IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

MAGGIE KNOWLES, as Personal Representative of the Estate of GLADSTONE KNOWLES, Deceased,

Petitioner,

CASE NO. SC00-1910
4DCA CASE NO. 98-765

vs.

BEVERLY ENTERPRISES-FLORIDA, INC., d/b/a BEVERLY GULF COAST-FLORIDA, INC., d/b/a WASHINGTON MANOR NURSING HOME AND REHABILITATION CENTER,

Respondent.
_____/

INITIAL BRIEF OF AMICUS CURIAE THE COALITION TO PROTECT AMERICA'S ELDERS

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INTRODUCTION

Amicus Curiae, The Coalition to Protect America's Elders, is an organization dedicated to improving the living conditions of Florida's elderly nursing home population. The issue raised in this matter is of great public importance regarding the ability of nursing home residents to protect and defend their rights under Florida's nursing home resident rights statutes, § 400.022, and 400.023(1), Fla. Stat. (1997). That issue is whether a Personal Representative can bring a claim pursuant to section 400.022 and 400.023(1), Florida Statutes, where the deprivation of the right complained of does not result in the death of the patient.

STATEMENT OF THE CASE AND OF THE FACTS

The Coalition refers to the Initial Brief of Petitioner for the facts of this case as they relate to this issue raised in this matter.

SUMMARY OF THE ARGUMENT

The Fourth District erroneously concluded that causes of action for non-lethal deprivations or infringements of rights pursuant to Florida Statutes section 400.023 do not survive the resident's death. The construction of the statute adopted by the Fourth District and urged by Respondent changes the language of the statute by adding terms to the statute which do not exist. This construction renders part of the statute meaningless, fail to achieve a consistent whole (and, in fact, causes conflict within provisions of the very same statute), and fails to give full effect to *all* statutory provisions. It also presumes that the legislature intended a useless act – to draft and enact a provision of a statute and to provide a civil remedy for that provision while ***intending*** at the same time that the provision never be enforceable.

The Fourth District's construction of this statute creates incentive for delay in litigation, and presumes that the legislature intended to leave those nursing home residents who are weakest and closest to death with the least protection under the statute. This construction of the statute is without support either in the language of the statute or in the legislative history.

ARGUMENT

A PERSONAL REPRESENTATIVE MAY BRING A STATUTORY CAUSE OF ACTION UNDER SECTION 400.023(1), FLORIDA STATUTES (1997), ON BEHALF OF A DECEASED RESIDENT OF A NURSING HOME FOR ALLEGED INFRINGEMENT OF THE RESIDENT'S STATUTORY RIGHTS PROVIDED BY SECTION 400.022, FLORIDA STATUTES (1997), WHERE THE INFRINGEMENT HAS NOT CAUSED THE RESIDENT'S DEATH.

This appeal involves the meaning of the legislative remedy provided in Florida Statutes sections 400.022 and 400.023, the Florida nursing home residents' rights statutes. These statutes were enacted in essentially their present form in 1980[1/] in the wake of two critical Grand Jury reports and a series of scandals involving abuse and neglect of Florida nursing home residents. As one legislative report put it: "[**T]he law was developed to address major problems of financial exploitations, abuse, neglect and even death which resulted from unscrupulous nursing homes and an ineffective regulatory scheme**." Committee on Regulatory Reform, Bill Summary, June 8, 1983.

Florida Statutes section 400.011 incorporates the legislature purpose of these statutes, which is to:

1Laws 1980, c. 80-186, § 3.

> [P]rovide for the development, establishment, and enforcement of basic standards for (1) [t]he health, care, and treatment of persons in nursing homes and related health care facilities; and (2) [t]he construction, maintenance, and operation of such institutions which will ensure safe, adequate, and appropriate care, treatment, and health of persons in such facilities.

Fla. Stat. Section 400.011. Sections 400.022 and 400.,023 were established in an effort to help provide additional protection to abused and neglected nursing home residents – protection that the legislature expressly found did not exist under then existing administrative and common law (wrongful death and negligence) remedies. These statutes are remedial in nature,[2] and must be liberally construed to broadly effectuate the remedy and to ensure access to the remedy. Martin County v. Edenfield, 609 So.2d 27, 29 (Fla. 1992); Garcia v. Brookwood Extended Care Center, 643 So.2d 715 (Fla. 3d DCA 1994); Mang v. Country Comfort Inn, Inc., 559 So.2d 672 (Fla. 3d DCA 1990).

