IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1910

MAGGIE KNOWLES, etc.,

Petitioner,

vs.

BEVERLY ENTERPRISES-FLORIDA, INC.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS, IN SUPPORT OF POSITION OF PETITIONER MAGGIE KNOWLES

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I
STATEMENT OF THE CASE AND FACTS

The facts of relevance are stated in the Fourth District Court's en banc opinion of May 24, 2000, and have been restated by the parties.

II
ISSUE ON APPEAL

WHETHER THE CAUSE OF ACTION FOR VIOLATION OF FLORIDA'S NURSING-HOME STATUTE, CHAPTER 400, FLA. STAT., SURVIVES THE DEATH OF A NURSING-HOME RESIDENT IF THE VIOLATION DID NOT CAUSE HIS DEATH.

III
SUMMARY OF THE ARGUMENT

As two district-court panels have recognized and a third has implied,[1/] the cause of action created by the nursing-home statute, § 400.023(1), Fla. Stat., for violation of § 400.022, survives the death of the nursing-home resident, when the violation did not cause his death. It has long been settled in Florida that a statute may not be modified or repealed by implication. The controlling statute at issue here–§ 46.021, Fla. Stat.–provides explicitly that "[n]o cause of action dies with the person." That general prescription has been modified by the legislature only in a few instances, and only

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[1/] *See Greenfield v. Manor Care, Inc.*, 705 So. 2d 926 (Fla. 4th DCA), *appeal dismissed, review denied*, 717 So. 2d 534 (Fla. 1998), *receded from, Beverly Enterprises-Florida, Inc. v. Knowles*, 25 Fla. L. Weekly D1244 (Fla. 4th DCA May 24, 2000) (en banc); *Beverly Enterprises-Florida, Inc. v. Spilman*, 661 So. 2d 867 (Fla. 5th DCA 1995), *review denied*, 668 So. 2d 602 (Fla. 1996). *See Beverly Enterprises-Florida, Inc. v. Estate of Maggiacomo,* 651 So. 2d 816 (Fla. 2nd DCA), *quashed on other grounds,* 661 So. 2d 1215 (Fla. 1955).

when the legislature has clearly and unambiguously prescribed such a modification. In the instant case, neither the original language of § 400.023–creating a cause of action for violation of the laws protecting residents of nursing homes–nor the 1986 amendment to that statute, said anything which remotely could be construed as an *explicit abolition* of survival actions in cases in which the defendant's alleged wrongdoing was not an alleged cause of the plaintiff's decedent's death.

To the contrary, § 400.023 has never said anything *at all* about such causes of action, and thus could not be construed to have expressly abolished them. The only causes of action even mentioned in § 400.023 (in the 1986 amendment) are those in which the alleged violation of the nursing-home statute *was* in fact the cause of death; and in those cases, the amendment *preserved* such causes of action. But there is no language in § 400.023–in any of its incarnations–which says anything whatsoever about violations of the nursing-home statute which were not the asserted cause of the plaintiff's death. Section 400.023 is entirely silent on that subject, and the subject therefore is governed by the general language of the survival statute (§ 46.021), which says explicitly that the plaintiff's cause of action survives. Moreover, any other interpretation would utterly gut the protections afforded by Chapter 400.

IV
ARGUMENT

THE CAUSE OF ACTION FOR VIOLATION OF FLORIDA'S NURSING-HOME STATUTE, CHAPTER 400, FLA. STAT., DOES SURVIVE THE DEATH OF A

NURSING-HOME RESIDENT IF THE VIOLATION DID NOT CAUSE HIS DEATH.

The place to start is with the statutory declaration that all causes of action in Florida survive the plaintiff's death. Section 46.021, Fla. Stat., provides: "No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law."

That general prescription has been modified by the Florida Legislature only in a handful of specific contexts, in which the legislature has clearly and unambiguously abrogated a given survival action. For example, § 440.16, Fla. Stat.–part of the workers'-compensation statute–modifies a deceased worker's pre-existing statutory monetary claims, and substitutes a different schedule of payments when the worker's death was the result of a compensable injury. And § 768.20, Fla. Stat.–part of the Florida Wrongful Death Act–provides that when the decedent's personal injury has resulted in his death, "no action for the personal injury shall survive, and any such action pending at the time of death shall abate."

