

SUPREME COURT OF FLORIDA

MAGGIE KNOWLES, et al.

Petitioners,

v.

CASE NO. SC00-1910
L.T. Case No. 4D98-765

BEVERLY ENTERPRISES-
FLORIDA, INC., et al.,

Respondents.

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BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

MAY A PERSONAL REPRESENTATIVE BRING A STATUTORY CAUSE OF ACTION UNDER SECTION 400.023(1), FLORDIA 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 STAUTES, WHERE THE INFRINGEMENT HAS NOT CAUSED THE RESIDENT’S DEATH 4

I. Introduction 4

II. Section 400.023 only confers limited standing to personal r e p r e s e n t a t i v e s 5

III. The Fourth District correctly concluded that section 400.023 only provides a cause of action to a personal representative if the alleged violation of section 400.022 resulted in the resident’s death. 9

A. The plain language of section 400.023 is consistent with the Fourth District’s decision . . 10

B.	The Fourth District’s decision is consistent with the applicable rules of statutory construction	13
C.	The Fourth District’s decision is consistent with the legislative history of section 400.023	15
IV.	If the Court rejects the Fourth District’s decision and allows a personal representative to pursue a claim regardless of whether the violation of section 400.022 results in death, attorneys pursuing these claims will be the primary beneficiaries of the Court’s decision	20
V.	The Fourth District’s decision limiting the right of a personal representative to bring suit pursuant to section 400.023 does not compound the existing liability crisis facing Florida’s long-term care facilities	21
CONCLUSION		25

TABLE OF AUTHORITIES

Cases

Aetna Casualty & Surety Co. v. Huntington National Bank, 609 So. 2d 1315 (Fla. 1992)	10
Bell v. Setzer, 375 So.2d 61 (Fla. 2D DCA 1979)	18
Beverly Enterprises-Florida v. Spilman, 661 So. 2d 867 (Fla. 5th DCA 1995), review denied, 668 So. 2d 602 (Fla. 1996)	15, 16, 18, 19, 20
Beverly Enterprises-Florida, Inc. v. Knowles, 766 So. 2d 335 (Fla. 4 th DCA 2000)	2, 9
Carpenter v. Sylvester, 267 So. 2d 370 (Fla. 3d DCA 1972)	18
Federal Insurance Co. v. Southwest Florida Retirement Center, Inc., 707 So. 2d 1119 (Fla. 1998)	19
First Healthcare Corp. v. Hamilton, 740 So. 2d 1189 (Fla. 4 th DCA), review dismissed, 743 So. 2d 12 (Fla. 1999)	19, 20
Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452 (Fla. 1992)	10, 13
Garcia v. Brookwood Extended Care Center of Homestead, 643 So. 2d 715 (Fla. 3d DCA 1994)	7
Greenfield v. Manor Care, Inc., 705 So. 2d 926 (Fla. 4 th DCA 1997), review denied, 717 So. 2d 534 (Fla. 1998)	9
Holly v. Auld, 450 So. 2d 217 (Fla. 1984)	10, 14
Kumar Corp. v. Nopal Lines, Ltd., 462 So. 2d 1178 (Fla. 3d DCA), review denied, 476 So. 2d 675 (Fla. 1985)	7
Locke v. Hawkes, 595 So. 2d 32 (Fla. 1992)	19

McKendry v. State, 641 So. 2d 45 (Fla. 1994)	18
Rogers & Ford Construction Corp. v. Carlandia Corp., 626 So. 2d 1350 (Fla. 1993)	7
Stiffelman v. Abrams, 655 S.W. 2d 522 (Mo. 1983)	8
United States v. Burlington Northern, Inc., 500 F.2d 637 (9th Cir. 1974)	7

Statutes

Ch. 00-190, 2000 Fla. Laws	24
Section 46.021, Florida Statutes.....	17
Section 400.126, Florida Statutes	14
Section 400.011, Florida Statutes	13
Section 400.022(1)(h)(4), Florida Statutes	14
Section 400.022, Florida Statutes	passim
Section 400.023, Florida Statutes	passim
Section 400.029, Florida Statutes	1
Section 415.1111, Florida Statutes	11, 12, 18