The Original Statute

When § 400.023 was enacted in 1980, it provided that:

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[2] See, generally, Holbein v. Rigot, 245 So.2d 57 (Fla. 1971)(test widely articulated to distinguish a penal statute from a remedial statute is "whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."

> 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 the resident with the consent of the resident or his guardian, to enforce such rights.

Fla. Stat. § 400.023 (1991). Under this statute, a nursing home resident whose rights were deprived or infringed upon had a cause of action against the licensee responsible for the violation. What happened to this cause of action when the resident died? The cause of action survived, just as all causes of action belonging to a person survive the death of the person pursuant to Florida*s survival statute, section 46.021. That statute has been a part of the Florida Statutes for over thirty years, and provides that:

> **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.**

Fla. Stat. § 46.021 (1997)(emphasis added). This statute is clear, direct and definite. All causes of action belonging to a person in the State of Florida survive the death of the person, and **no cause of action dies with the person.** Thus, when 400.023 was enacted, the cause of action belonging to the nursing home resident survived the death of the resident and did not die with the resident.

The issue, then, is not whether the original cause of action survived the death of the resident. Clearly, pursuant to the plain and unambiguous language of section 46.021, that cause of action survived the death of the resident. Section 400.023(1) was amended, however, in 1986, and this appeal raises the issue of whether the 1986 amendment to the statute abolished the surviving cause of action for non-lethal deprivations or infringements of rights to a deceased resident.

The 1986 Amendment and Greenfield v. Manor Care, Inc.

In Greenfield v. Manor Care, Inc., 705 So.2d 926 (Fla. 4th DCA 1997), the Fourth District had the opportunity to consider the construction of the language of the 1986 amendment to Florida Statutes section 400.023. The language of the statute as amended provided that:

> (1) 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, by a person or organization acting on behalf of a resident with the consent of the resident or 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.**

Fla. Stat. §400.023(1)(1997)(emphasis added). In Greenfield, the defendant argued that the legislature must have intended, by authorizing the Personal Representative

to bring suit for lethal violations of rights, to also extinguish the surviving cause of action for non-lethal violations. Upon review in Greenfield, the Fourth District rejected this "implied repeal" argument:

> **To construe section 400.023 as foreclosing all causes of action for nursing home negligence which does not cause the resident's death is to nullify section 46.021.** See generally *Beverly Enterprises-Florida, Inc. v. Estate of Maggiacomo*, 651 So.2d 816 (Fla. 2d DCA), quashed on other grounds, 661 So.2d 1215 (Fla. 1995(personal representative sued on behalf of deceased resident under section 400.023 for deprivation of nursing home rights for theft of diamond ring which was allegedly forced from finger of resident causing bruises; resident dies of unrelated causes); *Arthur v. Unicare Facilities, Inc.*, 602 So.2d 596 (Fla. 2d DCA), rev. denied, 613 So.2d 4 (Fla. 1992)(when death results from complained of injuries, The Wrongful Death Act applies; when death results from an independent cause, claim is preserved by section 46.021, the survival of actions statute).
>
> **As such, we hold that section 400.023, Florida Statutes (1993), must be read in pari materia with section 46.021, Florida Statutes (1993) in order to reach a logical result.**

Id. at 933 (emphasis added). The dissent in Greenfield disagreed, and would have held that the legislature intended that the cause of action belonging to a nursing home resident die with the person unless the cause of death resulted from the deprivation or infringement of resident rights.

In this case, the Fourth District originally affirmed the trial court's order which had followed the Greenfield decision. On rehearing, the Fourth District then receded from its opinion in Greenfield, holding that section 400.023 would not be read in pari materia with section 46.021, and that the ***only*** cause of action that may be brought by the Personal Representative was for lethal violations of rights. The issue is now before this Court.

Statutory Construction

In determining the proper application of the language of the 1986 amendment to section 400.023, it is important to recognize that the statutory language at issue is **permissive** and not restrictive. This is to say that the statute **does not say** that a Personal Representative **shall not,** or **may not** or **may "only"** bring a cause of action if the violation of a right caused the death of the resident. The statutory language itself does not restrict a personal representative in any way. Rather, the language of the statute **permits** a Personal Representative of an estate to bring a cause of action when the cause of death resulted from the deprivation or infringement of the decedent's rights.

