IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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

Petitioner,

vs.

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

Respondent.
_____/

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

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## PREFACE

This case is before the Court to answer a question certified by the Fourth District to be one of great public importance. The trial court granted plaintiff's motion for new trial and the Fourth District reversed, but certified to this Court the following question:

> 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 (1997), WHERE THE INFRINGEMENT HAS NOT CAUSED THE RESIDENT'S DEATH?

Beverly Enters.-Florida, Inc. v. Knowles, 763 So. 2d 1285 (Fla. 4th DCA 2000) (en banc). This Court has jurisdiction. See art. V, § 3(b)(4), Fla. Const.

Petitioner, Maggie Knowles, as Personal Representative of the Estate of Gladstone Knowles, deceased, was the plaintiff in the trial court. Respondent, Beverly Enterprises-Florida, Inc., d/b/a Beverly Gulf Coast-Florida, Inc., d/b/a Washington Manor Nursing Home and Rehabilitation Center, was the defendant. They are referred to herein as the plaintiff and the defendant or as Mr. and Mrs. Knowles and the nursing home.

All emphasis is supplied unless otherwise indicated. The following symbols are used:

| | | |
|---|---|---|
| A | - | Appendix |
| D | - | Deposition[1] |
| PX | - | Plaintiff's Exhibit |
| R | - | Record |
| SR | - | Supplemental Record (new trial hearing) |
| T | - | Trial Transcript |

## STATEMENT OF THE CASE AND FACTS

In April of 1995, seventy-two-year-old Gladstone Knowles fell out of bed at home and broke his left hip (T 804-05). When Mr. Knowles' family doctor, Steven Israel, examined Mr. Knowles shortly before his fall in April of 1995, he described him as thin, but not malnourished (D1 15). Over a two-year span, his weight ranged from about 85-90 pounds (D1 10-11). Dr. Israel's records included diagnoses of rheumatoid arthritis, anemia, mild organic brain syndrome, arteriosclerotic heart

[1]Two depositions were inadvertently omitted from the record on appeal. The district court granted an agreed motion to supplement the record with these depositions. The depositions were filed in the Fourth District in the appendix to the Answer Brief/Initial Brief on Cross-Appeal, which has been transferred to this Court as part of the record on appeal. The deposition of Steven Israel, M.D., taken on July 28, 1997, will be referred to as D1 and the deposition of Cynthia Bradley-Graziadei will be referred to as D2.

disease, and peptic ulcers (D1 8). Dr. Israel had been treating Mr. Knowles for these problems well before April of 1995 (D1 8). Dr. Israel's April 1995 examination of Mr. Knowles showed no limitation of movement in any limbs and no pressure sores (D1 13). Mr. Knowles walked without assistance and carried on a conversation (D1 12). He was able to care for himself and to function outside of a protective environment (D1 14).

Dr. Krant replaced Mr. Knowles' left hip at Hollywood Memorial Hospital (R6 999-1000). During his hospital stay, Mr. Knowles received pain medication (T 302). After eleven days, Dr. Krant released Mr. Knowles for admission to Washington Manor Nursing Home for long term care (T 301, 303, 311). When discharged to the nursing home, Mr. Knowles was able to walk about 100 feet with the help of a physical therapist and a walker (T 301-02, 338; R6 1000, 1017). He was alert and conversed regularly with his wife (T 813). On admission to the nursing home, he was evaluated as having a "fair" chance of rehabilitation (T 310, 611).

Mr. Knowles was admitted to the nursing home under the care of its medical director, Dr. Reines (T 309). Dr. Reines' initial orders included 650 mg of Tylenol as needed for pain (T 311, 1256). He also ordered Haldol, an anti-psychotic drug that depresses the central nervous system and causes loss of muscle tone, and a vest restraint (T 318-20, 325-26, 616, 1292-93). The following day, Dr. Reines removed

the vest restraint order (T 320, 1292). Despite the order to discontinue the vest restraint, a staff person found Mr. Knowles on the floor of his room twenty days later, wearing a vest restraint (T 321-22, 637).

On top of the Haldol, a psychologist called in to consult with the nursing home prescribed Ativan, a tranquilizer (T 325-326). Like Haldol, Ativan affects the ability to cooperate and depresses the appetite (T 333). In late May, Dr. Reines increased the Haldol and discontinued the Ativan (T 327-28, 332). Mrs. Knowles testified that these drugs changed her husband drastically (T 813). He essentially stopped talking (T 813).

During his sixty-seven days at the nursing home, Mr. Knowles was drugged continually, but remained in constant agonizing pain (T 620-34). The nursing home records showed that he never received any pain medication (T 313-14, 616, 620).

About six weeks after entering the nursing home, Mr. Knowles' arms and legs became locked in a bent position, called contractures (T 340). Contractures result from lack of motion and care and are totally preventable (T 339-40). Once contractures develop, they are irreversible (T 337).

By late May, Mr. Knowles had developed huge pressure sores on multiple parts of his body (T 658). Pressure sores (decubitus ulcers), like contractures, result from lack of motion and are totally preventable (T 344, 660-61). The nursing home chart did not note any contractures or pressure sores upon Mr. Knowles' admission to the facility (T 336, 344).

