S241431

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

JANICE JARMAN,
Plaintiff and Appellant,

v.

HCR MANORCARE, INC., et al.,
Defendants and Respondents.

After a Decision by the Fourth Appellate District, Division 3
Case No. G051086

Riverside County Superior Court
Case No. RIC10007764
Hon. Phrasel Shelton and Hon. John Vineyard

AMICI CURIAE BRIEF OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS AND PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTRODUCTION

(1) Does Health and Safety Code section 1430(b) authorize a maximum of $500 per "cause of action" in a lawsuit, as held below, or $500 per lawsuit?

(2) Does Section 1430(b) authorize an award of punitive damages?

Amici curiae California Medical Association, California Hospital Association, and California Dental Association urge the Court to reject the analysis of the Court of Appeal and, instead, to follow the approach of the Courts of Appeal that decided *Nevarrez v. San Marino Skilled Nursing and Wellness Centre, LLC* (2013) 221 Cal.App.4th 102, and *Lemaire v. Covenant Care California, LLC* (2015) 234 Cal.App.4th 860. For the same reasons, *Amici* urge the Court to answer the second question in the negative.

If the Court decides to affirm the Court of Appeal, however, *Amici* urge the Court at least to limit the effect of its ruling to the unique procedural background of this case, the trial of which was seriously bollixed. Otherwise, plaintiffs in future negligence cases will artificially manipulate, if not distort, the factual and legal analyses of their claims – as Plaintiff did in this case simply by accusing the defendant health care organizations of "understaffing" their facilities – to multiply their recoveries.

There will be many problems if the courts permit such a strategy to become routine. If nothing else, there will be jury confusion about calculating the violation of rights and what damages are worth. This case is a dramatic illustration.

INTERESTS OF *AMICI* IN THE ISSUES

The California Medical Association ("CMA") is a non-profit, incorporated, professional association of more than 43,700 member-physicians practicing in the State of California, in all specialties. The California Dental Association ("CDA") represents over 27,000 California dentists, more than 70 percent of the dentists practicing in the State. CMA's and CDA's membership includes most of the physicians and dentists engaged in the private practices of medicine and dentistry in California. The California Hospital Association ("CHA") represents the interests of more than 400 hospitals and health systems in California, having approximately 94 percent of the patient hospital beds in California, including acute care hospitals, county hospitals, non-profit hospitals, investor-owned hospitals, and multi-hospital systems. Thus, *Amici* represent much of the health care industry in California.

CMA, CDA, and CHA have been active before this Court in all aspects of litigation affecting California health care providers. Such cases have included *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, *Barme v. Wood* (1984) 37 Cal.3d 174, *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, *Delaney v. Baker* (1999) 20 Cal.4th 23, *Bird v. Saenz* (2002) 28 Cal.4th 910, and *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771. More recently, CMA, CDA,

and CHA filed briefs in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, and *Rashidi v. Moser* (2014) 60 Cal.4th 718. Most recently, CMA, CDA, and CHA filed briefs in *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, and *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148.

CMA, CDA, and CHA have long been concerned that a wide variety of health care providers and hospitals face the potential for unreasonably large and unpredictable awards in professional negligence actions. That was one of the reasons why the Medical Injury Compensation Reform Act ("MICRA") was enacted. Civil Code section 3333.1, for example, suspends the collateral source rule in medical malpractice litigation. Civil Code section 3333.2 provides guidance by limiting noneconomic damage awards. Code of Civil Procedure section 667.7 provides for periodic payments of future damages, including medical care.

CMA, CHA, and CDA have provided substantial input to the legislative process that led to MICRA's enactment, and they continue to support MICRA's ongoing viability. In doing so, CMA, CDA, and CHA have contributed to improved decision-making by judges and juries, primarily in personal injury litigation, where medical care is an important factual consideration. The MICRA statutes, for example, require damages to be assessed according to their various characteristics: economic damage versus noneconomic damage, past damage versus future damage, medical expense damage versus loss of earnings damage, and insurance-compensated damage versus

uncompensated damage. MICRA requires lawyers, judges, jurors, arbitrators, and all others involved in the resolution of medical malpractice cases to think more precisely about the reasons and the methods for calculating damages. In other words, MICRA has resulted in improved decision-making and fairness, particularly with regard to the assessment of damages during jury trials, which, in turn, has improved the administration of justice in tort litigation generally.

Amici's interest in this case is based on that same concern: that patients be reasonably compensated for their harm and, then, that the amount of money that patients recover is rationally calculated. Here, in addition to a reasonable compensation of $100,000 for the harm that resulted from Defendants' negligence, Plaintiff was artificially compensated for violating the statutes upon which Plaintiff relied to prove the negligence.

Amici fear a cascade of adverse effects on California health care providers if this Court affirms the Court of Appeal decision in this case. First, plaintiffs will routinely plead many, separate causes of action to achieve as many penalties as possible, which will render litigation against providers unnecessarily complex. Worse, the professional standard by which juries traditionally assess the conduct of providers will be blurred with – if not supplanted by – statutory requirements. Worst of all, providers will find that their professional liability insurance does not cover the penalties, attorney fees, and, perhaps most importantly, the punitive damages that plaintiffs seek to recover.

In summary, *Amici* are concerned that the Court of Appeal's approach has confused and complicated the analysis of how much to award patients who are injured by health care providers.

That is why some funding for this brief was provided by organizations and entities that share *Amici*'s interests, including physician-owned and other medical and dental professional liability organizations and non-profit entities engaging physicians, dentists, and other health care providers for the provision of medical services, specifically The Cooperative of American Physicians, Inc., The Dentists Insurance Company, The Doctors Company, Kaiser Foundation Health Plan, Inc., Medical Insurance Exchange of California, Norcal Mutual Insurance Company, and The Regents of the University of California.