The clear and unambiguous language of the statute is silent, however, as to what happens to the cause of action belonging to a nursing home resident for non-lethal violations of rights when the resident dies. The amendment to the statute did

not address that cause of action. The statute does not say that the cause of action "abates," or "dies with the person" or is "extinguished." The plain and unambiguous language of the statute tells us nothing about that cause of action.

In deciding this issue, the Fourth District intuitively employed a single rule of statutory construction, expressio unius exclusio alterius, to form the basis of its conclusion that the legislature must have intended, by **authorizing** the Personal Representative to bring suit for lethal violations of rights, **to also extinguish** the surviving cause of action for non-lethal violations. Thus, in its opinion, it sets forth the language of section 400.023(1), but with one important change -- the addition of the word "only" to the statute. As set forth more fully below, we believe this reasoning to be without merit. Nevertheless, it does point out the necessity to refer to the rules of statutory construction in resolving the issue before the court.

Statutory Construction

As stated above, the Fourth District employed a single rule of statutory construction, expressio unius exclusio alterius, to conclude that the legislature must have intended, by **authorizing** the Personal Representative to bring suit for lethal violations of rights, **to also extinguish** the survival cause of action for non-lethal violations. It has been said, however, regarding this maxim of statutory construction, that:

> The above maxim is strictly an aid to statutory construction and not a rule of law. In discussing the maxim, the Supreme Court of the United States in *Ford v. United States*, 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793 said:
>
> > "It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. **The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."**

Smalley Transportation Company v. Moed's Transfer Company, 373 So.2d 55 (Fla. 1st DCA 1979)(emphasis added). As seen below, the application of expressio unius exclusio alterius to the issue at hand leads to both inconsistency ***and*** injustice.

Inconsistency

Fundamental rules of statutory construction provide:

> **[T]hat all parts of a statute must be read together in order to achieve a consistent whole.** See, e.g., Marshall v. Hollywood, Inc. 224 So.2d 743, 749 (Fla. 4th DCA 1969), writ discharged, 236 So.2d 114 (Fla.), cert. denied, 400 US 964, 91 S.Ct. 366, 27 L.Ed.2d 384 (1970).
>
> **Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony**

> **with one another.** E.g., Villery v. Florida Parole & Probation Comm*n, 396 So.2d 1107, 1111 (Fla. 1980).

Forsythe v. Longboat Key Beach Erosion, 604 So.2d 452 (Fla. 1992) (emphasis added). Furthermore, "**[i]t is a cardinal rule of statutory interpretation that courts should avoid readings that would render part of a statute meaningless.**" Id.

The construction of section 400.023(1) should ensure, therefore, that all of the related statutory provisions be construed in harmony with one another to create a consistent whole, and must ensure that no part of the statute is rendered meaningless. In this regard, it is instructive to consider the nursing home resident right set forth in section 400.022(1) (h)(4), which provides the following:

> Upon the death of a resident with personal funds deposited with the facility, the facility must convey within 30 days the resident's funds, including interest, and a final accounting of those funds, to the individual or probate jurisdiction administering the resident's estate, or, if a personal representative has not been appointed within 30 days, to the resident's spouse or adult next of kin named in the beneficiary designation form provided for in §400.162(6).

Fla. Stat. §400.022(1)(h)(4)(1997). The legislature provided that this right accrues "[u]pon the death of a resident with personal funds deposited with the facility," and the legislature provided that this right is enforceable pursuant to the provisions of

§400.023. It is not possible for the violation of this right to cause the death of the resident, because the right cannot be violated until the resident has already died.

According to proffered construction of §400.023(1), however (that the violation must have caused the death of the resident to be enforceable after the resident has died), ***the legislature intended*** that this right, which does not accrue until the resident has died, is then not enforceable *because* the resident is dead! This construction of the statute is nonsensical. It "renders part of the statute meaningless," it "fails to achieve a consistent whole" (and, in fact, would cause conflict within provisions of the very same statute), and would fail to "give full effect to *all* statutory provisions." It would also presume that the legislature intended a useless act – to draft and enact a provision of a statute and to provide a civil remedy for that provision while ***intending*** at the same time that the provision never be enforceable. Clearly, therefore, under fundamental rules of statutory construction, the proffered construction of section 400.023(1) is untenable.