On July 2, Mr. Knowles was taken by ambulance to Memorial Hospital (T 1271). One of his pressure sores was severely infected and he was life-threateningly dehydrated (T 673). He was severely contracted in a fetal position (T 673). Photographs taken on July 15 by a Hollywood police officer, called in by the Agency for Health Care Administration to investigate elderly neglect and abuse of Mr. Knowles, graphically depict his horrific condition (D2 6-7; PX 14). Mr. Knowles died on July 28, 1995 (R4 699). Mrs. Knowles was appointed personal representative of his estate (R3 432).

Mrs. Knowles, as personal representative, sued the nursing home, alleging that Mr. Knowles' rights under section 400.022(1), Florida Statutes (1995), part of the Nursing Home Act, had been violated and that the cause of action set forth in section 400.023, Florida Statutes (1995), survived his death, as well as an alternative claim for wrongful death (R3 432-56). The nursing home moved for summary judgment, arguing that Mrs. Knowles could not bring an action under the Nursing Home Act

because Mr. Knowles had died from causes unrelated to the violation of the Act (R5 842-43). The trial court granted the nursing home's motion (R8 T 10/16/00 at 18). By consent of the parties, plaintiff orally amended the pleadings to allege common law negligence ( R1 41; R8 T 10/17/97 at 3). The jury returned a verdict in favor of the nursing home (R7 1214).

Plaintiff moved for a new trial and judgment in accordance with the motion for directed verdict, arguing that the court had incorrectly granted the nursing home's motion for summary judgment (R7 1227). At the hearing, plaintiff relied upon Greenfield v. Manor Care, Inc., 705 So. 2d 926, 933-34 (Fla. 4th DCA 1997), appeal dismissed, 717 So. 2d 534 (Fla. 1998),[2] which the Fourth District decided after the trial and the motion for new trial had been filed (SR 6). The trial court granted the motion (R7 1341-42; SR 43) and the nursing home appealed (R7 1345-46).

The Fourth District initially affirmed the new trial order. See Beverly Enters.-Florida, Inc. v. Knowles, 24 Fla. L. Weekly D1986 (Fla. 4th DCA Aug. 25, 1999). On rehearing en banc, the Fourth District receded from its opinion in Greenfield and reversed the trial court's order granting a new trial. See Beverly Enters.-Florida, Inc.

[2]In Greenfield, the Fourth District held that when a nursing home resident dies before the entry of final judgment and the cause of death is unrelated to the violation of the Nursing Home Act, the resident's personal representative may bring the action pursuant to section 46.021, Fla. Stat. (1995). Greenfield, 705 So. 2d at 933-34.

v. Knowles, 766 So. 2d 335, 336 (Fla. 4th DCA 2000). The court certified the above-stated question as one of great public importance because "[t]he State of Florida has one of the largest populations of elderly persons in the country[,] the elderly comprise the vast majority of the residential population of nursing homes" and "the nursing home statute was enacted to protect this segment of our population." Knowles, 763 So. 2d at 1285.

## SUMMARY OF ARGUMENT

The Legislature enacted section 400.022 and created a private cause of action in section 400.023(1) because the rights and remedies already available were inadequate to protect frail and elderly residents of nursing homes. Under section 400.023(1), "**[a]ny 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 statute further provides that this claim may be brought by the nursing home resident or "by the personal representative of the deceased resident when the cause of death resulted from the deprivation or infringement of the decedent's rights." § 400.023(1). Section 400.023 is a remedial statute and, thus, must be construed in favor of granting access to the remedy.

Conspicuously, the Legislature did not provide that the personal representative may **only** bring such an action when the resident dies from the violation of the Act.

See § 400.023(1). The Fourth District's holding erroneously inserted the word "only" into the statute. See Knowles, 766 So. 2d at 337. In addition, the Fourth District misapplied settled principles of statutory construction.

Regardless of whether the language in question is clear or ambiguous, it must be considered with interrelated statutes, particularly section 400.022, which sets forth the rights of nursing home residents, and section 46.021, Florida Statutes (1995), the survival statute. The Legislature amended section 400.023(1) to include the language concerning personal representatives to eliminate a loophole in these statutes--when the nursing home's violation of the Act was so severe it caused the resident's death, the resident's cause of action would be extinguished by section 768.20, Florida Statutes (1995), part of the Wrongful Death Act. The Legislature amended the statute to clarify that all actions for violations of the Nursing Home Act, those where the violation caused the resident's death and those where the violation did not, are included in sections 400.022 and 400.023. This interpretation is confirmed by the plain language of the Act, consideration of closely related statutes and the legislative history.

Many of the rights set forth in section 400.022 will never cause the death of a nursing home resident. Under the Fourth District's interpretation, these rights are rendered unenforceable in the event that the resident, who is by definition elderly or sick, dies before entry of final judgment. And even where the resident dies from the

violation of the Nursing Home Act, the Fourth District has limited damages to those recoverable under the Wrongful Death Act. See First Healthcare Corp. v. Hamilton, 740 So. 2d 1189, 1195-96 (Fla. 4th DCA), review dismissed, 743 So. 2d 12 (Fla. 1999). Together, Knowles and Hamilton effectively nullify the remedies provided in the Nursing Home Act.

Considering section 400.023(1) in pari materia with section 400.022, it is clear that the Legislature intended that causes of action for violations of the Act that did not cause the resident's death would survive pursuant to the general rule of survival set forth in section 46.021. This Court should quash the decision of the Fourth District and remand for the new trial ordered by the trial court.