Rules

Rule 1.210(a), Florida Rules of Civil Procedure	7, 8
---	------

Other Authorities

59 Am. Jur. 2d, <i>Parties</i> , §22, p. 409 (1994)	7
Florida House Bill 79 (1986)	15, 16, 17, 18
Florida House of Representatives Journal 232 (Reg. Sess. 1986)	16
Florida Senate Bill 128	16
Florida Senate Journal 869 (Reg. Sess. 1986)	16
Staff of Fla. H. R. Comm. on HRS, HB 79 (1986) Staff Analysis 3 (Final June 23, 1986) (on file with Fla. State Archives, Dept. of State).....	17
 AON Worldwide Actuarial Solutions, Florida Long Term Care General Liability and Professional Liability Actuarial Analysis (Jan. 17, 2000)(unpublished report on file with FHCA).....	5, 21, 22, 23
 Governor Bush Proposes Initiatives to Create an Elder-Friendly Florida, Jan. 9, 2001 at http://sun6.dms.state.fl.us/eog_new/eog/library/releases/ 2001/january/elder_friendly-01-09-01.html	24

INTRODUCTION

The Florida Health Care Association (“FHCA”) and the Florida Association of Homes for the Aging (“FAHA”), appear as *amici curiae* on behalf of their member facilities. FHCA is a non-profit organization representing approximately 850 member licensed nursing homes and assisted living facilities in Florida. FAHA is a non-profit organization representing over 270 long term-care facilities, senior housing communities, nursing homes and assisted living facilities in the State of Florida, most of which are sponsored by religious, fraternal, or community groups. In addition, the following facilities also appear individually as *amici*: Mt. Sinai-St. Francis Nursing and Rehabilitation Facility, Cathedral Foundation of Jacksonville, The Joseph L. Morse Geriatric Center, Menorah Manor, John Knox Village of Central Florida, Harbour’s Edge, Adult Communities Total Services, Inc., Palm Shores Retirement Center, and St. Catherine Laboure.

The statute at issue in this case, section 400.023, Florida Statutes, (1997), pertains to nursing homes. However, section 400.029, Florida Statutes, which pertains to assisted living facilities, contains identical language. Consequently, both nursing homes and assisted living facilities may be impacted by the Court’s decision. For purposes of this Brief the term “long term care facilities” or “facilities” may encompass both nursing homes and assisted living facilities.

The case is important to FHCA, FAHA and the individual amici facilities because it will address:

1. Whether the subject statute should be applied as expressed, or applied to create liability for Florida's long-term care facilities where none was provided by the legislative process.

2. Whether the subject statute should be applied to expose Florida's long-term care facilities to liability claims that neither compensate a resident nor improve any living condition of a resident, but primarily benefit the attorneys bringing these claims.

3. Whether the subject statute should be applied to increase exorbitant litigation costs that are already jeopardizing the ability of Florida's long-term care facilities to obtain insurance and improve resident care.

STATEMENT OF THE CASE AND FACTS

Amici refer to the facts as stated in the Fourth District Court of Appeal's opinion, *Beverly Enterprises-Florida, Inc. v. Knowles*, 766 So. 2d 335 (Fla. 4th DCA 2000).

SUMMARY OF THE ARGUMENT

Florida's long term care facilities are experiencing economic difficulties as a result of increasing litigation costs. The number and amount of claims, as well as

the defense costs associated with those claims, are greatly disproportional with the rest of the country. It is extremely difficult for facilities to provide good care when their resources are drained by lawsuits, exorbitant defense costs, and resulting insurance premium increases. Accordingly, neither Florida's long term care facilities, nor their residents can afford to have section 400.023, Florida Statutes, misapplied to allow personal representatives to bring suits for which the statute does not create a cause of action.

The Fourth District correctly concluded that a personal representative could only pursue a claim under section 400.023 if the alleged violation of a resident's statutory rights results in the resident's death. Section 400.023 does not otherwise give the personal representative standing to sue and recover attorneys fees. When a statute creating a cause of action designates who may sue, only those designated have standing to sue and only on the conditions stated. The plain language of section 400.023 thus requires a conclusion consistent with the Fourth District's decision, and the rules of statutory construction as well as the statute's legislative history support this conclusion.