Finally, *Amici* reassure the Court that this brief was not authored, either in whole or in part, by any party to this litigation or by any counsel for a party to this litigation. No party to this litigation or counsel for a party to this litigation made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF THE CASE AS IT RELATES TO COMPENSATORY DAMAGES, CIVIL PENALTIES, AND PUNITIVE DAMAGES

A. Plaintiff's Strategy In This Case Was To Maximize Recovery – By Multiplying Both Her Factual Theories And Her Legal Theories

Plaintiff Janice Jarman, successor in interest of John L. Jarman ("Plaintiff"), sued Defendants HCR ManorCare, Inc. and Manor Care of Hemet CA, LLC ("Defendants" or "Manor Care"), asserting three causes of action: (1) violation of the Patient's Bill of Rights, (2) elder abuse, and (3) negligence. (1 Clerk's Transcript on Appeal ("CT") 1-12; see also *Jarman v. HCR Manor Care, Inc.* (Apr. 11, 2014, G049215) [nonpub. opn.] 2014 WL 1401086, at *2 (hereafter referred to as "*Jarman I*"); *Jarman v. HCR ManorCare, Inc.* (2017) 9 Cal.App.5th 807, 812, review granted June 28, 2017, No. S241431 ("*Jarman II*").) Plaintiff alleged that, "[u]pon admission to MANORCARE, JARMAN required extensive assistance with his activities of daily living including eating, bathing, mobility, hydration, medication administration, pressure sore prevention, and other custodial care needs. MANOR CARE failed to provide sufficient numbers of staff for JARMAN'S custodial care needs to be met causing him to be unkempt, incurring bed sores, excoriations, and his needs neglected." (1 CT 6.)

Plaintiff alleged personal injury as a result of elder abuse neglect. For example, after describing "The Parties" in the Complaint (1 CT 1; emphasis in heading deleted), Plaintiff described "John L. Jarman's Injuries." (1 CT 3. Emphasis in heading deleted.)

Plaintiff not only sought recovery of compensatory damages pursuant to Civil Code section 3333, but also attorney fees pursuant to Welfare and Institutions Code section 15657, civil penalties pursuant to Health and Safety Code section 1430, and punitive damages pursuant to Civil Code section 3294. (1 CT 12.) To justify recovery under all four of those statutes, Plaintiff alleged that Defendants simultaneously breached their "standard of care duties" and "statutory and regulatory duties" to Plaintiff and that "[t]he Defendants' breach of their duties, both as to the standard of care duties and those created by statute and regulation to JARMAN, were the direct, actual, legal and proximate cause of Plaintiff's injuries." (1 CT 11-12.)

B. The Jury Instructions Conflated Plaintiff's Multiple Legal Theories – Of Violation Of Patient Rights, Elder Abuse, Negligence, And Even Professional Negligence

Even though Plaintiff did not allege a cause of action for professional negligence, the jury was instructed on professional negligence, specifically of the standard applicable to nurses:

> [A] licensed nurse is negligent if he or she fails to use a level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful licensed nurses would use in similar circumstances. This level of skill, knowledge and care is sometimes referred to as the standard of care. You must determine the level of skill, knowledge, and care that other reasonably careful licensed nurses would use in similar circumstances based only on the testimony of the expert witnesses, including ManorCare licensed nurses who have testified in this case.

(4 Reporter's Transcript on Appeal ("RT") 677.) The jury then was instructed on elder abuse neglect:

> Janice Harmon [*sic*] also claims that her father John Jarman was neglected by HCR ManorCare in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, Janice Jarman must prove all of the following:
>
> One, that HCR ManorCare had custody of the named person, John Jarman. Two, that John Harmon [*sic*] was 65 years of age or older while he was at HCR ManorCare's care or custody. Three, that the employees of HCR ManorCare failed to use the degree of care that a reasonable person in the same situation would have used by A, failing to assist in physical hygiene or in the provision of food, clothing or shelter; B, failing to provide medical care for physical care and/or mental health needs; C, failing to protect John Jarman from health and safety hazards; D, failing to prevent malnutrition or dehydration; or E, failing to exercise that degree of skill and care necessary to prevent John Jarman from acquiring infections of skin breakdown. Four, that John Jarman was harmed, and five, that HCR ManorCare's conduct was a substantial factor in causing John Harmon's [*sic*] harm.

(4 RT 677-678.) The jury was instructed on the elements of "reckless oppression, fraud or malice in neglecting John Harmon [*sic*]." (4 RT 678-679.)

As to "damages," the jury was instructed, "you also must decide how much money will reasonably compensate plaintiff for the harm. This compensation is called damages." (4 RT 679.) "Now, the following are the specific items of damages claimed by Janice Harmon -- Jarman. Physical pain, mental suffering, loss of enjoyment

of life, disfigurement, grief, anxiety, humiliation and emotional distress." (4 RT 679.)

C. The Jury Was, According To Plaintiff's Counsel, "Confused About How To Go About Calculating The Violation Of Rights And What Damages Are Worth"

During deliberations, the jury was confused about how to decide the question of rights violations and sent the court a written question: "what is the guideline to be used to determine the number of [infractions] that has or has not happened?" (4 RT 686-687.) The most obvious implication of the question, given the way in which Plaintiff argued the case, was whether there should be a single violation for *a course of conduct* that denies patient rights or whether there should be multiple violations, one for *each episode* during that course? That was consistent with the way Juror Number One explained the jury's question to the court: "our question as a group was if we find on either side for a question, how many times are we allowed to one [*sic*] of the guidelines are we allowed to say yes or no for that finding?" (4 RT 688.)

That question prompted Plaintiff to move for supplemental instructions. (4 RT 689.) Defendants objected. (4 RT 689-691.) Plaintiff's counsel explained his concern: "my concern is that they brought to our attention that they're confused about how to go about calculating the violation of rights and what damages are worth." (4 RT 692.)

The court denied the motion. (4 RT 695.)

The very next event in the trial was the court's announcement that the jury had arrived at a verdict. (4 RT 695.) They did so by special verdict form, which was entitled "NURSING NEGLIGENCE." (1 CT 183-185. Emphasis in original.) The first three questions on the verdict form related to Plaintiff's first cause of action for violation of patient rights. In answer to the first question – "Did Manor Care of Hemet violate any rights of John Jarman provided for by federal or state law or regulation?" – the jury answered "Yes." (1 CT 183.) In answer to the second question – "How many times did Manor Care of Hemet violate any rights of Jarman provided for by federal or state law or regulation?" – the jury wrote "382." (1 CT 184.) In answer to the third question – "What is the total amount you find HCR Manor Care liable for as a result of violating John Jarman's rights?" – the jury wrote "$250.00 per violation x 382 = $95,500." (*Ibid.*)

There were no questions on the special verdict form related to Plaintiff's second cause of action, for elder abuse neglect.