The wrongful-death statute thus abolishes the survival action when the defendant's alleged wrongdoing resulted in death; but it says nothing to forestall the prosecution of a survival action for negligence when the defendant's alleged wrongdoing *did not* result in death. *See Williams v. Bay Hospital, Inc.*, 471 So. 2d 626, 629 (Fla. 1st DCA 1985) ("The intent of the Wrongful Death Act is that a separate lawsuit for death-related personal injuries cannot be brought as a survival action under

Fla. Stat. § 46.021, but this does not preclude a survival action for injuries which do not result in death"). Consistent with the broad legislative preservation of survival actions under § 46.021, the legislature and the courts have recognized that it requires *specific and explicit* legislation in order to preclude the survival of a cause of action in any given context.

The question, then, is whether the statutory cause of action created by the legislature for nursing-home residents under § 400.023, Fla. Stat.–which was enacted in 1980, when the above-quoted language from the survival statute (§ 46.021) had been on the books for almost thirty years–*clearly and unambiguously* purported to abrogate the survival of any and all causes of action arising under the act. In the instant case, vacating a panel decision and overruling prior precedent, the Fourth District Court held that a 1986 amendment (quoted *infra*) unambiguously foreclosed a survival action under Chapter 400 because it stated affirmatively that the nursing home resident's personal representative *could* bring an action when the violation *did* result in death, making *no mention* of any survivor action when it did not. As we hope to demonstrate in reviewing the legislative history of the statute, the Fourth District Court's reasoning is a complete non-sequitur, and should not be adopted by this Court.

The original language of the statute, enacted in 1980, said nothing which either explicitly or implicitly purported to abrogate such survival rights:

> **Civil enforcement.**–Any resident whose rights as

> specified in this part are deprived or infringed upon shall have a cause of action against any licensee responsible for the violation. The action may be brought by the resident or his guardian or by a person or organization acting on behalf of a resident with the consent of the resident or his guardian. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any deprivation or infringement on the rights of a resident. . . . The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident and to the department.

§ 400.023, Fla. Stat. (1981). Nothing in that language remotely purported to abrogate a claimant's survival rights under § 46.021. Indeed, to the contrary, the statute provided that the cause of action created was "in addition to and cumulative with other legal and administrative remedies available to a resident and to the department." Under §46.021, therefore, the resident's survival rights, at least to that point, clearly were retained.

The Florida Legislature then amended § 400.023 in 1986; it was that amendment through which the district court reasoned that the legislature *sub silento* abolished the survival of the statutory cause of action created by that section, in all cases in which the asserted violation had not resulted in death. The new language of the 1986 statute is printed in italics in the quotation below:

> **Civil enforcement.**–Any resident whose rights as specified in this part are deprived or infringed upon shall have a cause of action against any licensee responsible for the violation. The action may be brought by the resident or

> his guardian or by a person or organization acting on behalf of a resident with the consent of the resident or his guardian, *or by the personal representative of the estate of a deceased resident when the cause of death resulted from the deprivation or infringement of the decedent's rights*. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any deprivation or infringement on the rights of a resident. . . . The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident and to the department.

§ 400.023, Fla. Stat. (1986).

It is difficult to understand how the district court could conclude from the above-quoted amendment that the legislature *clearly and unambiguously* abolished survival rights in actions brought under the statute for violations which had *not* resulted in the decedent's death. Simply put, the amendment says *absolutely nothing* about such actions, and thus nothing which purports to modify the general statutory right of survival created by § 46.021. And as the Court is aware, the repeal of a statute–in this case the partial repeal of § 46.021–cannot be declared by implication; it must appear from the *explicit* language of the assertedly-repealing legislation. *See Woodgate Development Corp. v. Hamilton Investment Trust*, 351 So. 2d 14, 16 (Fla. 1977). Because the 1986 amendment to § 400.023 says absolutely nothing about survival actions in cases in which the asserted statutory violation was not the cause of death, it cannot be construed by implication to have abolished a plaintiff's pre-existing statutory right of survival in such cases under § 46.021.

What the 1986 amendment did concern was the survival of the plaintiff's statutory cause of action in cases in which the asserted statutory violation *was* the asserted cause of the plaintiff's decedent's death. Before that amendment, it might have been argued that the wrongful-death statute (§ 768.20)–which abolishes survival actions in favor of the cause of action created for wrongful death under that statute–had the effect of precluding survival actions under the nursing-home statute whenever the alleged violation of that statute was the cause of the plaintiff's death. Such an argument might well have succeeded (§ 768.19 creates a cause of action for any "wrongful act" resulting in death, and a violation of the nursing-home statute certainly seems to be a "wrongful act"); thus the legislature apparently wanted to make clear that the wrongful-death statute does not preclude a survival action under the nursing-home statute in cases in which the nursing-home violation resulted in death. Therefore, the legislature made it explicit–in its 1986 amendment to § 400.023–that an action under the nursing-home statute does survive even when the violation resulted in death; it provided that such an action may be brought "by the personal representative of the estate of a deceased resident when the cause of death resulted from the deprivation or infringement of the decedent's rights." The clear purpose of the amendment was to explicate the relationship between § 400.023 (the nursing-home cause of action) and § 768.20 (the wrongful-death statute), making clear that the abolition of survival actions under the wrongful-death statute (in cases in which the alleged wrongdoing resulted in death) should not extend to survival actions under the

nursing-home statute (when the alleged nursing-home violation resulted in death).