The application of section 400.023 is reasonable because it protects residents' rights while preventing abusive litigation. Section 400.023 recognizes that in life, nursing home residents should be afforded special statutory rights that are not available to other persons. However, after a resident dies, the need for many of

these special rights disappears. Allowing claims based upon these rights would not benefit residents, but would entitle the attorneys pursuing these claims to fees. Accordingly, section 400.023 recognizes that after a resident's death, unless the facility caused the resident's death, the resident's personal representative may only pursue actions, such as negligence, otherwise available to all individuals. Section 400.023 thus discourages attorneys from pursuing statutory claims that will unfairly burden long term care facilities.

ARGUMENT

MAY A PERSONAL REPRESENTATIVE 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, WHERE THE INFRINGEMENT HAS NOT CAUSED THE RESIDENT'S DEATH.

I. Introduction.

Petitioner, the personal representative of Gladstone Knowles, brought and lost a common law negligence claim against Respondent nursing home. Petitioner, however, continues to pursue a statutory claim against Respondent under section 400.023 for the same alleged harm on which she based her negligence claim. This case should have ended when Petitioner lost her negligence claim but instead, it

continues to drain the resources of Respondent nursing home. In light of the current liability crisis in Florida,¹ Amici are deeply concerned that the proliferation of such claims against Florida's long term care facilities will further harm their ability to continue to operate and serve the needs of their residents. As litigation costs dramatically rise, the cost of care is necessarily impacted. It is therefore imperative that the Court approve the Fourth District's decision.

II. Section 400.023 only confers limited standing to personal representatives.

Even disregarding the issue of collateral estoppel,² section 400.023 does not provide a personal representative with standing to pursue a statutory claim unless the alleged violation of the deceased resident's rights under section 400.022 resulted in death.

¹ See AON Worldwide Actuarial Solutions, Florida Long Term Care General Liability and Professional Liability Actuarial Analysis (Jan. 17, 2000)(unpublished report on file with FHCA)(attached as Ex. A)(hereinafter "Liability Report"). The Liability Report was completed for FHCA in January 2000. It provides an actuarial analysis of general liability and professional liability claims for long term care facilities in Florida. This analysis documents that Florida has three times the claims rate as the rest of the country; that about half of the claims cost in Florida go directly to attorneys; that the annual per facility bed cost in Florida is eight times the average cost for the rest of the country; and that the explosion of claims has created an insurance crisis for Florida facilities. Liability Report at 5.

² Amici do not address the issue of collateral estoppel, but maintain that it is applicable to this particular case.

Section 400.022 sets out an extensive list of residents' personal rights. Some examples include the right to private and uncensored communications, including but not limited to receiving and sending unopened correspondence; access to a telephone; visiting with any person of the resident's choice during visiting hours; overnight visitation outside the facility with family and friends; presenting grievances and having them resolved; recommending policy changes for the facility; and participating in resident groups in the facility. These personal statutory rights are not afforded to individuals that do not reside in long term care facilities. Moreover, in order to prove a violation of a resident's statutory right warranting relief, the resident need only show that a facility infringed upon the right rather than deprived the resident of that right. § 400.023, Fla. Stat.

Although the Legislature determined that statutory personal rights were needed to protect residents, the Legislature also recognized that a statutory cause of action would not survive the resident's death unless the death actually resulted from the deprivation or infringement of a resident's right. Section 400.023 provides that:

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 or her guardian, by a person or organization action on behalf of a resident with the consent of the resident or his or her 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.

(emphasis added). A personal representative is thus precluded from bringing a statutory action under section 400.023 to enforce the personal rights afforded to living residents by section 400.022 except where an alleged violation has resulted in the resident's death. The legislature did not provide a personal representative with standing to pursue any other cause of action. It is a basic principle of law that when a statute creates a cause of action and designates those who may sue thereunder, none except the persons so designated may bring such an action. *See United States v. Burlington Northern, Inc.*, 500 F.2d 637 (9th Cir. 1974) and cases cited therein; 59 Am. Jur. 2d, *Parties*, §22, p. 409 (1994); *see also Rogers & Ford Construction Corp. v. Carlandia Corp.*, 626 So. 2d 1350 (Fla. 1993)(recognizing that legislation may affect standing through substantive regulation of the rights or interests at issue).