There were four questions on the verdict form related to Plaintiff's third cause of action, for negligence. In answer to the fourth question (which was two questions, one question for each Defendant) – "Was Manor Care of Hemet negligent in the diagnosis or treatment of John L. Jarman?" and "Was HCR Manor Care negligent in the diagnosis or treatment of John L. Jarman?" – the jury answered "Yes" twice. (1 CT 184.) In answer to the fifth question – "Was John L. Jarman injured at Manor Care of Hemet?" – the jury answered "Yes." (*Ibid.*) In answer to the sixth question – "Was Manor Care of Hemet's negligence a substantial factor in causing

injury to John L. Jarman?" – the jury answered "Yes." (*Ibid.*) In answer to the seventh question – "What are plaintiff's total damages?" – the jury answered "$100,000 plaintiff damages + $95,500 violation total." (1 CT 185.)

In answer to the last question on the special verdict form – "Did the defendant engage in conduct that caused harm to the plaintiff with malice, oppression or fraud?" – the jury answered "Yes." (1 CT 185.) The jury was not asked to render a decision specifying the amount of punitive damages.

Judgment was entered on June 15, 2011. (1 CT 238-245.)

D. The Trial Court Granted A New Trial On The Ground The Jury Verdict Was "Incomplete Or Inconsistent" And Struck The Punitive Damages, But The Court Of Appeal Reversed The New Trial Order

The trial court denied Defendants' motion for judgment notwithstanding the verdict, granted Defendants' motion for an order either correcting the jury's verdict or setting the case for new trial, and granted Defendants' motion to strike the punitive damages claim because there was insufficient evidence to support the jury's finding of malice, oppression, or fraud. (*Jarman I, supra*, 2014 WL 1401086 at *2-3.) Subsequently, the trial court on its own motion ordered a new trial on all issues, reasoning that the special verdict returned by the jury was "incomplete or inconsistent." (4 RT 759; *Jarman I, supra*, 2014 WL 1401086 at *4; *Jarman II, supra*, 9 Cal.App.5th at 815.) As the court explained during the hearing,

> [A]s to the violation of rights, that that cause of action, the judgment – the special verdict as to that cause of

> action is incomplete or inconsistent, and as a matter of law, a new trial would be required on that.
>
> As to the second cause of action, essentially you have the same problem, incomplete, and, in effect, inconsistent, but basically incomplete, which again demands a new trial, with one exception possibly. You've both stipulated that as to HCR Manor Care, that a judgment could be entered for $100,000.

(4 RT 759.) In a subsequent hearing, the trial court put it this way, "It is also clear to me that this Special Verdict Form could have been much better and may, in fact, be defective." (5 RT 791 [Oct. 24, 2014].)

Both Plaintiff and Defendants appealed. In an unpublished opinion (*Jarman I*, *supra*, 2014 WL 1401086), the Court of Appeal affirmed the order denying JNOV, reversed the order granting new trial, and remanded the matter to the trial court with directions to enter a judgment. (*Id.* at *8.) The Court of Appeal did not reach the merits of the trial court's order striking punitive damages. (*Id.* at *7.)

The case returned to the trial court, which then entered judgment against Defendants, awarding Plaintiff the amount of $195,500. (1 CT 238-243; *Jarman II*, *supra*, 9 Cal.App.5th at 815.) The trial court subsequently awarded Plaintiff $368,755 in attorney fees. (10 CT 2445, 2453-2454; *Jarman II*, *supra*, 9 Cal.App.5th at 815.)

E. There Was A Second Appeal On The Merits Of The Trial Court's Order Striking Punitive Damages, And The Court Of Appeal Reversed That Order, As Well

Both Plaintiff and Defendants appealed again. (*Jarman II*, *supra*, 9 Cal.App.5th 807.) In the Appellant's Opening Brief ("AOB") filed in that second appeal, Plaintiff broadly argued that punitive damages were justified because "HCR Manor Care consciously disregarded the health, safety, and well-being" (AOB, p. 25; emphasis in heading deleted), but Plaintiff did not explain which of the three theories Plaintiff pursued at trial – negligence, elder abuse, and statutory violations – was the basis of the punitive damages claim.

In the Respondents' Brief and Cross-Appellants' Opening Brief ("RB/XAOB"), Defendants argued, "the special verdict contains no findings for Plaintiff on any cause of action that could support an award of punitive damages." (RB/XAOB, p. 9. Emphasis in heading deleted.) As to the issue of multiple civil penalties, Defendants argued Plaintiff only was entitled to recover a single civil penalty under Health and Safety Code section 1430. (RB/XAOB, pp. 1-2, 30-48.)

In the Combined Appellant's Reply Brief and Cross-Respondent's Brief ("CARB/XRB"), Plaintiff explained that the "Elder Abuse and Neglect cause of action supports an award of punitive damages" (CARB/XRB, p. 12), but "even if this Court [of Appeal] were not to construe the jury's 'negligence' finding as Elder Abuse and Neglect, but as simple negligence, punitive damages are still warranted, because Civil Code section 3294, subdivision (a)

authorizes punitive damages in any action that is not based on breach of contract – *i.e.*, any *tort* action." (*Id.* at pp. 12-13. Emphasis in original.)

The Court of Appeal ruled for Plaintiff on both Plaintiff's and Defendants' appeals. As to the issue of punitive damages, the Court of Appeal held the trial court erred. (9 Cal.App.5th at 810 (Slip opn., p. 2).) As to the issue of multiple civil penalties, the Court of Appeal held the trial court did not err. (9 Cal.App.5th at 810-811 (Slip opn., pp. 2-4).)