On remand, the nursing home should be precluded from arguing the comparative fault of nonparties. That defense is not permissible in this statutory enforcement action. Further, because only the nursing home has an obligation to the resident under the Nursing Home Act, the fault of others is irrelevant. In any event, the comparative fault statute is inapplicable because defendant adduced no evidence of nonparty fault and the nonparty doctor was not a joint tortfeasor with the nursing home.

## ARGUMENT

## POINT I

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

The Fourth District erroneously interpreted the plain language of section 400.023(1) in a way contrary to the evident legislative intent. A broad overview of the statutory scheme makes clear that the Legislature intended the statutory remedy provided by the Nursing Home Act to survive a resident's death, even if the violation of the Act did not directly cause the resident's death.

In 1980, the legislature undertook a major legislative effort to remedy indigenous areas of abuse in the operation of nursing homes. See ch. 80-186, § 3, Laws of Florida (codified at § 400.023, Fla. Stat. (Supp. 1980)). The State of Florida has the highest percentage of residents aged sixty-five and older in the nation.[3] In January 2000, the Florida Department of Elder Affairs reported that there were 74,874 persons

[3]According to United States Census figures, there are 2,734,145 persons aged sixty-five and older living in Florida, constituting 18.3 percent of the state's population. See U.S. Census Bureau, Population 65 Years and Over and 85 Years and Over, Region, and State: 1998 (visited Nov. 29, 2000) <http://www.census.gov:80/population/estimates/state/st98elderly.txt>.

over the age of sixty living in nursing homes in Florida.[4] The abuses to which nursing home residents are susceptible are well known and documented. For example, the legislative history of the bill creating section 400.023(1) cited a Dade County Grand Jury report describing substandard conditions that existed for years in nursing homes. See Fla. S. Comm. on HRS, CS/SB 1218 (1980) Staff Analysis 1-2 (rev. June 10, 1980) (A 4).

The legislature enacted the protections in sections 400.022 and 400.023(1) precisely because the rights and remedies afforded in traditional common law negligence actions were inadequate to protect elderly nursing home residents. Rarely will there be found a loss of support and services to anyone from the death of an elderly and feeble nursing home patient. Nursing home residents present particular problems because of their advanced age, failing health, mental disabilities, reduced mobility, sensory impairment, reduced tolerance to heat, smoke and gases, and greater susceptibility to shock. See generally Beverly Enters.-Florida v. Spilman, 661 So. 2d 867, 873 (Fla. 5th DCA 1995). Many nursing home patients lack the physical strength to endure even one episode of abuse or neglect.

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[4]See Florida Dep't of Elder Aff., Florida County Profiles: 2000 1 (Jan. 2000) (available at <http://www.state.fl.us/doea/Home/More_Information/Demographics/demographics.html > (visited Nov. 29, 2000)).

Chapter 400, Florida Statutes (1995), is entitled "Nursing Homes and Related Health Care Facilities." Part II of chapter 400, sections 400.011-.335, is entitled "Nursing Homes" and is commonly known as the Nursing Home Act. The express legislative purpose of the Nursing Home Act is to establish "basic standards" for "[t]he health, care, and treatment of persons in nursing homes and related health care facilities" as well as to "ensure safe, adequate, and appropriate care, treatment , and health of persons in such facilities." § 400.011, Fla. Stat. (1995); see Beverly Enters.-Florida, Inc. v. McVey, 739 So. 2d 646, 648 (Fla. 2d DCA 1999), review denied, 751 So. 2d 1250 (Fla. 2000). The Nursing Home Act establishes comprehensive standards for the operation of nursing homes and "evinces a legislative plan to protect the interests of the citizens of this state who use" nursing homes. Garcia v. Brookwood Extended Care Ctr., 643 So. 2d 715, 717 (Fla. 3d DCA 1994) (quoting Mang v. Country Comfort Inn, Inc., 559 So. 2d 672, 673 (Fla. 3d DCA 1990)).

Section 400.022 is entitled "Residents' Rights" and sets forth a lengthy list of rights bestowed upon all nursing home residents. See National Healthcorp Ltd. Partnership v. Cascio, 725 So. 2d 1190, 1191 (Fla. 2d DCA 1998) (describing rights as "far-ranging"); Beverly Health and Rehabilitation Servs., Inc. v. Freeman, 709 So. 2d 549, 550 (Fla. 2d DCA) (describing rights as "extensive and diverse"), review denied, 719 So. 2d 892 (Fla. 1998). The statute requires nursing homes to make the list of rights public, inform all residents of their rights orally and in writing, and give all

staff members a copy of the residents' rights. See § 400.022(1), (2). These rights recognize the unique vulnerability of nursing home residents and the need to protect them from abuse. These rights, among other things, grant nursing home residents:

> (k) The right to refuse medication or treatment and to be informed of the consequences of such decisions ....
>
> (l) The right to receive adequate and appropriate health care and protective and support services, including social services; mental health services, if available; planned recreational activities; and therapeutic and rehabilitative services ....
>
> (m) The right to have privacy in treatment and in caring for personal needs ....
>
> ....
>
> (o) **The right to be free from mental and physical abuse**, corporal punishment, extended involuntary seclusion, **and from physical and chemical restraints,** except those restraints authorized in writing by a physician for a specified and limited period of time or as are necessitated by an emergency.... Restraints may not be used in lieu of staff supervision or merely for staff convenience, for punishment, or for reasons other than resident protection or safety.