The person in whom a statute creates the cause of action is the "real party in interest" with standing to sue. *See Rogers & Ford Construction Corp.*, 626 So. 2d at 1352; *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183 (Fla. 3d DCA), *review denied*, 476 So. 2d 675 (Fla. 1985); *see also* Fla. R. Civ. P. 1.210(a) (Author's Comment). Here section 400.023 clearly identifies the real party in interest as the resident of the nursing home. *See Garcia v. Brookwood Extended*

Care Center of Homestead, 643 So. 2d 715, 716 n.2 (Fla. 3d DCA 1994)

(recognizing nursing home resident as real party in interest pursuant to section 400.023).

Of course, a party expressly authorized by statute may sue on behalf of the real party in interest. *See* Fla.R.Civ.P. 1.210(a). Section 400.023 expressly designates those that may sue under the statute on behalf of the resident, *i.e.* a guardian of the resident, or a person or organization acting for a resident with the resident's consent. Section 400.023 also provides a personal representative with standing to bring an action on behalf of the resident when the rights violation claimed by the personal representative resulted in the resident's death. If death did not result from a rights violation, the personal representative has no standing to sue under the statute. *Cf. Stiffelman v. Abrams*, 655 S.W.2d 522, 532 (Mo. 1983) (recognizing that Missouri nursing home statute providing broadly that "the estate of the former resident so deprived" could sue, gave the resident's estate unconditional standing to bring a civil action after the resident's death)(quoted at length at pages 21-23 of the Amicus Brief of the Coalition to Protect America's Elders).

Accordingly, Petitioner is neither a real party in interest under section 400.023, nor has she been authorized by that statute to bring a claim on behalf of the deceased resident. She therefore lacked standing to sue under the statute.

III. The Fourth District correctly concluded that section 400.023 only provides a cause of action to a personal representative if the alleged violation of section 400.022 resulted in the resident's death.

In *Beverly Enterprises-Florida, Inc. v. Knowles*, 766 So. 2d 335 (Fla. 4th DCA 2000), the Fourth District concluded that the language of section 400.023 unequivocally provided that a deceased resident's personal representative could bring a section 400.023 claim when the alleged violation of section 400.022 resulted in the resident's death. The Fourth District thus declined to confer standing to a personal representative where the Legislature declined to do so. The Fourth District, *en banc*, unanimously adopted the dissenting opinion of Judge Warner in *Greenfield v. Manor Care, Inc.*, 705 So. 2d 926 (Fla. 4th DCA 1997), *review denied*, 717 So. 2d 534 (Fla. 1998). Judge Warner recognized the personal nature of the many of the rights listed in section 400.022 and stated:

I can conceive of valid policy reasons why the legislature would not want such actions to survive, as post-death vindication would not bring any personal satisfaction to the resident. Considering the fact that attorney's fees are available for successful suits proving infringements of these statutory rights, it may have been part of the legislative bargain in passing the resident's bill of rights to limit actions to the lifetime of the patient, other than those alleging that the violation of the rights resulted in the death of the resident.

Knowles, 766 So. 2d at 337 (quoting Judge Warner's dissent in *Greenfield*, 705 So. 2d at 934). Even Judge Shahood, who wrote the majority opinion in

Greenfield, concurred with the *en banc* decision below. The decision is correct regardless of whether one considers the plain language of section 400.023, the applicable rules of statutory construction, or the statute's legislative history.

A. The plain language of section 400.023 is consistent with the Fourth District's decision.

If the language of a statute is clear and unambiguous, there is no need for the Court to construe the statute. *See Aetna Casualty & Surety Co. v. Huntington National Bank*, 609 So. 2d 1315 (Fla. 1992); *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So. 2d 452 (Fla. 1992); *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984). The statute must be given its plain and obvious meaning. *See Holly*, 450 So. 2d at 219.

Here, section 400.023 clearly provides a personal representative with standing to pursue a violation of section 400.022 only if the alleged violation of section 400.022 results in the resident's death. The personal representative does not otherwise have standing to pursue a section 400.023 claim. For example, the personal representative cannot pursue a cause of action pursuant to section 400.023 for the nursing home employee's failure to knock before he or she entered the deceased resident's room. Nor can the personal representative in the instant case pursue a cause of action under section 400.023 because she agreed that Respondent did not cause Mr. Knowles' death.