As a result of her two appeals, Plaintiff now is entitled to recover punitive damages in addition to the $95,500 in statutory penalties, $100,000 in compensatory damages, $368,755 in attorney fees, and costs already awarded. There will be a trial on the amount of punitive damages Plaintiff "is entitled to recover as a result of Manor Care's 382 violations of his rights." (9 Cal.App.5th at 832 (Slip opn., p. 31).)

LEGAL ANALYSIS

I. PERSONAL INJURY PLAINTIFFS SHOULD NOT BE ALLOWED TO MULTIPLY THE RECOVERY FROM HEALTH CARE PROVIDERS SIMPLY BY MULTIPLYING THEIR LEGAL AND FACTUAL THEORIES, AS PLAINTIFF DID HERE

A. *Amici* Are Concerned That The Rules Applicable To Professional Negligence Not Be Avoided Simply By Alleging Other Theories

Amici have long been concerned when plaintiffs who sue California health care providers for professional negligence try to multiply their damages by artificially multiplying their legal and factual theories. Usually, they add theories to sidestep one or more of the rules applicable to professional negligence. For example, they sometimes try to avoid the procedural requirement to pursue punitive damages by invoking theories of fraud or other intentional torts, such as in *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181.[1] For another example, they sometimes try to avoid procedural rules like the statute of limitations by invoking theories of ordinary negligence, such as in *Flores v. Presbyterian*

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[1] "We recognize that in the medical malpractice context, there may be considerable overlap of intentional and negligent causes of action. Because acts supporting a negligence cause of action might also support a cause of action for an intentional tort, we have not limited application of MICRA provisions to causes of action that are based solely on a 'negligent act or omission' as provided in these statutes. To ensure that the legislative intent underlying MICRA is implemented, we have recognized that the scope of conduct afforded protection under MICRA provisions (actions 'based on professional negligence') must be determined after consideration of the purpose underlying each of the individual statutes." (3 Cal.4th at 192.)

Intercommunity Hospital, supra, 63 Cal.4th 75.[2] For yet another example, they sometimes try to avoid substantive rules like the damages limitations by invoking theories of statutory neglect, such as in *Winn v. Pioneer Medical Group, Inc., supra*, 63 Cal.4th 148.[3]

Here, Plaintiff not only tried, but actually succeeded, in avoiding the substantive rules applicable to compensatory damages. As a result, *even though the verdict in this case was neither for elder abuse nor for wrongful death*, Plaintiff will recover noneconomic damages, attorney fees, and civil penalties for nursing (that is,

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[2] "[I]f the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under [Code of Civil Procedure] section 340.5. But section 340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient for, or incidental to, the provision of medical care to a patient." (63 Cal.4th at 88.)

[3] "A doctor's failure to prescribe the right medicine, or refer a patient to a specialist may give rise to tort liability even in the absence of a caretaking or custodial relationship. (See Code Civ. Proc., § 364 [defining professional negligence as the 'negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death']; see also *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 143-145, 151, 211 Cal.Rptr. 368, 695 P.2d 665 [affirming medical malpractice judgment where defendants misdiagnosed plaintiff]; *Evans v. Ohanesian* (1974) 39 Cal.App.3d 121, 129, 112 Cal.Rptr. 236 [failure to refer to specialist].) What seems beyond doubt is that the Legislature enacted a scheme distinguishing between—and decidedly not lumping together—claims of professional negligence and neglect." (63 Cal.4th at 159.)

professional) negligence. Worse, Plaintiff is poised to recover punitive damages.

B. Plaintiff Avoided The Rules Applicable To Professional Negligence Simply By Alleging Other Theories

The ultimate source of the problem in this case – at least the problem about which *Amici* are most concerned – is the multiplication of legal and factual theories. There was one cause of action in Plaintiff's complaint for the common law tort of negligence, another cause of action for elder abuse "neglect," and yet another cause of action for statutory violation of nursing home patient rights. Those three causes of action were all based on the same course of conduct: nursing negligence due to "understaffing" at Defendants' skilled nursing facility. That problem was compounded because Plaintiff analyzed the entire course of "understaffing" in terms of separate episodes of inadequate nursing care. In other words, not only did Plaintiff artificially multiply legal theories, she also artificially multiplied factual theories – and she did so on the same, single set of facts.

The greatest reason for *Amici*'s concern is that the Court of Appeal rationalized what Plaintiff had done, and did so in a *published* decision, holding that each statutory violation occurring during each of the separate episodes of nursing care could be analyzed in terms of separate causes of action. The basic message of the Court of Appeal's decision is clear: plaintiffs can easily increase their monetary recovery for personal injury by presenting their cases in terms of multiple legal theories and multiple factual theories.

The inevitable effect of the Court of Appeal's interpretation of Health and Safety Code section 1430(b) will be widespread adoption of the strategy. That will lead to many other plaintiffs who sue California health care providers sidestepping one or more of the rules applicable to professional negligence and other ordinary torts. It will be common for plaintiffs to make simultaneous claims for statutory violations and ordinary negligence, in lieu of professional negligence. Many will follow the lead of Plaintiff in this case and allege "understaffing" at the facilities where patients seek care. Their common theory of injury will be that, if there just had been more health practitioners at the facilities, the patients would not have been harmed.

To summarize, the Court of Appeal expanded the ways in which California health care providers will be held responsible for poor patient outcomes and, as a result, will be required to pay artificially increased amounts.

II. WHILE STATUTORY VIOLATIONS CAN BE USED TO PROVE THE *BREACH* OF DUTY ELEMENT OF A CAUSE OF ACTION FOR PERSONAL INJURY, THE VIOLATIONS SHOULD NOT BE USED TO MULTIPLY CAUSES OF ACTION FOR INJURY

A. Plaintiff Relied Upon Legal And Factual Fictions To Multiply Causes Of Action

Plaintiff justifies her strategy for maximizing her recovery and, in particular for justifying her recovery of punitive damages, with a legal fiction: multiple causes of action for personal injury *per se*. (Supplemental, Corrected Appellant's Answer Brief on the Merits ("ABM"), p. 53 ["these violations of the Bill of Rights and other state

and federal law *per se* cause injury and suffering"].) The effect, of course, is to multiply damages. Another effect is to sidestep the law applicable to professional negligence and other ordinary torts.

