comprehensive scheme" for the enforcement of a new right. It provides only an additional remedy to enforce the Bill of Rights.

And section 1430(b) did not create a new right or liability that did not exist at common law. The statute "is not a substitute for the standard damage causes of action for injuries suffered by residents of nursing care facilities." (*Lemaire,* 234 Cal.App.4th at p. 867.)

ManorCare acknowledges that a section 1430(b) action may also include such common law causes of action as negligence, infliction of emotional distress, "and many other claims that can provide compensation for harm." (Opening Br. at p. 32.) In such an action, even before subdivision (b) was enacted, liability could be established by the Bill of Rights. Because it is a formal regulation, it set the standard of care. (Evid., Code §§ 669, 669.1; see also *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 720.)

Moreover, when subdivision (b) was enacted, nursing homes were already civilly liable for violating regulations governing operation and maintenance of long-term care health facilities. The Long-Term Care Act was enacted in 1973. (Stats. 1973, ch. 1057, § 1, p. 2088; Exh. 1 to RJN, pp. 80-83.) Section 1430, which was part of the act, provided that a nursing home could be sued for damages in a civil action for a violation. (Exh. 1 to RJN, p. 2093.) The action could be brought by the Attorney General or "upon the complaint of any board, officer, person, corporation or association, or *by any person acting for the interests of itself*, its members or the general public." (*Ibid.* [emphasis added.]) When subdivision (b)

was added in 1982, it simply provided a means for a particular class of persons, nursing home patients and residents, to bring an action for violation of a particular regulation governing nursing home operations, the Bill of Rights.

Subdivision (b), therefore, did not create a new right or a new cause of action with no common law analog. It provided a remedy "in addition to" common remedies already existing. (§§ 1424, 1430, subd. (c).) It is cumulative, providing a specific remedy for violation of the Bill of Rights in addition to all other common law remedies. (*Rojo v. Kliger*, *supra*, 52 Cal.3d at p. 79.)

C. That the liability imposed by section 1430(b) may be viewed as a penalty does not bar punitive damages.

"The fact that a statutory penalty or even criminal liability is imposed for a particular wrongful act does not preclude recovery of punitive damages in a tort action, where the necessary malice or oppression is shown...." (9 Witkin Summary, Torts § 1742.)

In *Greenberg v. Western Turf Association* (1903) 140 Cal. 357, a statute made it unlawful for racetracks and other places of public amusement to refuse admission to a ticketholder over the age of 21. Any person refused admission in violation of the statute was entitled to recover from the proprietor actual damages plus $100. Plaintiff purchased a ticket to the Tanforan racetrack but was denied admission. He sued the defendant association, proprietor of the racetrack, and the jury rendered a verdict for plaintiff that included punitive damages. This Court rejected the association's argument that the statutory $100 precluded the award of punitive damages.

The Court agreed that the $100 was unquestionably a penalty. (*Id.*, at p. 364.) But the penalty did not serve the purpose of punitive damages. It was imposed without regard to the circumstances under which a ticket-

holder was denied admission. The penalty was imposed in every case regardless of how admission was denied. "The courteous refusal as much exposes a defendant to this penalty of the law as would a brutal expulsion." (*Ibid.*)

The penalty was imposed having regard only to the fact that the law has been violated and its majesty outraged. It is a matter aside and apart from any consideration of the plaintiff's feelings. It does not, therefore, exclude the operation of section 3294 of the Civil Code, but that section runs current with it, and, notwithstanding the imposition of the $100 penalty, in any proper case a plaintiff may recover damages given by way of example for the personal indignity and wrong which have been put upon him.

(*Ibid.*)

The same is true here. If the liability of up to $500 under section 1430(b) is considered a penalty for violating the Bill of Rights, it is imposed whether the violation is intentional or negligent, whether it is malicious, oppressive or fraudulent, or merely inadvertent. The liability is not imposed "for the sake of example and by way of punishing the defendant." (Civ. Code § 3294, subd. (a).)

ManorCare attempts to distinguish *Greenberg* on the ground that the statute there had a common law analog. (See *Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243, 1255, fn. 10.) As shown in the preceding section, so does an action under section 1430(b), which only provides an additional remedy, not a new liability.

Even when a statute creates a new right with no common law antecedent, an important factor that must be considered in determining whether the statute forecloses punitive damages is adequacy of the remedy it provides. The rules that statutes in derogation of the common law are to be strictly construed and a statute imposing a liability unknown at common

law should not apply when the statutory remedy is inadequate. (*Orloff v. Los Angeles Turf Club* (1947) 30 Cal.2d 110, 113.) "A statutory remedy for a statutory right is considered exclusive where the Legislature so intended [citation], but such intent will not be found where the remedy is patently inadequate." (*B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 961 [citing *Orloff*].)

In *Orloff*, the Court considered former Civil Code section 53, successor to the statute in *Greenberg*, which provided the same remedy to a person refused admission to a racetrack, compensatory damages plus $100. The trial court held that plaintiff could not obtain an injunction under the statute. This Court reversed, holding that the statute did not limit plaintiff's remedies as it provided "plainly inadequate relief in a case of this character." (*Id.*, at pp. 113-114.) The Court added, "The sum of $100 is a relatively insignificant recovery when we consider that a positive and unequivocal right has been established and violated." (*Id.*, at p. 114.)

Here, making a nursing home liable for a maximum of $500 for violation of the Bill of Rights is not "relatively insignificant"; it is trivial, and even more so when the defendant is a nationwide nursing home operator with over 500 facilities. (Exh. 30, p. 30-004; 1 CT 134.)