Applying the plain language of section 400.023 does not lead to unreasonable results. Section 400.023 provides residents with a statutory cause of action to enforce or seek damages for the violation of an extensive list of personal rights. The resident can raise a claim for any violation of these rights. The personal representative, however, cannot pursue a section 400.023 claim to enforce all the resident's statutory rights. For example, the personal representative is rightly precluded from suing a facility for failure to provide a resident with his or her mail or to provide visitation to relatives. These rights, like many of the rights listed in section 400.022, are special and personal rights that cannot be enforced unless the resident is alive. Injunctive relief is often the most effective way to address a violation of these rights, and normally, any monetary recovery for these claims would be small or non-existent.

Obviously, for more serious violations of a resident's rights, like those listed by the Coalition to Protect America's Elders on page 17 of its Amicus Brief, the personal representative will have other causes of action available, such as negligence, false imprisonment, or assault. In addition, claims resulting from rape, illegal confinement, or physical beating can be asserted pursuant to section 415.1111, Florida Statutes, which provides:

A vulnerable adult who has been abused, neglected, or exploited as specified in this chapter has a cause of action against any perpetrator and may recover actual and punitive damages for such abuse, neglect,

or exploitation. The action may be brought by the vulnerable adult, or that person's guardian, by a person or organization acting on behalf of the vulnerable adult with the consent of that person or that person's guardian, **or by the personal representative of the estate of a deceased victim without regard to whether the cause of death resulted from the abuse, neglect or exploitation.**

(emphasis added). Notably, section 415.1111 expressly provides that the cause of action it creates survives regardless of whether the alleged abuse violation caused the death of the person protected. Hence, the Legislature knew how to provide standing to a personal representative to pursue a statutory action on behalf of a deceased person regardless of the cause of death. However, the Legislature chose not to provide this remedy for section 400.023.

Section 400.023 thus strikes a proper balance. It provides redress to living residents and to deceased residents if the alleged rights violation was so egregious that it resulted in the resident's death. As to other harm that occurred before a resident died, the Legislature left the personal representative with the relief that otherwise existed without section 400.023. If the alleged harm was serious enough, presumably an attorney for the personal representative would pursue damages through a common law or other statutory action. Without the incentive of statutory attorneys' fees, however, insubstantial grievances will not be pursued on behalf of a decedent. The balance struck by section 400.023 thus deters the proliferation of claims that drive up litigation costs.

In the instant case, Petitioner pursued a negligence claim that survived the resident's death, but lost the claim in a jury trial. Her argument that the Fourth District's decision has left her without a remedy on the decedent's behalf is therefore meritless, because she clearly had her day in court. Moreover, the Petitioner's contention that the Court should ignore the plain language of section 400.023 because a pending section 400.023 claim will die with the resident ignores the wisdom of the balance struck by the Legislature. Petitioner also ignores the fact that in cases like this one, the personal representative often pursues a cause of action, such as negligence, in conjunction with the section 400.023 claim. Thus, if the resident dies during the litigation, the personal representative can still recover for any substantial harm through actions that survive.

Because the statute's plain language is clear and unambiguous and does not lead to an absurd result, the Court should approve the Fourth District's decision.

B. The Fourth District's decision is consistent with the applicable rules of statutory construction.

Although there is no need to look beyond the plain language of section 400.023 to discern legislative intent, the rules of statutory construction also support the Fourth District's decision. Section 400.023 is consistent with the purpose of the act as a whole. *Forsythe*, 604 So. 2d at 455. The purpose of the act is stated in section 400.011, Florida Statutes (1997):

The purpose of this part is to provide for the development, establishment, and enforcement of basic standards for:

(1) The health, care, and treatment of **persons in nursing homes and related health care facilities**; and

(2) The construction, maintenance, and operation of such institutions which will ensure safe, adequate, and appropriate care, treatment, and health of **persons in such facilities**.

(emphasis added). Thus, the act focuses on ensuring residents' care while they are **in** facilities. Section 400.023 serves that purpose by providing residents in facilities the right to seek relief for any violation of section 400.022. Because every right listed in section 400.022 may be enforced by a resident, no right is rendered meaningless.