Furthermore, the argument that the legislature intended that no cause for violation of these rights should survive the death of the resident unless the violation killed the resident ignores the language employed by the legislature when it intends that a cause of action not survive death. For example, consider the Wrongful Death Act, section 768.20, Fla. Stat. (1999), which simply states that "[w]hen a

personal injury to the decedent results in his death, **no action for personal injury shall survive, and any such action pending at the time of death shall abate**." (emphasis supplied). This is remarkably easy to say. If the legislature had intended that the action should abate and not survive death, it would have said so simply and clearly.

Past litigants attempted unsuccessfully to imply a similar result when the legislature enacted the 1972 Wrongful Death Act. The courts and the attorney general at that time analyzed the effect the 1972 Act had on the Survival Statute, section 46.021, Florida Statutes, which has been in effect in its current form since 1951 (Ch. 26541, § 1, Laws of Fla. (1951):

> Appellees apparently attempt to find refuge in the last sentence of Section 768.20, *supra*, urging that the legislature provided that when an injury causes death no action for personal injury shall survive and any such action pending at the time of death shall abate and, thus, this language impliedly abolishes Section 46.021. To bolster their argument, appellees urge upon us *Martin v. United Security Services, Inc.*, 314 So. 2d 765 (Fla. 1975), wherein the Supreme Court wrote: "The claim for pain and suffering of the decedent from the date of the injury to the date of the death was eliminated. Substituted therefore was the claim for pain and suffering of close relatives, the clear purpose being that any recovery should be for the living and not for the dead." 314 So.2d at 769.
>
> We thoroughly agree with *Martin* but note that it is distinguishable from the case sub judice because in *Martin* the personal injury to the decedent resulted in his death. **Also, we note that the *Martin* court, in its wisdom, observed in footnote 18 at page 770: "However,**

> **the Survival Statute is still applicable to preserve other actions which the decedent may have brought or was bringing prior to his death."**
>
> Obviously, in *Martin*, the Supreme Court wished to continue one's right to maintain an action for damages where death was not the result of injuries sustained. Considering the language of *Martin* in conjunction with the clear language of the legislature in Sections 768.16, et seq., we are led to but one unmistakable conclusion which is, the legislature did not, in fact, impliedly abolish the Survival Statute by enacting the Wrongful Death Act. A finding to the contrary is error . . . .

Smith v. Lusk, 356 So. 2d 1309, 1310-11 (Fla. 2d DCA 1978) (**emphasis** added).

Another decision construing the effect of the Wrongful Death Act on the Survival Statute rejects the very reasoning urged by the Respondent, i.e. that the enactment of a cause of action for lethal injuries eliminates claims for nonlethal injuries inflicted on the victim:

> At the risk of oversimplifying what is perhaps a more complex problem, **we are inclined to think it is fundamental that the wrongful death statute is not applicable except in wrongful death actions, i.e. where it is claimed that the death of a person was "caused by the wrongful act, negligence, [or] default . . . of another. s 768.19, Florida Statutes (1983)**. . . . **[N]o provision was made in the Wrongful Death Act or by other enactment for elimination of claims for pain and suffering, or other damages, where it is not alleged that death resulted from the claimed negligence**. As stated in Martin, *SUPRA*, the intent of the amended Wrongful Death Act is that "a separate lawsuit for death-resulting personal injuries cannot be brought as a survival action under Section 46.021." *Id*. at 770. This, in our opinion, does not preclude a survival

action for "non-death-resulting injuries."

> **Under appellee's view, the result would be that medical providers or others would be free to negligently injure patients with impunity, so long as death did not result from the injuries.** Again, Martin instructs us that **"the Survival Statute is still applicable to preserve other actions which the decedent may have brought or was bringing prior to his death."** *Id*. at 770, footnote 18. *See, also,* Smith v. Lusk, 356 So.2d 1309 (Fla. 2d DCA 1978); Metropolitan Life Insurance Company v. McCarson, 429 So.2d 1287, 1291 (Fla. 4th DCA 1983).