§ 400.022(1).[5]

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[5]The statutory rights also protect the civil liberties of nursing home residents. For example, section 400.022(1) protects the residents' rights to: "civil and religious liberties"; "private and uncensored communication"; reasonable access for persons providing health, social, or legal services; reasonable access for family members; present grievances, organize and meet; "participate in social, religious, and community activities that do not interfere with the rights of other residents"; be discharged only for medical reasons; examine the results of the most recent inspection of the nursing home; manage his or her own financial affairs or to delegate that responsibility to the nursing home. § 400.022(1)(a)-(j), (p). If the nursing home is managing the resident's

The Legislature put "muscle" into the Act by creating a private right of action in section 400.023 to hold nursing homes responsible for violations of the rights created by the Nursing Home Act. See McVey, 739 So. 2d at 648; Garcia, 643 So. 2d at 717; Mang, 559 So. 2d at 673. This section is entitled "Civil Enforcement" and provides 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 or her guardian, by a person or organization acting 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.** The action may be brought ... to enforce such rights and to recover actual and punitive damages for any deprivation or infringement on the rights of a resident.

§ 400.023(1).

The plain language of section 400.023(1) directs that "[t]he **remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident and to the agency**." The statute

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funds, it must maintain a system ensuring a complete accounting and upon the resident's death, the funds and a final accounting must be conveyed within thirty days to the resident's personal representative or next of kin. See § 400.022(1)(h)4.

imposes "strict liability" upon proof of violation of the statute without regard to negligence or fault and entitles the resident to actual damages, attorney's fees, and, where appropriate, punitive damages. See Knowles, 24 Fla. L. Weekly at D1987; Mang, 559 So. 2d at 673-74 (noting the requirements to invoke a statutory claim for violation of section 400.428, identical to section 400.022). As such, section 400.023(1) is a remedial statute that should be liberally construed in favor of granting access to the remedy provided by the Legislature. See, e.g., Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000); Golf Channel v. Jenkins, 752 So. 2d 561, 564 (Fla. 2000); Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992) (stating that the public sector whistle-blower act is unambiguous, but applying the canon of construction that "[a]s a remedial act, the statute should be construed liberally in favor of granting access to the remedy" established by statute).

### 1. Established Principles of Statutory Construction Confirm the Legislature's Intent to Allow the Statutory Action for Violation of the Nursing Home Act to Survive the Resident's Death.

This Court has often stated that legislative intent is the "polestar" guiding the interpretation of statutes. See, e.g., Donato v. American Tel. and Tel. Co., 767 So. 2d 1146, 1150 (Fla. 2000); McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998); Miele v. Prudential-Bache Sec., 656 So. 2d 470, 472 (Fla. 1995). Accordingly, "this intent must be given effect even though it may contradict the strict letter of the statute."

State v. Webb, 398 So. 2d 820, 824 (Fla. 1981); Arthur Young & Co. v. Mariner Corp., 630 So. 2d 1199, 1202 (Fla. 4th DCA 1994).

The Legislature's intent must be determined primarily from the language used in the statute; therefore, courts will not resort to canons of construction or extrinsic aids to interpretation where the statutory language used is clear and unambiguous.[6] See, e.g., Rollins v. Pizzarelli, 761 So. 2d 294, 297 (Fla. 2000); McLaughlin, 721 So. 2d at 1172; Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984); see also Golf Channel, 752 So. 2d at 564. This Court recently explained, "[i]t is a cardinal rule of statutory construction that a statute must be construed in its entirety and as a whole." St. Mary's Hosp., Inc. v. Phillipe, 25 Fla. L. Weekly S501, S503 (Fla. June 29, 2000); see United States v. Morton, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole."); see also Miele, 656 So. 2d at 472 (reading an undefined statutory term in context with the other subsections of the statute because "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes"). A statutory phrase should be read in the context of the entire statutory section as well as "in harmony with

[6]Where reasonable persons could find two different meanings in the statutory language, a statute is considered ambiguous. See Rollins, 761 So. 2d at 297; Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992).

interlocking statutes." WFTV, Inc. v. Wilken, 675 So. 2d 674, 678-79 (Fla. 4th DCA 1996).

Additionally, "related statutory provisions should be read together to determine legislative intent, so that '**if from a view of the whole law, or from other laws in pari materia the evident intent is different from the literal import of the terms employed** to express it in a particular part of the law, **that intent should prevail, for that, in fact, is the will of the Legislature**.'" Golf Channel, 752 So. 2d at 564 (quoting Forsythe, 604 So. 2d at 454, which was quoting Van Pelt v. Hilliard, 78 So. 693, 698 (Fla. 1918)). A statutory phrase that appears clear and unambiguous when read in isolation may be rendered ambiguous when read, as required, in context with other related statutes. See Golf Channel, 752 So. 2d at 564; see also St. Mary's Hosp., 25 Fla. L. Weekly at S503-04 (finding provisions of statute to be ambiguous when read together).