Plaintiffs should not be allowed to artificially manipulate their recoveries by the use of such legal fictions.

For one thing, while the effect of a statute on personal injury litigation may be to create a *duty*, and the effect of a violation of that statutory duty may give rise to a finding of a *breach of duty*, that is not to say there is a *cause of action* for each statutory violation. That is because the statutory *duty* and the *breach of that duty* are two *elements* of a personal injury cause of action, not the *entire* cause of action. The statutory duty and the breach of that statutory duty should be analyzed no differently than the breach of a common law duty. That is particularly true in those situations where the statutory duties correspond to – if not duplicate – common law tort duties.

Health and Safety Code section 1430(b) provides that a plaintiff "may bring *a civil action* against the licensee of a facility who violates any rights of the resident or patient as set forth in the Patient's Bill of Rights[.]" (Emphasis added.) "*The suit* shall be brought in a court of competent jurisdiction. . . . The licensee shall *be liable for up to* five hundred dollars ($500), and for costs and attorney fees[.]" (*Ibid.* Emphasis added.) Notwithstanding the plain meaning of this statutory language, Plaintiff argues there could be a separate *cause of action* for each right that is violated.

Plaintiff also argues there could be a separate *cause of action* for each day that each right is violated.

In addition to Plaintiff's strategy of arguing multiple legal theories, Plaintiff pursued a strategy of arguing multiple episodes of inadequate nursing care during the single course of care, which Plaintiff characterized as Defendants' "understaffing" of their facility. That is, Plaintiff relies upon a factual fiction: *the single course of nursing care* at Defendants' understaffed skilled nursing facility can be separately analyzed as *individual episodes of nursing negligence* directed at Plaintiff's father while he was a patient at Defendants' facility. (ABM, p. 39 ["A single act may violate multiple primary rights and give rise to multiple causes of action"]. Emphasis in heading deleted.) It was in that way the jury was able to find 382 violations, increasing the statutory penalty from $500 to $95,500.[4]

Personal injury claimants should not be allowed to artificially manipulate their recoveries by employing such legal and factual fictions.

B. The Court of Appeal Held That Each Violation Can Give Rise To A Separate Cause Of Action

The Court of Appeal held that each violation can give rise to a separate cause of action, which is an approach that obviously will complicate the litigation process. If nothing else, if a plaintiff can simultaneously pursue negligence and statutory violation causes of

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[4] *Amici* submit that Plaintiff's strategy was what led to the jury's confusion "about how to go about calculating the violation of rights and what damages are worth." (See 4 RT 692.) The jury naturally assumed from the way Plaintiff tried the case that they were somehow expected to calculate the "worth" of Plaintiff's harm for the violation of rights.

action for each episode in a single course of conduct, the jury could be required to answer many more questions than necessary.

Here, it is unclear whether the Court of Appeal actually was recommending that approach should have been followed, however. There are parts of the decision that suggest the Court felt that was precisely what the jury did during deliberations. (9 Cal.App.5th at 828 (Slip opn., p. 26) ["For all we know, the 382 violations found by the jury reflect circumstances establishing 382 separate causes of action"].) But there also are parts of the decision that suggest the Court did not approve of such an approach. (9 Cal.App.5th at 825 (Slip opn., p. 22) ["In our view, *Nevarrez*'s acknowledgement that a single plaintiff could state multiple *causes of action* under section 1430, subdivision (b), highlights the flaw in its 'per lawsuit' measure of statutory damages"]. Emphasis in original.)

Perhaps the Court of Appeal's remark about multiple causes of action was nothing more than another legal fiction to justify multiplying the $250 statutory penalty, reduced from the $500 maximum, to $95,500 in this case. But then, even assuming that the Court of Appeal's analysis of separate statutory violations giving rise to separate causes of action was a legal fiction, *Amici* are concerned that, like Plaintiff in this case (ABM, p. 41 ["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"]; emphasis in heading deleted), other plaintiffs in other cases will argue it was a holding.

III. PLAINTIFF'S ARGUMENT ON APPEAL – FIRST TO JUSTIFY *MULTIPLICATION OF THE PENALTY* AND THEN *ADDITION OF PUNITIVE DAMAGES* – MIRRORS THE CONFUSING ARGUMENT AT TRIAL BY WHICH PLAINTIFF PERSUADED THE JURY TO ANALYZE THIS CASE FOR "NURSING NEGLIGENCE" IN TERMS OF STATUTORY VIOLATIONS OF PATIENT RIGHTS

A. Plaintiff's Case Is For "Nursing Negligence," Yet Plaintiff Persuaded The Jury To Analyze The Case In Terms Of Statutory Violations Of Patient Rights

As noted above, the gravamen of this case is negligence – specifically, nursing negligence. Why else, after the close of evidence at the trial of this case, was the jury presented with a special verdict form captioned "NURSING NEGLIGENCE"? (1 CT 183. Emphasis in original.)

The first three questions the jury was asked to answer had nothing to do with negligence: "Did [Defendants] *violate any rights* of [their patient,] John Jarman[,] provided for by federal or state law or regulation" and, if so, what was "*the total amount you find [Defendant] liable for* as a result of violating John Jarman's rights." (1 CT 183-184. Emphasis added.) All three questions were framed in terms of legal conclusions rather than factual findings.

Admittedly, the remaining questions in the verdict form were about negligence, but the fourth question (which actually was in the form of two questions, one for each Defendant) was framed in terms of *professional* negligence: "Was [Defendant] *negligent in the diagnosis or treatment* of [its patient]?" (1 CT 184. Emphasis added.) That, as well as the fifth and sixth questions which used the words "injured" and "injury," respectively (1 CT 184), demonstrated

that the gravamen of the factual inquiry was negligence, if not *professional* negligence.

In other words, the special verdict form reflects the fundamental problem with this case, the source of which was Plaintiff's determination to multiply her monetary recovery. By relying upon Section 1430(b), she was able to artificially manipulate the factual and legal analyses of her claim for negligence into a simultaneous claim for violation of rights. It was how Plaintiff persuaded the jury to conclude that Defendants committed 382 statutory violations and should be penalized $95,500. It now is how Plaintiff hopes to recover still more, in the form of punitive damages.