Even section 400.022(1)(h)(4), which provides that the facility must, upon the death of a resident, provide to the personal representative or the resident's spouse any funds that the resident has deposited with the facility, is not rendered meaningless by section 400.023. Petitioner alleges that this provision can never be enforced because it will never result in the death of the resident. However, the personal representative need not rely on section 400.023 to enforce this provision. The Petitioner has the ability to enforce this right under section 400.126, Florida Statutes, which also requires a facility to return the deceased resident's funds to the personal representative or spouse.

Accordingly, section 400.023 is consistent with the remainder of the act, and viewing the act as a whole does not render section 400.023 ambiguous. Where as here, there is no reason to believe that the plain language of section 400.023 does not accurately disclose the legislative intent, the Court should adhere to the statute's plain language. *See Holly*, 450 So. 2d at 219.

C. The Fourth District's decision is consistent with the legislative history of section 400.023.

The legislative history of section 400.023 is also consistent with the statute's plain language. A review of the statute's legislative history demonstrates that the Legislature only intended a 400.023 claim to survive the resident's death if the underlying violation of section 400.022 resulted in the resident's death.

When section 400.023 was initially enacted in 1980, it provided that a cause of action for violating section 400.022 could be brought by a "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." §400.023, Fla. Stat. (1981). Thus, section 400.023 provided living residents the right to pursue the facility they lived in for violations of the rights in section 400.022. *See Beverly Enterprises-Florida v. Spilman*, 661 So. 2d 867, 868 (Fla. 5th DCA 1995)("When section 400.023 was first enacted in 1980, it addressed only the rights of residents who survived the violation of their rights

and allowed them to seek actual and punitive damages.”) *review denied*, 668 So.2d 602 (Fla. 1996).

In 1986, the Legislature proposed an amendment to the section 400.023. As originally introduced, the amendment provided that an action could be brought “by the personal representative of the estate of a deceased resident.” Fla. HB 79 (1986). A similar amendment had been previously considered by the 1985 Legislature, but apparently died in committee. As the Court in *Spilman* pointed out, the following discussions took place regarding the 1985 proposed amendment during committee hearings of the 1985 Regular Session:

REP. CANADY: This bill would amend Chapter 400, which sets forth the law concerning nursing homes. And in Chapter 400 currently there is set forth sort of a nursing home residents’ Bill of Rights. It’s a detailed listing there of the rights that the people who live in nursing homes have under the law. The law also gives the residents of nursing homes the right to bring a legal action to enforce those rights if they’re violated. So essentially, if a resident of a nursing home is mistreated in some way – and that’s really what it all boils down to – then the resident can sue the operator of the nursing home for damages and so on to redress that wrong that has been done. **There’s an anomalous situation under the laws that now exist in that although a resident can do that, if the resident is treated so badly that the resident actually dies as a result of that, the cause of action does not survive so that no suit can be brought....**

Spilman, 661 So. 2d at 869 (quoting comments made during the 1985 Regular Legislative Session).

In the 1986 legislative session, House Bill 79 was itself amended on the floor to assure that the personal representative could only bring a cause of action pursuant to section 400.023 “when the cause of death resulted from the deprivation or infringement of the decedent’s rights.” *See Fla. H. R. Jour.* 232 (Reg. Sess. 1986). The Senate made an identical amendment to Senate Bill 128, the companion bill to House Bill 79. *See Fla. S. Jour.* 869 (Reg. Sess. 1986).

The addition of the floor amendment language demonstrates that the Legislature decided to give the personal representative standing to pursue a cause of action only where the violation of section 400.022 resulted in death. This was also confirmed by the final Staff Analysis of House Bill 79 noting:

The proposed revision to section 400.023, Florida Statutes adds the personal representative of the estate of a deceased resident to the list of persons who can bring action against the licensee for violation of a resident’s rights when the cause of death resulted from a deprivation or infringement of the decedent’s rights

The revision allows the personal representative of the estate of a deceased resident to bring action against the licensee and if they prevail, recover attorney’s fees in addition to costs of the action and the actual and punitive damages.

Staff of Fla. H. R. Comm. on HRS, HB 79 (1986) Staff Analysis 3 (Final June 23, 1986) (on file with Fla. State Archives, Dept. of State). Thus, the 1986 amendment gave a personal representative limited standing to pursue a cause of action on behalf of deceased residents in those most egregious cases where the violation of a

resident's right resulted in death, as well as the right to seek punitive damages and attorneys fees in those cases.