The Fourth District concluded that section 400.023(1) unambiguously restricts actions brought by personal representatives to only those cases where the violation of section 400.022 caused the resident's death. See Knowles, 766 So. 2d at 336-37. This is contrary to the Second District's opinion in Beverly Enterprises-Florida, Inc. v. Estate of Maggiacomo, 651 So. 2d 816, 817 (Fla 2d DCA), quashed on other grounds, 661 So. 2d 1215 (Fla. 1995), where the court assumed that a violation of the

Nursing Home Act would survive the resident's death from unrelated causes. The Fourth District's construction patently contravenes the Legislature's intent because it conflicts with the plain meaning of the statutory language, erroneously reads one phase of section 400.023(1) in isolation, and ignores the Legislature's stated intent.

The plain statutory language grants "**[a]ny resident** whose rights as specified in this part are deprived or infringed upon ... a cause of action against any licensee responsible for the violation." § 400.023(1). The Fourth District's interpretation requires the Court to insert the word only, a word the Legislature conspicuously omitted, so the statute would read: "The action may be brought by ... the personal representative of the estate of a deceased resident [**ONLY**] when the cause of death resulted from the deprivation or infringement of the decedent's rights." See Knowles, 766 So. 2d at 336-37 (inserting word "only" into statutory language when describing its holding). Courts, however, are not free to rewrite statutes by adding words the Legislature chose not to include. See, e.g., Holly, 450 So. 2d at 220; Webb v. Hill, 75 So. 2d 596, 605 (Fla. 1954); Meyer v. Caruso, 731 So. 2d 118, 126 (Fla. 4th DCA 1999).

The Fourth District further erred in declining to read sections 400.022 and 400.023 together. Sections 400.022 and 400.023 are clearly interrelated--one section provides statutory rights and the other provides the statutory remedy. They must be

considered together in order to harmonize and give full effect to both provisions. See Golf Channel, 752 So. 2d at 564; Forsythe, 604 So. 2d at 455 ("[C]ourts must give full effect to **all** statutory provisions and construe related statutory provisions in harmony with one another.") (emphasis in original). Even if this language in section 400.023(1), when read in isolation can be interpreted as the Fourth District did, it is rendered ambiguous when read with section 400.022, as it must be.

This is because, under the Fourth District's construction, resident rights may not be enforced if the resident dies from unrelated causes before final judgment is entered. See Knowles, 766 So. 2d at 337. Yet section 400.022(1)(h)4. provides that within thirty days of the resident's **death**, the nursing home must convey the resident's funds to the estate. See also § 400.162(6), Fla. Stat. (1995) ("In the event of the death of a resident, a licensee shall return all refunds and funds held in trust to the resident's personal representative...."). The right provided by section 400.022(1)(h)4. only arises after the resident dies, but the violation can never **cause** the resident's death. Therefore, under the Fourth District's construction, this right will never be enforceable through section 400.023(1), rendering the provision meaningless.

Likewise, many other rights provided by section 400.022 will never **cause** the resident's death. For example, the resident's death will never be caused by a violation of the resident's right to civil or religious liberties; to uncensored communication; to

access entities providing health, social, legal or other services; and to present grievances. See § 400.022(1). Under the Fourth District's construction, these rights are unenforceable if the resident dies before final judgment.

"As a fundamental rule of statutory interpretation, 'courts should avoid readings that would render part of a statute meaningless.'" Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996) (quoting Forsythe, 604 So. 2d at 456). These subsections of section 400.022(1) give no indication that the Legislature intended them to be unenforceable or a merely aspirational goal. To the contrary, these subsections make clear that the Legislature intended that actions can be brought under section 400.023(1) where the violation of the Act did not cause the resident's death.

**2. Existing Law Demonstrates the Legislative Intent That the Action Survives.**

An examination of the law regarding survival of actions existing when the Legislature created the Nursing Home Act indicates the Legislature's intent that the statutory action survive the resident's death from unrelated causes. As discussed above, related statutes should be considered together to give full effect to both. See Golf Channel, 752 So. 2d at 564. In addition, as a general principle of statutory construction, it is presumed that when the Legislature acts, it knows existing law. See Joshua, 768 So. 2d at 438; Woodgate Dev. Corp. v. Hamilton Inv. Trust, 351 So. 2d

14, 16 (Fla. 1977).[7] Thus, to determine legislative intent, courts should consider the act as a whole and the "evil to be corrected, the language of the act, including its title, the history of the enactment, and the **state of the law already in existence bearing on the subject**." Webb, 398 So. 2d at 824.

The Fourth District failed to consider two closely related statutes--the survival statute, section 46.021, and the Wrongful Death Act, sections 768.16-.27, Florida Statutes (1995). The survival and wrongful death statutes must be considered in conjunction with section 400.023 because they are closely related and set forth the existing law regarding survival of actions, which the Legislature was presumed to be aware of when it amended section 400.023(1).

Section 46.021 is entitled "Actions; surviving death of party" 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." The general rule set forth by section 46.021 is that a cause of action survives the death of the person entitled to bring the action. See, e.g., Ake v. Birnbaum, 25 So. 2d 213,

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[7]See, e.g., Facchina v. Mutual Benefits Corp., 735 So. 2d 499, 502 (Fla. 4th DCA 1999); Agency for Health Care Admin. v. In re Estate of Johnson, 743 So. 2d 83, 86-87 (Fla. 3d DCA 1999); Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602, 611 (Fla. 2d DCA 1997); Floyd v. Bentley, 496 So. 2d 862, 863 (Fla. 2d DCA 1986).