Williams v. Bay Hospital, Inc., 471 So. 2d 626, 629 (Fla. 1st DCA 1985) (emphasis added). Just as the Wrongful Death Act did not repeal the Survival Statute, so too the 1986 amendment to section 400.023 did not repeal the Survival Statute. Obviously, the legislature is aware of and operates on the principle that it must expressly abate a cause of action. Otherwise, the abatement provision in the Wrongful Death Act itself would have been superfluous.

As set forth above, the application of expressio unius est exclusio alterius to the statues at hand would lead to inconsistency -- it would "render part of the statute meaningless," fail "to achieve a consistent whole" and would fail to "give full effect to *all* statutory provisions." It would also presume that the legislature intended a useless act – to draft and enact a provision of a statute and to provide a civil remedy for that provision while ***intending*** at the same time that the provision never be enforceable. In addition to inconsistency, the application of this maxim

would also lead to injustice.

Injustice

Under the construction of the statute as adopted by the Fourth District and as urged by Respondent, the cause of action created by the legislature and belonging to the resident for non-lethal violations of rights would cease to exist when the resident died. Accordingly, under this theory, the legislature ***intended*** that there be no statutory cause of action: where a nursing home resident is raped, but later dies of cancer; or where a resident is restrained and illegally confined to a locked unit, but later dies from congestive heart failure; or where a resident is beaten and kept isolated, but later dies of liver failure. Thus, under that interpretation, it is argued that the legislature intended that the most vulnerable members of the protected class, the weakest, the ones closest to death, to be the least protected by the statute, since no liability would survive so long as the resident died of cancer, Alzheimer disease, or heart failure.

As eloquently expressed by the Court in Spilman v. Beverly Enterprises, Inc. 661 So.2d 867 (Fla. 5th DCA 1995):

> Such [a] construction not only offends the strong public policy that nursing homes are to "promote maintenance or enhancement of the quality of life of each resident," but basic statutory construction. See, Williams v. State, 492 So.2d 1051, 1054 (Fla. 1986)(statutes should not be given a meaning that leads to an absurd or unreasonable result).

Spilman, supra. at 869.

In addition, the construction of the statute as adopted by the Fourth District would extinguish the cause of action brought by a living resident if the resident died, regardless of *when* the resident died -- even if a claim had been filed by the resident, even if litigation had proceeded, and even if the case had gone to trial and the jury were out deciding the case. Because almost all nursing home residents are, by definition, old and sick, this construction would require a race to trial, and would encourage delay.

These concerns were shared by the Supreme Court of Arizona in Denton v. American Family Care Corporation, 190 Ariz. 152, 945 P.2d 1283 (Ariz. 1997). In that case, the lower court had held that the cause of action for actual damages under Arizona's elder abuse statute died with the nursing home resident. The Supreme Court reversed, and noted that:

> Furthermore, most vulnerable or incapacitated adults are near the end of their lives. Under defendant's theory, the tortfeasor would have a great incentive to delay litigation until the victim dies. If we were to subscribe to defendant's theory, the policy of the elder abuse statute would not be furthered.

Id., at 1288. The construction of this statute as adopted by the Fourth District leaves those most vulnerable persons, the oldest and sickest, afforded little or no

protection under the statute, because they were going to die anyway. It is difficult to imagine that the legislature intended the statute to be construed to afford those most at risk with the least protection.

The 1986 Amendment

As set forth above, it is clear that before the 1986 amendment of the statute the cause of action for both lethal and non-lethal violations of rights survived the death of the resident pursuant to the plain language of Florida's Survival Statute, §46.021. A question remained, however. If a resident was abused so badly that the resident died as a direct result of the abuse, was the cause of action and the "actual" damages recoverable **under section 400.023** lost by the application of the Wrongful Death Act? According to the plain language of the Wrongful Death Act, if the death occurred as a direct result "any such action pending at the time of death shall abate," and the action would be subsumed by the Wrongful Death Act. The purpose of the 1986 amendment to section 400.023(1) was to expand the cause of action under section 400.023(1) to also allow the Personal Representative to bring an action directly under section 400.023(1) (and not under the Wrongful Death Act) in the event that the nursing home caused the death of the resident.