Amici submit the jury's conclusions about statutory violations undoubtedly distorted the jury's findings on the remaining questions about negligence. After all, given the order of the questions in the special verdict form, it is likely the jury first concluded that there were statutory violations and only then found that Defendants were negligent. The obvious implication is that the jury award of "damages" and the jury finding of "malice, oppression or fraud" were strongly affected by, if not completely based on, the jury's conclusions about statutory violations. That implication is confirmed by the jury's answer to Question No. 7, the "damages" question, where the jury wrote "$100,000 [Plaintiff Damages] + $95,500 [Violation Total]." (1 CT 185.) It also is confirmed by the Court of Appeal. (9 Cal.App.5th 810 (Slip opn., p. 2 ["[t]he sheer number of violations found by the jury"].)

B. This Case Illustrates The Confusion Which Occurs When A Cause Of Action For Statutory Violations Is Simultaneously Analyzed With A Common Law Tort Claim, Based On The Same Set Of Facts

If nothing else, the Court of Appeal decision will result in confusion. This case is an illustration.

During jury deliberations, the jury asked the trial court a question, which prompted Plaintiff's counsel to become concerned that the jury was confused:

> THE COURT: My question to you is your expert came on and testified as to all of these Bill of Rights in the state law and federal law, correct? That was part of the expert testimony, am I right or wrong?
>
> [Plaintiff's counsel] MR. LANZONE: That was part of it.
>
> THE COURT: And that being the case, was there any further need for instructions on this since the expert had already supposedly laid out all these rights?
>
> MR. LANZONE: Not only did our expert, but his expert. The director of nurses also testified about what would comprise all these rights.
>
> THE COURT: Counsel, let's accept that both experts testified as to what the rights were. Were there any additional needs to instruct on those rights?
>
> [Defense counsel] MR. PETRULLO: No.
>
> THE COURT: Counsel?
>
> MR. LANZONE: As to the rights, your Honor, I'll submit to the Court that perhaps it may be overkill because we've already discussed it with the jury in closing argument and so on and so forth, but my concern is that they brought to our attention that they're confused

about how to go about calculating the violation of rights and what damages are worth.

THE COURT: How does this resolve that issue? Assuming that they are confused and assuming that now that they have plenty of instructions that they have and didn't have before, how can this straighten that out, clear up that possible confusion?

MR. LANZONE: Well, the first part of the requested instruction is the exact language from 1430 (b) and (c), which specifically states for each violation, you know, you -- these are the types of damages that you can award of up to $500.

THE COURT: And both experts have testified as to these rights, have they not?

MR. LANZONE: Yes.

(4 RT 691-692.)

After the verdict, during the hearing on Defendants' post-trial motions, there was a discussion between the court and counsel that revealed Plaintiff's awareness of the proper way in which statutory violations are used in personal injury litigation: to prove a breach of duty. Plaintiff's counsel said that the jury had been instructed on negligence *per se*. Counsel was mistaken, however, and so the court responded, "[w]here does the verdict talk about negligence *per se*?" (4 RT 758.) Defense counsel specifically denied the jury was instructed on negligence *per se*. (*Ibid.*)

Even though Plaintiff's counsel had unwittingly identified the source of the problem – that statutory violations should be used to prove that there was a breach of duty, not that statutory violations

establish a separate cause of action – he continued to insist that the jury was instructed on negligence *per se*:

> MR. LANZONE: But an instruction was also given about negligence *per se*.
>
> MR. PETRULLO: No, it was not.
>
> THE COURT: All right. I know that.
>
> MR. LANZONE: It wasn't?
>
> THE COURT: No. But that's -- give me a couple of minutes to cogitate on this and I'll come out and give you my decision.
>
> MR. PETRULLO: Thank you.

(4 RT 758-759.) The discussion about expert testimony, "all of these Bill of Rights in the state law and federal law" (4 RT 691), and the resulting jury confusion obviously had given the trial court reason to wonder (*i.e.*, "to cogitate on") whether there was a flaw in the verdict.

There was a recess, immediately after which the court ordered a new trial:

> THE COURT: Okay, gentlemen. I've arrived at the conclusion that as to -- and the Court would have the power to enter judgment at this point. But as to the violation of rights, that that cause of action, the judgment -- the special verdict as to that cause of action is incomplete or inconsistent, and as a matter of law, a new trial would be required on that.
>
> As to the second cause of action, essentially you have the same problem, incomplete, and, in effect, inconsistent, but basically incomplete, which again demands a new trial, with one exception possibly. You've both

stipulated that as to HCR Manor Care, that a judgment could be entered for $100,000.

(4 RT 759.)

It is likely that the jury answered Question No. 4 (whether Defendants were negligent) in the affirmative because the jury already had answered Question Nos. 1 and 2 (whether there were statutory violations by Defendants) in the affirmative. Since the jury answered Question No. 7 (Plaintiff's total damages) with two numbers – one for "damages" and the other for "violations" – it is obvious that the jury understood (albeit mistakenly) that both the "damages" and the "violations" were Plaintiff's "damages" for negligence. And that understanding was consistent with the basic message of the entire special verdict form, which was entitled "Nursing Negligence."

Amici anticipate other plaintiffs will follow Plaintiff's lead, and not just in cases against skilled nursing facilities. If this Court approves the multiplication of penalties for the multiplications of "violations" for the single course of "nursing negligence" in this case, other plaintiffs will pursue the same strategy against not only nurses but also physicians and acute care hospitals in other cases.

C. Plaintiff's Argument Blurs The Distinction Between Her Legal Theory Based On Common Law Tort And Her Legal Theory Based On Statutory Violation

Plaintiff's explanation of why Section 1430(b) allows for *multiplication* of the amount of damages, and then *addition* of an amount to punish, is nothing more than a thinly veiled argument that this is a case for "physical and mental harm." (See, *e.g.*, ABM, pp. 30, 34.) That is, Plaintiff argues, her recovery of damages for

statutory violations was part of her case for personal "injury." (See, *e.g.,* ABM, pp. 37, 38, 42, 45, 53.) Essentially, Plaintiff urges this Court to equate "violation" with "harm." Ultimately, Plaintiff argues, "violations of the Bill of Rights and other state and federal law *per se* cause injury and suffering." (ABM, p. 53.)