216 (Fla. 1946) (construing the predecessor to the survival statute); Estate of Wilson v. Metro-Dade Police Dep't, 585 So. 2d 946, 947 (Fla. 3d DCA 1990); Rosin v. Peninsular Life Ins. Co., 116 So. 2d 798, 802-03 (Fla. 2d DCA 1960).

An exception to the general rule of survival is found in the Wrongful Death Act, which expressly provides that "[w]hen a personal injury to the decedent **results in his death, no action for the personal injury shall survive,** and any such action pending at the time of death shall abate." § 768.20. In that instance, the decedent's action for personal injuries is replaced by a statutory right of action on the behalf of the estate and the statutory survivors. See § 768.19, Fla. Stat. (1995).

If the decedent died from unrelated causes, i.e., where a personal injury does not result in death, the decedent's cause of action for personal injuries survives pursuant to section 46.021 and the remedies are not governed by the Wrongful Death Act. See Martin v. United Sec. Servs., Inc., 314 So. 2d 765, 770 n.18 (Fla. 1975); Smith v. Lusk, 356 So. 2d 1309, 1311 (Fla. 2d DCA 1978); see also Poole v. Tallahassee Mem'l Hosp. Med. Ctr., Inc., 520 So. 2d 627, 630 n.1 (Fla. 1st DCA 1988) (explaining that the wrongful death and survival statutes create distinct, mutually exclusive causes of action); Williams v. Bay Hosp., Inc., 471 So. 2d 626, 629 (Fla. 1st DCA 1985) (same). As Justice Anstead previously explained when writing for the Fourth District:

> The right to recover for wrongful death is separate and distinct from, rather than derivative of, the injured person's right while living to recover for personal injuries. **The latter is that of the injured person to be secure in his person or property, while the former is the right of the family of the deceased to the companionship and support of the decedent, coupled with the expectancy of a participation in the estate which the decedent might have accumulated but for his untimely death**.

Rimer v. Safecare Health Corp., 591 So. 2d 232, 235 (Fla. 4th DCA 1991), approved, 620 So. 2d 161, 164 (Fla. 1993). Accordingly, while a wrongful death action compensates the decedent's estate and survivors for **their** damages from the decedent's death, the survival statute compensates the decedent's estate for damages to the decedent during his or her lifetime.

The Fourth District misapprehended the general rule of survival in three ways. First, it erroneously applied the canon of construction that specific statutory language controls over general statutory language when it should have harmonized and given full effect to the Nursing Home Act, the survival statute, and the Wrongful Death Act. Second, it erroneously concluded that the rule of survival set forth in section 46.021 does not apply to actions involving "personal" rights. Third, it ignored the plain language of section 400.023(1) allowing a personal representative to recover damages under the Act when the statutory violation is so severe that it causes the resident's death.

The first error occurred when the district court applied the canon of construction that specific statutory language controls over general language. See Knowles, 766 So. 2d at 336. Where possible, courts must

> favor a construction that gives a field of operation to all rather than construe one statute as being meaningless or repealed by implication. Therefore, whenever possible, courts must attempt to harmonize and reconcile two different statutes to preserve the force and effect of each. There must be hopeless inconsistency before rules of construction are applied to defeat the plain language of one of the statutes.

Agency for Health Care Admin. v. In re Estate of Johnson, 743 So. 2d 83, 87 (Fla. 3d DCA 1999) (citations omitted); see also Woodgate Dev. Corp. v. Hamilton Inv. Trust, 351 So. 2d 14, 16 (Fla. 1977). While special statutes covering the particular subject matter generally control over a general statute addressing the same and other subjects in general terms, "[o]nly if the two statutory provisions present such an inconsistency as cannot be harmonized or reconciled will the latest expression of legislative will prevail." Floyd v. Bentley, 496 So. 2d 862, 864 (Fla. 2d DCA 1986), and cases cited therein. The district court should have read these related statutes together rather than finding the Nursing Home Act operated as an exception to section 46.021.

As for the second mistake, the Fourth District concluded without citation to authority that the statutory rights provided by section 400.022 "are largely personal to the resident of the facility" and, thus, should not survive the resident's death pursuant

to section 46.021. Knowles, 766 So. 2d at 336 (adopting Judge Warner's dissent in Greenfield, 705 So. 2d at 934). The Fourth District's rationale is contrary to the general rule of survival set forth in section 46.021, which allows the personal representative of the estate to sue or defend on **any** of the grounds that would have been available to the decedent, had he or she survived. See, e.g., Levy v. Baptist Hosp. of Miami, Inc., 210 So. 2d 730, 731 (Fla. 3d DCA 1968). As the Fifth District explained:

> At common law real actions, contract actions (actions on express or implied contracts) and actions for wrongs which damaged or diminished the decedent's property, survived the plaintiff's death, but actions for personal wrongs and personal injuries were considered "personal" causes of action and died with the person. **The common law rule that personal causes of action die with the person has been generally abrogated by section 46.021** ....

Taylor v. Orlando Clinic, 555 So. 2d 876, 878 (Fla. 5th DCA 1989) (footnote omitted), disagreed with on other grounds, AC and S, Inc. v. Redd, 703 So. 2d 492 (Fla. 3d DCA 1997). Notably, section 46.021 does not create an exception to the rule of survival for "personal" actions.