There are compelling reasons for the legislature to enact a direct statutory cause of action under the nursing home statute -- one not subsumed by the

Wrongful Death Act. Most elderly nursing home residents do not have minor children, living parents, loss of net accumulations to their estates or lost earnings. Wrongful death damages are, therefore, non existent or minuscule at best.

If the resident did **not** die, however, damages would **not** be limited to wrongful death damages. Damages would be greater, therefore, if the resident lived than if the resident died. Causing the death of the resident, therefore, would be cheaper than merely injuring the resident. The direct action for damages under the statute prevents an economic benefit for causing the death of the nursing home resident:

> **Under [the nursing home's] theory, it would be cheaper for a nursing home to kill its residents [as opposed to merely injuring them] and thereby limit claims by personal representatives to the damages listed in the Wrongful Death Act.**

Beverly Enterprises-Florida v. Spilman, 661 So.2d 867, 869, (Fla. 5th DCA 1995) (emphasis added).

Accordingly, and as the Court held in Spilman, this part of the statute ensures that the legislature did not intend a useless act, "a right to sue with no practical effect," and where "**[t]he result was that it was more profitable for the defendant to kill the plaintiff than to scratch him.**" Id.

This understanding of the ultimate result led the Court in Stiffelman v.

Abrams, 665 S.W. 2d 522, 531 (Mo. 1983), to its conclusion. In Stiffelman, plaintiffs brought an action pursuant to Missouri's nursing home resident rights statute, as personal representatives of the estate of Sherman Stiffelman, a ninety year old resident of a nursing home located in St. Louis Missouri. Id. at 525. The complaint alleged severe injury and death to Mr. Stiffelman caused from beatings inflicted upon him while a resident of the nursing home. Id. Plaintiff sought compensatory damages for pain and suffering, as well as funeral and medical expenses. Id. at 526. The trial court granted the nursing home's motion to dismiss the complaint on the grounds that the Missouri Wrongful Death Act provided the exclusive remedy applicable to the allegations in the complaint.

In Stiffelman, the plaintiff relied upon two Missouri statutes in support of its position that it could recover damages for pain and suffering. The first was the resident rights provision giving each nursing home resident the right to be free from abuse and neglect. The second section relied upon was the private enforcement provision. The private enforcement provision allowed any resident of a nursing home, to bring a civil action against the owner or operator of the facility, and to recover "actual damages" for violations of the resident rights.

In discussing the nursing home's argument that the measure of damages should be controlled by the Wrongful Death Act, the Court stated as follows:

We conclude that the legislature, in the exercise of its police power, cognizant of the deficiencies of traditional remedies, by the enactment of § 198.093 intended to provide a remedy for physical and emotional abuse in the nursing home, fatal as well as nonfatal. **To conclude that the legislature did not intend to allow recovery of actual damages for intentional injuries inflicted on a resident and for the pain and suffering sustained by him as a result of said injuries when it turns out, as would be expected, that the injuries ultimately produce his death, would lead to the same incongruity expressed by Professor Prosser in his comment on the rule announced in *Baker v. Bolton*, 1 Camp. 483, 170 Eng.Rep. 1033 (K.B.1808) that no cause of action existed at common law for death:**

> **"The result was that it was more profitable for the defendant to kill the plaintiff than to scratch him."**

W. Prosser, Handbook on the Law of Torts, § 127, at 902 (4th ed. 1971)(footnote omitted.)

If, as defendants contend, the death of a resident of a nursing home wiped out all the actual damages which had been sustained by the resident, where he has undergone the injuries and suffering which were allegedly inflicted upon Mr. Stiffelman prior to his death, **and the plaintiffs** (who would be, in the event of the resident's death, his executors) **were restricted to the actual damages the estate could show by virtue of the death of the decedent, the damages would be non-existent, or minuscule at best.**

Exposure to such a claim would be scant help in enforcing compliance by the nursing home with observance of the right of the resident to be free from mental and physical abuse during his stay in the nursing home. **Such an interpretation would mean that the legislature, in giving "the estate of a former resident so deprived" of his rights, standing to bring a civil action to recover actual damages had intended a useless act, a right to sue with no practical effect.**

> It is well established, however, that the presumption is that the legislature did not intend for any part of a statute to be without meaning or effect. It is not presumed to have intended a useless act.

Stiffelman v. Abrams, supra, at 531-32(emphasis added, citations omitted).