The survival statute, section 46.021, Florida Statutes, does not alter this analysis. If as Petitioner contends, the Legislature in 1980 had created an unrestricted right for a personal representative to pursue a statutory cause of action regardless of whether a resident's death was caused by violation of listed rights, the Legislature would have passed the amendment to section 400.023 as first proposed in 1985, thereby conferring unfettered authority for a personal representative to sue under the statute. There would have been no need for the 1986 floor amendment limiting the personal representative's standing to those rights violations resulting in death. Alternatively, the Legislature in amending section 400.023 could also have used language comparable to that used in the section 415.1111, *supra*. However, the Legislature did neither.

Accordingly, section 400.023 as originally enacted did not give Petitioner standing to pursue a statutory claim. *See Spilman*, 661 So. 2d at 868; *see also Carpenter v. Sylvester*, 267 So. 2d 370 (Fla. 3d DCA 1972)(survival statute did not apply to paternity statute to allow unwed mother to sue the estate of a deceased putative father because the later did not provide for the action to survive the putative father's death); *Bell v. Setzer*, 375 So.2d 61 (Fla. 2d DCA 1979) (same). Nor did the 1986 amendment provide her with standing to sue Respondent. Rather, House

Bill 79 expressly limited a personal representative's standing to cases in which a rights violation resulted in death.

Furthermore, section 400.023 is a specific statute and therefore prevails over the general survival statute. *See McKendry v. State*, 641 So. 2d 45 (Fla. 1994).

Similarly, if two statutes conflict, the latter, in this case section 400.023, prevails as the last expression of legislative intent. *Id.* at 46. In addition, under the doctrine of *expressio unius et exclusio alterius*, the fact that the Legislature expressly provided for a cause of action where the violation resulted in death, but excluded any mention of a cause of action for a violation that did not result in death, supports the conclusion that the Legislature did not intend to provide a cause of action in the later case. *See Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992); *Federal Insurance Co. v. Southwest Florida Retirement Center, Inc.*, 707 So. 2d 1119 (Fla. 1998).

In addition to asking the Court to ignore the statute's plain language and legislative history, Petitioner asks the Court to overrule the decision in *First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189 (Fla. 4th DCA), *review dismissed*, 743 So. 2d 12 (Fla. 1999). *Hamilton* involved a resident who died as a result of a violation of section 400.022 and establishes that the elements of compensatory damages recoverable by the personal representative of the deceased resident under section

400.023 are limited by the Wrongful Death Act.³ Petitioner says *Spilman* is better reasoned. However, this Court already decided not to review *Hamilton*, 743 So. 2d 12 (Fla. 1999), or *Spilman*, 668 So.2d 602 (Fla. 1996). The Court should therefore disregard the Petitioner's attempt to have the Court resolve any alleged conflict between *Hamilton* and *Spilman* as part of this case. Moreover, the

Court's decision in the instant case will not be dispositive of any alleged conflict between *Hamilton* and *Spilman*.

IV. If the Court rejects the Fourth District's decision and allows a personal representative to pursue a claim regardless of whether the violation of section 400.022 results in death, attorneys pursuing these claims will be the primary beneficiaries of the Court's decision.

In addition to providing standing to a personal representative where none was provided, reversing the Fourth District's decision would entitle attorneys to an award of fees for all integrally related services in a section 400.023 action on behalf of a deceased resident, including pursuit of common law actions simultaneously

³ Amici agree that *Hamilton* was correctly decided.

brought. As a result, attorneys will be the primary beneficiaries of such suits, and will be further motivated to pursue them even though not otherwise practicable.

Specifically, attorneys will pursue suits to vindicate a resident's personal rights although such suits are likely to warrant only injunctive relief, rather than any significant compensatory damages. Attorneys will also pursue section 400.023 claims in conjunction with other available remedies so they can obtain fees. Because the proof for both a section 400.023 claim and a related claim, such as a negligence claim, are necessarily similar, section 400.023 essentially entitles the attorney pursuing both claims to obtain fees for the negligence claim.