As we have noted, however, the wrongful-death statute does *not* abolish survival actions in cases in which the alleged wrongdoing did *not* result in the decedent's death. Those actions were unaffected by the wrongful-death statute, and thus the 1986 amendment to § 400.023 did not have to be concerned with such actions. Those types of actions are protected by § 46.021–providing that all causes of action survive; and no other legislative provision–not the wrongful-death act, and not the nursing-home act–even purports to discuss such actions, no less abolish them. As the Fifth District Court has recognized, and the Second District Court has suggested, *see supra* note 1, such actions survive under the clear language of § 46.021; and such actions will continue to survive unless and until the legislature explicitly abolishes them. There is no language anywhere in the Florida Statutes which expressly purports to do so.

Finally, although the plain language of § 46.021 and the rule against repeal by implication make it unnecessary to look to the underlying legislative objective, we should note that the district court's holding would virtually eliminate claims for the abuse and neglect of nursing-home residents under Chapter 400. It would effectively gut the protection afforded by the Nursing Home Statute--and with it the legislature's clear intention. Obviously, the statute should not be construed to undermine its purpose.

As the Court is well aware, nursing-home residents are extremely frail and elderly people, suffering from any number of medical problems and disabilitites which

required their placement in a nursing home. Many do not have surviving spouses, some do not have surviving children, and all have little or no life expectancy.

The Fourth District Court had already held in *First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189 (Fla. 4th DCA), *review dismissed*, 743 So. 2d 12 (Fla. 1999), that if the negligence of a nursing home does cause cause the death of the resident, there is no claim for the resident's pain and suffering--only a wrongful-death claim. *Contra, Beverly Enterprises-Florida, Inc. v. Spilman*, 661 So. 2d 867 (Fla. 5th DCA 1995). In those (frequent) cases in which the resident does not have a spouse or adult children, there will be no damages under the wrongful-death act other than medical bills and funeral expenses. When the resident does have adult children (but no spouse), and that there are medical-malpractice implications in the Chapter 400 claim, then the medical-malpractice statute again eliminates damages under the wrongful-death claim. Thus, there are only a few instances in which there would be any wrongful-death damages resulting from the fatal abuse and neglect of a nursing-home resident. In addition, wrongful-death claims in these cases have little if any value. The death of a frail, abused nursing-home resident usually *ends* the emotional pain and suffering of the family. Relatives no longer are forced to stand by helplessly watching their loved one slowly waste away physically and mentally while suffering constantly from the actions of incompetent caregivers. The family is generally relieved when the resident finally passes to a better place. Most of the time, the joint life expectancy over which wrongful-death damages are measured is in the negative.

At least in the Fourth District, *Hamilton* has removed the main hope of compensation for Chapter 400 claims--and thus the main incentive to attend to these needy patients--when the abuse or neglect causes death. *Knowles* has removed the claim for the resident's pain and suffering when the abuse or neglect does not cause the resident's death. For example, a resident can develop multiple state IV pressure sores which cause agonizing pain for many months, then be hospitalized and languish, but eventually die from other causes. In the Fourth District, what possible incentive does the nursing home have to properly treat the patient? Why was Chapter 400 passed, if not to redress such wrongdoing?

The combination of *Hamilton* and *Knowles* also reduces damages in pending cases to minimal or zero values if the defense is clever enough to delay the trial until the resident dies from natural causes. The abused resident would be left with a claim for medical bills and attorneys fees--an outcome which could not possibly have been legislature's intent. The defendant's money would be saved if it either escalated the abuse or neglect, thus killing the resident, or simply delayed the trial until the resident died of natural causes, thus extinguishing the Chapter 400 claim. This was not what the legislature intended.

Chapter 400 is an enforcement statute. It was intended as a sanction to prevent abuse and neglect in long-term care facilities. It should be allowed and interpreted to achieve its purpose.

V

CONCLUSION

It is respectfully submitted that the judgment of the circuit court should be reversed.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of October, 2000, to all counsel of record on the attached service list.

Respectfully submitted,

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