

## JANSSEN MALLOY LLP

ATTORNEYS AT LAW  
730 FIFTH STREET  
EUREKA, CALIFORNIA 95501  
(707) 445-2071  
FAX: (707) 445-8305  
www.janssenlaw.com

MARLA G. ZUMWALT  
NANCY J. HOLMES McPARTLAND  
KAREN O. ELLIS  
CONNIE A. SCHECKLA  
LESLIE AMES  
PARALEGALS  
-----  
MAILING ADDRESS  
P.O. DRAWER 1288  
ZIP CODE: 95502

W. TIMOTHY NEEDHAM  
MICHAEL MORRISON  
DENNIS C. REINHOLTSEN  
MICHAEL J. CROWLEY  
PATRIK GRIEGO  
AMELIA F. BURROUGHS  
MEGAN A. YARNALL  
JEFFREY SLACK  
DAVID S. NIMS  
-----  
CLAYTON R. JANSSEN (1925-2000)  
MICHAEL F. MALLOY (1949-1999)

April 20, 2016

Honorable Presiding Justice Cole Blease  
Honorable Associate Justice Harry E. Hull, Jr.  
Honorable Associate Justice Ronald B. Robie  
Court of Appeal, Third Appellate District  
914 Capitol Mall, 4<sup>th</sup> Floor  
Sacramento, CA 95814

Re: *Nidiver*, et al. v. Lifehouse Health Services, LLC,  
Court of Appeal, Third Appellate District, Action No. C077803

Opposition to Request for Publication, Cal. Rules of Court, Rule 8.1120

Dear Presiding Justice Blease and Associate Justices Hull and Robie:

### **Statement of Interest**

My firm has been litigating elder abuse cases against nursing homes for at least the last 15 years. In 2010, I was honored to receive the Attorney of the Year Award from California Lawyer for elder law and I have been counsel of record in a number of reported cases involving nursing home litigation, including *Wehlage v. Evergreen at Arvin LLC* (2012) U.S. Dist. Lexis 144152; *Walsh v Kindred Healthcare* (2013) U.S. Dist. Lexis 176319; *Fitzhugh v. Granada Healthcare and Rehabilitation Center, LLC* (2007) 150 Cal.App.4th 469; *Shuts v Covenant Holdco LLC* (2012) 208 Cal.App.4th 609; and *Monschke v. Timber Ridge Assisted Living, LLC* (2016) 244 Cal.App.4th 583.

In my practice, we are often presented with attempts by nursing home claims to limit liability through a myriad of interlocking corporations and limited liability companies, all of whom seek to disclaim responsibility. Indeed, the nursing home industry has turned such “hide and seek” ownership into an art form unparalleled in any other industry. See GAO 2010 Report to Congress Nursing Homes – Complexity of Private Investment Purchases

Honorable Presiding Justice Cole Blease  
Honorable Associate Justice Harry E. Hull, Jr.  
Honorable Associate Justice Ronald B. Robie  
April 20, 2016  
Page 2

Demonstrates Need for CMS to Improve the Usability and Completeness of Ownership Data, Harrington, Organizational Structure, Financing, and Quality of the Ten Largest For-Profit Nursing Home Chains in the U.S.; Carter Who's Really Running the Nursing Home Trial Magazine 2006.

While this author provides no opinion as to whether or not this case was or was not correctly decided, there is imprecise language in the opinion which will further the attempts of responsible parties to avoid liability through corporate machinations. I do not believe that was the intent of the drafters and would ask that the opinion not be published.

**Reasons that *Nidiver* Should not be Published**

Unfortunately, as read, the court's language in this case on the issue of direct liability appears to be a misstatement of the law. The opinion states that the mere fact that a member/manager manages the day-to-day operations of a limited liability company does not make that company liable. However, the court goes on to indicate that:

“The member-manager must act *outside* its statutorily authorized power as a member-manager to incur direct liability for the debts, obligations, or other liabilities of the company.”

Respectfully, that is simply not a correct statement of the law.

Our courts have always held that each person or entity is liable for its own torts. As noted in *United States Liability Insurance Company v Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, “Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done.” *Id* 595.

The same legal requirement holds true for a limited liability company as indicated in Corporations Code §17703.04(c):

“Nothing in this section should be construed to affect the liability of a member of a limited liability company to third parties for the member's participation in tortious conduct.”

JANSSEN MALLOY LLP

Honorable Presiding Justice Cole Blease  
Honorable Associate Justice Harry E. Hull, Jr.  
Honorable Associate Justice Ronald B. Robie  
April 20, 2016  
Page 3

Here, the language of the decision seems to conflict with Corporations Code §17703.04(c).

A simple example will suffice to show this author's concern. Let us presume that a truck driver forms a limited liability company and becomes the member-manager of that company. While acting within the "statutorily authorized powers as a member-manager" the truck driver runs a red light and seriously injures a third party. Certainly, the truck driver is not relieved from his own personal liability merely because he is acting within the scope of his statutorily authorized powers as a member-manager. Yet, reading the language of this decision on its face, that's what this court appears to allow.

Similarly, if a member-manager of a nursing home intentionally understaffs the home in violation of the law and its intentional acts cause injury to the patients, that "member-manager" should not be off the hook simply because it was acting "inside" its statutorily-authorized powers. This author has no doubt that, should this decision be published, that argument will be made over and over again by the nursing home industry. As the attorneys for the California Association of Health Facilities appear to concede in their letter arguing publication, no published appellate decision has ever gone this far. And, if this case is published, one can be assured that the nursing home industry will use it to create mischief and mislead trial courts as to the scope of liability of their "managing-members."

Respectfully submitted,



W. Timothy Needham

WTN/lbd

**DECLARATION OF SERVICE BY MAIL (CCP§1013a(3))**

I am a citizen of the United States and a resident of the County of Humboldt, over the age of eighteen years and not a party to or interested in the within entitled cause. My business address is 730 Fifth Street, Eureka, California, 95501.

On April 20, 2016, I served the following document attached hereto in this action:

**LETTER TO COURT OF APPEAL OPPOSING PUBLICATION OF  
NIDIVER V. LIFEHOUSE HEALTH SERVICES, LLC, Case No. C077803**

[X ] [BY MAIL] By placing a true copy thereof enclosed in a sealed envelope, addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Joseph M. Earley, III James Schacht Law offices of Joseph M. Earley, III 5778 The Skyway, P.O. Box 1809 Paradise, CA 95967 <i>Attorneys for Appellants</i>	Daniela P. Stoutenburg Kirk G. Neiberger Dummit, Buchholz & Trapp 1661 Garden Highway Sacramento, CA 95833 <i>Attorneys for Respondent</i>
Sanford I. Horowitz Law Offices of Sanford I. Horowitz 101 Maple Street, Suite 303 Sonoma, CA 95476 <i>Attorneys for Appellants</i>	David S. Ettinger Mark A. Kressel Horvitz & Levy LLP 15750 Ventura Blvd., 18 <sup>th</sup> Floor Encino, CA 91436-3000 <i>Attorneys for Respondent</i>
C. Athena Roussos Attorney at Law 9630 Bruceville Rd., Suite 106-386 Elk Grove, CA 95757 <i>Attorneys for Appellants</i>	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 20, 2016, Eureka, California.

  
LINDA DEMANT