D. Section 1430(b) provides statutory damages, but a plaintiff need not be awarded compensatory, or even nominal, damages to recover punitive damages.

1. Section 1430(b) grants nursing home patients and residents a right to recover statutory damages.

HCR's argument that punitive damages are unavailable unless plaintiff is awarded at least nominal damages fails for the simple reason that section 1430(b) "clearly and unambiguously grants current and former residents of skilled nursing facilities an absolute right to have their claims for *statutory damages* and injunctive relief decided 'in a court of competent jurisdiction.' (§ 1430, subd. (b).)" (*Shuts v. Covenant Holdco LLC, supra,*

208 Cal.App.4th at p. 625.) In *Lemaire v. Covenant Care California, LLC*, *supra*, 234 Cal.App.4th 860, although the court held that section 1430(b) only permits an award of up to $500 for the action, rather than for each violation, the court repeatedly stated that the amount recoverable is "statutory damages."[5]

The Assembly Committee on Judiciary's analysis of SB 1930 in its final version, which is now section 1430(b), stated that the bill "would authorize a patient or resident of a skilled nursing or intermediate care facility to bring an action for damages or an injunction...." (Assem. Com. on Judiciary, analysis of Sen. Bill. No. 1930 (1981-1982 Reg. Sess.) as amended August 2, 1982, RJN Exh. 1, p. 213.) And, as noted previously, when the bill went to the Governor's desk, the Department of Aging stated in its enrolled bill report that SB 1930 "should help assure better quality of care and provide recourse for long-term care residents by creating a more meaningful private right of action, by specifying the amount of damages, and by not restricting damages to present amounts for 'A' or 'B' citations." (RJN, Exh. 1, p. 289.)

2. The award of compensatory damages is not a prerequisite to an award of punitive damages.

An award of damages, even nominal damages, is not necessary before punitive damages may be awarded. The fact that defendant has been found to have committed a tort and inflicted damage is sufficient, whether or not monetary damages are awarded. (*Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 360.) There, the court affirmed an award of punitive damages without an award of compensatory damages in an action for slander per se, an action in which damage to plaintiff's reputation is

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[5] In *Nevarrez*, the court had no occasion to determine whether an award under section 1430(b) is damages because the parties treated the award as "'penalties.'" (*Id.*, 224 Cal.App.4th at p. 129, fn. 10.)

conclusively presumed. As for nominal damages, """"[s]uch damages are damages in name only and not in fact; *they are the same as no damages at all.*""" (*Ibid.*, at p. 359, quoting *Fairfield v. American Photocopy etc. Co.*, *supra*, 138 Cal.App.2d at pp. 87-88, quoting *Price v. McComish* (1937) 22 Cal.App.2d 92, 100 [italics added in *Contento*].)

The prerequisite to punitive damages, therefore, is not an *award* of damages, but a *showing* that plaintiff has been damaged. "[I]f actual damages are *shown*, there need be no finding either as to the existence or monetary extent of such damages to support an award of punitive damages." (*James v. Public Finance Corp.* (1975) 47 Cal.App.3d 995, 1001–1002 [court's italics].) "'The requirement of "actual damages" imposed by section 3294 is simply the requirement that a tortious act be proven if punitive damages are to be assessed.'" (*Id.*, at p. 1003, quoting *Topanga Corp. v. Gentile* (1967) 249 Cal.App.2d 681, 691.)

Just as injury to reputation is presumed from defamation per se, injury to one's peace of mind and comfort may be presumed from violations of the Bill of Rights. Being verbally, mentally, sexually or physically abused (Bill of Rights, subd. (a)(10); 42 C.F.R. § 483.12(a)(1)); being ignored or humiliated instead of being treated with consideration, respect and dignity (Bill of Rights, subd. (a)(12); 42 C.F.R. § 483.10, subds. (a), (e)); being left filthy and unsanitary rather than being assured of good personal hygiene (Health & Saf. § 1599.1, subd. (b)), any or all of these violations of the Bill of Rights and other state and federal law *per se* cause injury and suffering.

Violation of the Bill of Rights causes damage and supports the award of punitive damages in a section 1430(b) action.

CONCLUSION

The language of section 1430(b) and principles of statutory construction support the interpretation of the statute as providing for

liability of up to $500 for each right of a nursing home patient or resident under the Bill of Rights and other applicable federal and state laws and regulations. Under the long-standing primary right theory, each violation of a patient's or resident's rights may also be viewed as a separate cause of action and the patient or resident is entitled to recover up to $500 for each cause of action proven.

Section 1430(b) does not preclude an award of punitive damages. The relief it provides is in addition to any other legal remedies that the patient or resident may have, including the statutory damages provided by the statute.

The decision of the court of appeal should be affirmed.

DATED: February 2, 2018

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CERTIFICATE OF WORD COUNT

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Dated: February 2, 2018

JAY-ALLEN EISEN

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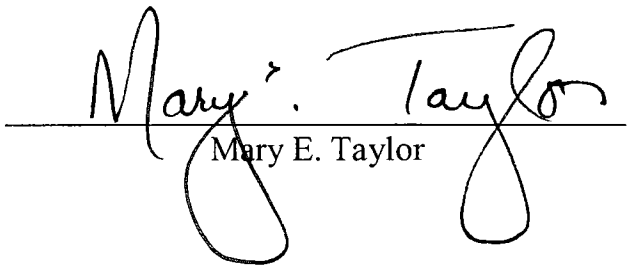

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JARMAN v. HCR MANORCARE
Case Number S241431

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