Even now, Plaintiff's argument distracts the discussion. Plaintiff acknowledges that Section 1430(b) is remedial, which means that it is not compensatory or punitive, yet Plaintiff argues that she is entitled to more compensation for the "harm" to her father, and then she is separately entitled to punitive damages for the "conduct" of Defendants. The result she seeks is perhaps best articulated by language drawn from this Court's recent decision in *Winn v. Pioneer Medical Group, Inc., supra,* 63 Cal.4th 148, 165, which described a similar strategy to blur the distinction between legal theories: to "undermin[e]" the "central premise" of the statutory scheme on which she relies.

IV. IF NOTHING ELSE, PLAINTIFF'S ARGUMENT THAT SECTION 1430(B) PROVIDES DAMAGES FOR PATIENT HARM CONFIRMS THAT PLAINTIFF'S TRUE GOAL IS TO MAXIMIZE HER RECOVERY FOR TORT, NOT TO ACHIEVE THE REMEDIAL PURPOSE OF THE STATUTORY SCHEME FOR LICENSING SKILLED NURSING FACILITIES

In their Opening Brief on the Merits ("OBM"), Defendants characterize Section 1430 as "remedial and preventive, not punitive" (OBM, p. 18) and argue, "Here, the same conduct of the defendant is alleged to have violated multiple *resident* rights (1-CT-6-7 ¶ 23), which is not the same thing as causing multiple harms or violating

multiple *primary* rights." (OBM, p. 42. Emphasis in original.) Defendants' point is that Section 1430(b) does not give rise to recovery of compensatory damages for injury. (OBM, p. 40 ["a suit for rights violations under Section 1430(b) has nothing to do with harm"].)

In the Answer Brief on the Merits, Plaintiff acknowledges that Section 1430(b) is "a remedial statute" (ABM, p. 31), but argues that "violations of the Bill of Rights injure a nursing home patient or resident." (ABM, p. 37.) Plaintiff's point is that Section 1430(b) does give rise to recovery of compensatory damages for injury.

Plaintiff's Answer Brief on the Merits demonstrates in many ways that Plaintiff's strategy is to multiply factual and legal theories in order to multiply recovery of personal injury damages. For example, Plaintiff explains in detail why her First Cause of Action for violation of patient rights is actually for personal injury, *i.e.*, "physical and mental harm." (ABM, pp. 30, 34.) Plaintiff argues, "Violation of the Bill of Rights causes injury that supports a cause of action" (ABM, p. 37; emphasis in heading deleted), and "Whatever Manor Care conceives to be 'harm' necessary to a cause of action under the primary right theory, the theory does not require tangible harm." (ABM, p. 37.) Plaintiff compares the injury from violation of Section 1430(b) to "the violation of one's right of privacy [which] *per se* supports an award of damages even though there is no tangible, pecuniary, or other harm." (ABM, p. 38, citing *Fairfield v. American Photocopy Equipment Co.* (1955) 138 Cal.App.2d 82, 86-87.)

Plaintiff cites Civil Code section 1708 as authority for the right to recover compensation for the harm caused by Defendants' violation

of patient rights. (ABM, p. 37 ["'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*'"]. Emphasis in original.) Civil Code section 1714, subdivision (a), provides that "[t]he extent of liability" is defined by the Title on Compensatory Relief, which is at Civil Code section 3281 *et seq.* Civil Code section 3300 provides that "the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused" by Defendants.

Plaintiff characterizes the first question before the Court as "the nature of a cause of action under the statute" (ABM, p. 39), which *Amici* understand to be Plaintiff's request that this Court hold that Section 1430(b) authorizes a cause of action for personal injury compensation. *Amici* urge the Court to reject the invitation.

V. MULTIPLYING THE $500 CIVIL PENALTY AND THEN ADDING PUNITIVE DAMAGES MISTAKENLY ASSUMES THAT THE PURPOSE OF THE REGULATORY SCHEME UPON WHICH PLAINTIFF RELIES IS PUNITIVE, NOT REMEDIAL

Health and Safety Code section 1430 authorizes civil penalties for violations of the Patient's Bill of Rights but does **not** authorize punitive damages. Therefore, as authority for her right to recover punitive damages in this case, Plaintiff cites Civil Code section 3294. (ABM, p. 45.) Plaintiff then argues that "section 1430(b) did not create a new right or liability that did not exist at common law" but simply "set the standard of care." (ABM, p. 48.)

Plaintiff's real argument is simple: she must recover punitive damages because $500 is not enough. (ABM, p. 51 ["a maximum of

$500 for violation of the Bill of Rights is not 'relatively insignificant'; it is trivial"].) Ultimately, Plaintiff returns to the basic strategy by which she has pursued this case to maximize her recovery for personal injury: "The prerequisite to punitive damages . . . is not an *award* of damages, but a *showing* **that plaintiff has been damaged**." (ABM, p. 53. Emphasis by italics in original. Emphasis by bold added.)

The first and most obvious reason Plaintiff is wrong is that Section 1430 does not create an "obligation" within the meaning of Civil Code section 3294. Subdivision (a) of Section 3294 provides, "In an action for the breach of *an obligation not arising from contract*, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Emphasis added.) That is the authority for punitive damages in *tort* actions. And, reinforcing *Amici*'s fundamental point about this entire case, that is yet another illustration of Plaintiff's strategy to multiply factual and legal theories to maximize her recovery.

As noted above, the purpose of Section 1430 is remedial, not punitive. Plaintiff acknowledges that it is remedial. (ABM, pp. 10, 31-32.) After all, Section 1430(b) is part of the "Licensing Provisions" for long-term health facilities, commonly referred to as "nursing homes." (Health & Saf. Code, §§ 1200-1797.8 ["Division 2. Licensing Provisions"].) And, as this Court noted in *California Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284,

> **The declared legislative intent of the Act is to "establish (1) a citation system** for imposition of

> prompt and effective civil sanctions against long-term health care facilities in violation of the laws and regulations of this state . . . relating to patient care; **(2) an inspection and reporting system** to ensure that long-term health care facilities are in compliance with state statutes and regulations pertaining to patient care; and **(3) a provisional licensing mechanism** to ensure that full-term licenses are issued only to those long-term health care facilities that meet state standards relating to patient care." ([Health & Saf. Code,] § 1417.1.) The Act covers skilled nursing facilities as well as intermediate care facilities of various types. ([Health & Saf. Code,] § 1418.)