Moreover, case law refutes the Fourth District's assumption that "personal" rights do not survive pursuant to section 46.021. In Baumstein v. Sunrise Community, Inc., 738 So. 2d 420, 421 (Fla. 3d DCA 1999), the Third District held that section

393.13, Florida Statutes (1993), unquestionably affords a private cause of action to individuals for violation of rights guaranteed to such patients under the "Bill of Rights of Persons Who Are Developmentally Disabled,"[8] entitling the deceased resident's personal representative to bring suit for damages arising from the defendant's violation of Chapter 393. The Third District relied upon Greenfield and Spilman as authority for its holding that the statute created a private right of action. See Baumstein, 738 So. 2d at 421. The rights protected by section 393.13 are very similar to those protected by section 400.023(1). Significantly, the rights protected by section 400.023(1) are no more "personal" than the rights protected by section 393.13.

The assumption that "personal" actions do not survive is also refuted by Estate of Wilson, where an estate defended a forfeiture proceeding on the ground that the search and seizure of the decedent violated the decedent's Fourth Amendment rights. 585 So. 2d at 947. The police department claimed that because Fourth Amendment

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[8]393.13(5) provides:

> (5) LIABILITY FOR VIOLATIONS.--**Any person who violates or abuses any rights or privileges of persons who are developmentally disabled provided by this act shall be liable for damages as determined by law.** Any person who acts in good faith compliance with the provisions of this act shall be immune from civil or criminal liability for actions in connection with evaluation, admission, habilitative programing, education, treatment, or discharge of a client. However, this section shall not relieve any person from liability if such person is guilty of negligence, misfeasance, nonfeasance, or malfeasance.

rights are personal, the estate had no standing to raise this defense. See id. The court disagreed, reasoning that pursuant to the survival statute, "[n]o sound reason appears why the same grounds which were available to [the decedent] would not also be available to his estate in the statutory forfeiture proceeding." Id. This case demonstrates that even a right as personal as the constitutional right to be free of unreasonable searches and seizures survives pursuant to the survival statute.[9]

As for the Fourth District's third misunderstanding of the existing law, the purpose of the language in section 400.023 granting personal representatives the right to bring an action under the Nursing Home Act was to clarify that the Wrongful Death Act did not apply to extinguish a cause of action where the violation of the Nursing Home Act was so severe that the resident died. Shortly after the Legislature enacted section 400.023, it realized that a loophole existed--if the violation of the Nursing

[9] Apparently, the only causes of action that do not survive because they are actions "personal" to the decedent involve dissolution of marriage or paternity. Cf. Gaines v. Sayne, 764 So. 2d 578, 582 (Fla. 2000) ("Obviously there can be no judgment of divorce rendered after the death of either of the parties, since that event of itself terminates the status of marriage."); Carpenter v. Sylvester, 267 So. 2d 370, 372 (Fla. 3d DCA 1972) (applying common law rule that an action for paternity will not survive the death of the putative father absent specific legislation to the contrary in the paternity statute). Even in dissolution cases, however, collateral matters to the dissolution, such as the equitable distribution of the parties' assets, will survive the death of one of the parties as long as the court has entered an order dissolving the marriage prior to the death. See Gaines, 764 So. 2d at 584-86. This demonstrates the limited vitality of the principle that "personal" actions will not survive pursuant to section 46.021.

Home Act was so severe that it caused the resident's death, the resident's cause of action and remedies under the Nursing Home Act would be extinguished by the Wrongful Death Act. See Spilman, 661 So. 2d at 868-69.

To rectify this situation, the Legislature amended section 400.023(1) in 1986 to add a phrase to clarify that the action may also 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." See ch. 86-79, § 1, Laws of Florida (codified at section 400.023(1), Florida Statutes (Supp. 1986)). The legislature amended section 400.023(1) to **expand** the private cause of action to **include** death actions, not to limit it, as defendant contended below. The amendment was necessary **to create a cause of action** so that where the deceased resident died as a result of the violation his or her personal representative could invoke the broader remedies afforded under Chapter 400 rather than the limited damages available under the Wrongful Death Act.

In Hamilton, the Fourth District misinterpreted this amendment and held that where a resident dies **as a result of** the nursing home's violation of the Act, the resident's personal representative is limited to recovering the damages set forth in the Wrongful Death Act. 740 So. 2d at 1196. Again, accepting this interpretation renders useless the Legislature's decision to give "[**a]ny resident** whose rights as specified

in this part are deprived or infringed upon ... **a cause of action** against any licensee responsible for the violation" standing to bring a civil action to recover actual and punitive damages and attorney's fees. Thus, in two decisions, Knowles and Hamilton, the Fourth District totally eviscerated the Nursing Home Act where the resident dies.

As the Fifth District recognized in Spilman, the remedy available for a violation of the Nursing Home Act and the remedy available under the Wrongful Death Act are significantly different. 661 So. 2d at 868. Limiting the personal representative of a resident to damages available under the Wrongful Death Act essentially results in **no recovery**.[10] This is because while the Nursing Home Act allows the resident to recover for physical and mental pain, the Wrongful Death Act does not. See §§ 400.023(1), 768.21 (1995); Spilman, 661 So. 2d at 868. The wrongful death act only allows statutory survivors to recover the value of the decedent's lost support and services and lost companionship and the estate to recover for the loss of net accumulations of the estate, medical and funeral expenses, and the decedents's loss of earnings. See § 768.21(1)-(6). Because an elderly resident has a short projected life span and no income, these damages provide a token remedy, at best, for the personal representative. See generally Heath R. Oberloh, A Call to Legislative Action: Protecting Our Elders from Abuse, 45 S.D. L. Rev. 655, 662, 664-65 (2000).