These concerns were shared by the Court in Denton v. American Family Care Corporation, supra, where the Court held that:

> Finally, in many elder abuse actions, the claim for pain and suffering will often be the most significant element of damages. Persons bringing such cases usually will not have claims for lost earnings or diminution of earning capacity. Their medical and other special damages will usually be covered by Medicare or other insurance. As a result, an elder abuse case that proceeds to trial without damages available for pain and suffering will often be **senseless and futile**.

Id. at 1285.

Representative Canady, in sponsoring the 1986 amendment to the statute, stated that its purpose was to expand the cause of action under section 400.023:

> [T]here's an anomaly under the law in that if a nursing home resident is abused and they survive that they can bring a lawsuit. However, if they're abused so badly that they die, the cause of action is lost. So this bill would simply amend the statute to provide that the personal representative of the estate of a deceased nursing home resident would ***also*** be able to bring an action ***under Chapter 400*** to redress the rights of a deceased nursing home resident.

Id. at 869 (quoting, Florida House Bill No. 79)(emphasis added). The reason the cause of action was lost was because it was subsumed by the Wrongful Death Act.

Accordingly, the statute was amended to ensure "that the personal representative of the estate of a deceased nursing home resident would **also** be able to bring an action **under Chapter 400** to redress the right of a deceased nursing home resident." Thus, **under Chapter 400**, the resident would recover "actual damages" as provided by the Florida Legislature in the plain and unambiguous language of section 400.023.

The Fourth District's opinion in this matter speculates as to the legislative intent by noting that "it may have been a part of the legislative bargain in passing the resident's bill of rights to limit actions to the lifetime of the patient." The resident bill of rights, however, and its enforcement provisions were enacted six years before the 1986 language cited by the Court in that opinion was enacted. It is not possible, therefore, for this "legislative bargain" to have occurred.

Furthermore, the legislative history is clear as to the intent of the 1986 amendment, which was to expand the rights available under the statute to nursing home residents. The holding of the Fourth District that, by **authorizing** the Personal Representative to bring suit for lethal violations of rights, the legislature intended **to also extinguish** the surviving cause of action for non-lethal violations is simply without any basis either in the statute or in the legislative history.

Conclusion

The Fourth District erroneously concluded that causes of action for non-lethal deprivations or infringements of rights pursuant to Florida Statutes section 400.023 do not survive the resident's death. The construction of the statute adopted by the Fourth District and urged by Respondent changes the language of the statute by adding terms to the statute which do not exist. This construction renders part of the statute meaningless, fails to achieve a consistent whole (and, in fact, causes conflict within provisions of the very same statute), and fails to give full effect to *all* statutory provisions. It also presumes that the legislature intended a useless act – to draft and enact a provision of a statute and to provide a civil remedy for that provision while ***intending*** at the same time that the provision never be enforceable.

The Fourth District's construction of this statute creates incentive for delay in litigation, and presumes that the legislature intended to leave those nursing home residents who are weakest and closest to death with the least protection under the statute. This construction of the statute is without support either in the language of the statute or in the legislative history.

For these reasons, the decision of the Fourth District should be quashed and the case should be remanded for the new trial ordered by the trial court.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the forgoing was sent via U.S. Mail this _____ day of November, 2000, to: **Edward C. Prieto, Esquire**, Quintairos, McCumber, Prieto & Wood, P.A., Suite 725, 9200 S. Dadeland Blvd., Miami, Florida 33156; **Scott A. Mager, Esquire**, South Trust Tower -- Suite 620, One East Broward Boulevard, Fort Lauderdale, Florida 33301; **Joel S. Perwin, Esquire**, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, 25 West Flagler Street, Suite 800, Miami, Florida 33130; **Laura Zeberski, Esquire**, Zebersky & Associates, P.A., Suite 308, 1776 N. Pine Island Road, Plantation, Florida 33322; **Jane Kreusler-Walsh, Esquire**, 501 South Flagler Drive, Suite 503, Flagler Center, West Palm Beach, Florida 33401; and **Jeffrey M. Fenster, Esquire**, 8751 West Broward Boulevard, Plantation, Florida 33324.

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CERTIFICATE OF FONT

Counsel hereby certifies that this brief has been typed using 14 point Times New Roman font.

_____

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