(16 Cal.4th at 290. Emphasis added.)

> In construing the statute in question, we first recognize that [Health and Safety Code] **section 1424 is not essentially penal in nature but remedial**. In this respect, we differ from the Court of Appeal, which found the statute to be penal because of the civil penalties imposed. As we have stated: "While the civil penalties may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives. [Citations.] **The focus of the Act's statutory scheme is preventative**."

(16 Cal.4th at 294-295. Emphasis by italics deleted. Emphasis by bold added.)

The Court of Appeal in *Nevarrez v. San Marino Skilled Nursing and Wellness Centre, LLC, supra*, 221 Cal.App.4th at 137, correctly noted that "section 1430, subdivision (b) does not require proof of a particular injury and imposes liability solely upon the showing a violation of a statute or regulation that comes within its scope." The Court of Appeal in *Lemaire v. Covenant Care California, LLC, supra,*

234 Cal.App.4th at 866, correctly noted "The 'focus' of the private right of action is 'to *encourage regulatory compliance* and prevent injury.'" (Quoting *Nevarrez*, *supra*, 221 Cal.App.4th at 135. Emphasis in original.)

VI. IF THIS COURT REJECTS *AMICI*'S ANALYSIS AND AFFIRMS THE COURT OF APPEAL'S INTERPRETATION, *AMICI* URGE THE COURT AT LEAST TO REJECT PLAINTIFF'S BASIC STRATEGY OF ARTIFICIALLY MULTIPLYING THEORIES

Amici submit that Plaintiff's strategy to maximize recovery not only was rationalized, but essentially was endorsed, by the Court of Appeal, as apparent in the following cynical comment in the opinion: "A statute which offers the opportunity to file a lawsuit for a maximum recovery of $500 – no matter how many wrongs are proved – would be a remedy suitable only for those who like litigating far more than they like money." (*Jarman II*, *supra*, 9 Cal.App.5th at 823 (Slip opn., p. 19).) The flaw in that analysis is that the Court of Appeal assumed the goal of statutory penalties and punitive damages is to compensate the plaintiff for harm caused by the defendant. The problem *Amici* have with the analysis is that the strategy from which it arose will be relied upon by other plaintiffs to invoke virtually any regulatory scheme that applies to California health care providers to achieve the same result as Plaintiff achieved here.

Amici submit that a far more logical way of achieving the remedial goal of Section 1430(b) is to have the jury *only* make the findings of fact, *not* draw the conclusions of law, as occurred here. That is, the trial court should explain to the jury what conduct (*e.g.*, the single course of Defendants' alleged negligent "understaffing" or

each of the multiple alleged episodes of the nurses' negligence) qualifies as a "violation" and, based on the jury's findings, the court should conclude what an appropriate penalty (*i.e.,* in this case, either $500 or $95,500) would be.

It is instructive that the jury in this case asked the trial court for clarification and, in doing so, identified for this Court the problem to be avoided in future cases arising from Section 1430(b): What is the "guideline" to be used by the jury to "determine" the number of violations that have or have not happened? (4 RT 687) and how many penalties "are allowed" for one violation? (4 RT 688.) If this Court determines that there will be other such trials in the future, the jury's question in this case revealed that there must be guidance to ensure that the jury understands the goal is remedial, not compensatory and not punitive. That is, it should be made clear to the trier of fact that statutory violations are not to be analyzed as separate personal injuries.

In this case, the problem can be resolved easily and simply by this Court conforming the jury's findings to the clear statutory language that the maximum award is $500.

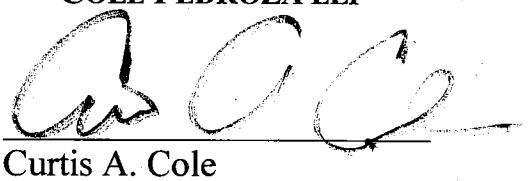
CONCLUSION

Plaintiffs who sue health care providers for damages under ordinary tort theories should not be able to maximize the amounts they recover, as Plaintiff did here, simply by blurring the distinction between their tort theories and their statutory violation theories.

Health and Safety Code section 1430(b) should not be rewritten, as Plaintiff proposes, so that she and other plaintiffs can "stack" the $500 maximum statutory penalty and recover punitive damages.

Dated: October 9, 2018

COLE PEDROZA LLP

By: 

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CERTIFICATION

Appellate counsel certifies that this document contains 8,687 words. Counsel relies on the word count of the computer program used to prepare the document.

Dated: October 9, 2018

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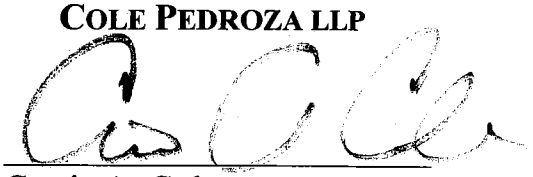
By: 

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PROOF OF SERVICE

I am a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 2670 Mission Street, Suite 200, San Marino, California 91108.

On this date, I served the *AMICI CURIAE* BRIEF OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS AND PETITIONERS on all persons interested in said action in the manner described below and as indicated on the service list:

SEE ATTACHED SERVICE LIST

By United States Postal Service – I am readily familiar with the business's practice for collecting and processing of correspondence for mailing with the United States Postal Service. In that practice correspondence would be placed in a sealed envelope, would be clearly labeled, and would be deposited with the United States Postal Service that same day in the ordinary course of business, with the postage thereon fully prepaid, in San Marino, California. The envelope was placed for collection and mailing on this date following ordinary business practice.

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

Executed this 9th day of October 2018, at San Marino, California.

Joseph Hernandez

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