Because attorneys will recover fees, they will be motivated to bring section 400.023 claims against long-term care facilities even if the claims are otherwise unproductive. As a result, the litigation costs associated with defending such claims will continue to mount. Attorneys are already motivated to bring suit pursuant to section 400.023 because the burden of proof is easily met, the statute entitles them to fees, and punitive damages are currently unlimited. In addition, much of the money awarded in such suits is going directly to the attorneys. Almost half of the total amount of claim costs paid by Florida's long term care facilities is going directly to attorneys who either prosecute or defend long term care facilities. Liability Report at 12, *supra* footnote 1. If the Court declines to uphold section 400.023 as written, attorneys will pursue such claims where the rights violation did

not result in a resident's death with equal fierceness. Ironically, the result may be that the law created to protect nursing home residents will drive those residents' facilities into financial disrepair.

V. The Fourth District's decision limiting the right of a personal representative to bring suit pursuant to section 400.023 does not compound the existing liability crisis facing Florida's long-term care facilities.

Since the 1990's there has been a significant increase in the number and costs of suits against long term care facilities. Liability Report at 11. The increase was prompted in large part by Florida's existing legislation and it is causing extreme financial hardship for many long-term care facilities. The severity of this situation is clearly demonstrated by the difference in liability costs per occupied long-term care bed in Florida and the rest of the nation. Florida has the highest liability costs per bed in the nation. Liability Report at 6. In 1999, the average cost per bed in Florida was eight times higher than the average cost per bed in the remaining 49 states. *Id.* Liability costs in Florida make up approximately 40 percent of the total liability costs reported in the nation as a whole, but Florida has only ten percent of the beds. *Id.* at 8. In addition, Florida's annual costs per year are increasing faster than those of any other state. Liability Report at 9.

The increase in costs is due to increases in both the frequency and severity of the claims. With respect to the frequency, Florida has the largest number of

claims reported in the country. They have approximately 21 percent of the total claims in the nation, but only ten percent of the beds. Liability Report at 7. The annual number of claims per 1,000 beds is currently three times higher than the rest of the country. Liability Report at 8. With respect to the severity or amount of claims, the average size of a claim in Florida in 1999 was more than double the average size for claims in the rest of the nation. Liability Report at 9. Almost half of Florida's claims were greater than \$50,000 while only 22 percent of the rest of the nation's claims exceeded that amount. Liability Report at 10. Facilities are also finding it difficult to obtain liability insurance, which they must have to operate. Liability Report at 11.

As a result of the problems that litigation is creating, some facilities are closing, while resident care at others is severely jeopardized. The quality and number of staff are decreasing, there are fewer improvements made to facilities, there are fewer improvements in patient care, and there are fewer beds available for residents. Ultimately, the quality of resident life is diminished because an exorbitant amount of money must be funneled to litigation costs rather than resident care. The situation will only worsen if section 400.023 is construed so as to give a personal representative standing to bring a suit for a violation of section 400.022 regardless of whether the violation resulted in death.

The Legislature has recognized the severity of this problem. During the 2000 legislative session, the Legislature passed a bill creating a Task Force on the Availability and Affordability of Long Term Care to study various issues including: (1) the effect of lawsuits against nursing homes on the cost of nursing home care and on the financial stability of the nursing home industry in the state; (2) the kinds of incidents that lead to the filing of lawsuits and the extent to which frivolous lawsuits are filed; (3) the cost and availability of liability insurance for long term care providers. Ch. 00-190, 2000 Fla. Laws.⁴ The Legislature thus recognizes the precarious position which nursing homes now occupy as a result of increasing litigation costs and it is contemplating the limits that may be necessary to rectify that situation. In addition, the Governor has stated that he intends to recommend to the 2001 Legislature that they address the adverse impact of existing law on long-term care facilities. Specifically, the Governor has recognized that lawsuits against long-term care facilities should be subject to the same limits applicable to nearly all other causes of action. *See Governor Bush Proposes Initiatives to Create an Elder-Friendly Florida*, Jan. 9, 2001 at <http://>

⁴ The Task Force has met and is preparing to submit a report to the Governor, President of the House, and Speaker of the House of Representatives after its last meeting on January 29, 2001.

sun6.dms.state.fl.us/eog_new/eog/library/releases/2001/january/elder_friendly-01-09-01.html. The Fourth District's decision recognizes the need for reasonable limits on lawsuits against long term care facilities, consistent with Legislative and Executive expression.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Court should answer the certified question in the negative, and approve the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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