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[10]See H. Glenn Boggs & Ken Connor, Nursing Home Tort Victims--Rights and Remedies, Fla. B. J., Feb. 1989, at 11, 12.

The legislative history of the 1986 amendment confirms that it was intended to rectify the unfairness arising when the Wrongful Death Act eliminated a cause of action under the Act when the elder abuse was so severe that it actually caused the death of the resident. Courts can consider legislative history to help determine the Legislature's intent in enacting the amendment if the statute is considered ambiguous, see Rollins, 761 So. 2d at 299, or to support the Court's interpretation of the plain meaning of the statute, see Hawkins v. Ford Motor Co., 748 So. 2d 993, 1000 (Fla. 1999). Considering the plain language of the statute and this legislative history, the Fifth District in Spilman concluded that the Legislature "did not intend for damages under section 400.023 to be limited by the Wrongful Death Act where the nursing home's infringement or deprivation of the patient's rights resulted in the patient's death." Spilman, 661 So. 2d at 869.

As originally proposed, the 1986 amendment would have provided that "[t]he action may be brought by the resident or his guardian, ... or by the personal representative of the estate of a deceased resident." Fla. HB 79 (1986); Fla. SB 128 (1986) (A 7). The following discussion occurred during the legislative committee meeting:

> HOUSE BILL NO. 79:
> REP. CANADY: Members, this bill has been before the Committee before and actually has passed the House last session. It is a bill [that] changes Chapter 400. Under Chapter 400 currently the residents of nursing homes are

> given certain rights, basically the right to be treated decently and receive proper care. They are also given a legal remedy in case those rights are violated and not properly honored. However, **there'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. [Bill passes].

Spilman, 661 So. 2d at 869 (quoting transcripts of legislative committee meetings, which are included in A 8).

On the floor of the Senate and House, the bills were amended to add the language "when the cause of death resulted from the deprivation or infringement of the decedent's rights." Fla. S. Jour. 258 (Reg. Sess. 1986); Fla. H. Jour. 232 (Reg. Sess. 1986) (A 9, 11). The legislators' discussion of the amendment on the Senate floor made clear that the amendment was intended to **clarify** the existing liability of nursing homes **as it presently existed** under the Nursing Home Act:

> SENATOR FOX: [The amendment would]...make certain that the **liability that nursing homes have is not enlarged beyond what it is today**. We have added, the bill itself permits a personal representative of an estate of a deceased resident of a nursing home, if that person, the deceased person has sustained a licensing violation, for that person's personal representative and the estate to go ahead and

> pursue the violation. There was some concern on the House side that this **language would extend liability** in other areas that was not the intent of the bill, **so we have put some language in by amendment** and that's the first amendment.
>
> ....
>
> .... The bill comes out of the Select Committee on Aging. It is one of the Governor's groups on aging, one of their priorities and it would permit the personal representative of the estate of a deceased resident of a nursing home to pursue a violation of the patient's rights in the event of a death. The limiting language which is the first amendment ... is designed to **make certain that while the personal representative of the estate can pursue the licensing limitation, that liability is not extended in other areas of the law--enhanced, extended, exposure made greater--**I don't know how else to explain that....
>
> ....
>
> SEN. LANGLEY: Mr. President, I've talked with Sen. Fox about this previously, but its clear that **the intent of this is not to limit any actions against the nursing home for other related injuries, is that not right**?
>
> SEN. FOX: That is correct, Senator Langley.... The intent of this is not to change the status quo of the law except insofar as licensing violations are concerned.

Fla. S., tape recording of proceedings (May 13, 1986) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla., tape 1 and 2) (discussing rationale behind an amendment to SB 128).

Before the amendment, it is clear that the existing law allowed actions for personal injuries that did not cause the death of the plaintiff to survive. See §§ 46.021, 768.20. The Legislature intended to correct a loophole and ensure that the personal representative of a resident who died from elder abuse could maintain an action under section 400.023, rather than being limited to the action and remedies under the Wrongful Death Act. Rather than attempting to limit the liability of nursing homes, the Legislature intended to clarify its intent that the cause of action and remedies available for a violation of the Nursing Home Act were available regardless of whether the violation caused the resident's death. The Legislature clearly added the phase, "when the cause of death resulted from the deprivation or infringement of the decedent's rights," to clarify that the amendment would not **expand** the nursing home's liability **beyond** the existing liability imposed by section 400.023(1) **and** the survival statute.

### 3. Public Policy Supports Survival.

The Legislature had sound policy reasons for clarifying that, while actions for violations that did not cause the death of the resident survived pursuant to the general rule of survival, violations of the Act that caused the resident's death are not controlled by the Wrongful Death Act. The Fourth District's holding in Knowles ignores the realities of nursing home abuse and the reason the Legislature provided a private cause of action to the residents. Consider, for example, a cancer-ridden resident who is raped in the nursing home and dies from cancer; an elderly female resident left

unclothed in her bed, lying in her own waste, who dies from a heart attack; or another resident deprived of food for days who eventually succumbs from unrelated causes. Permitting survival of claims for violations of the Act is consistent with developing, establishing and enforcing basic standards for the treatment of nursing home residents, one of the express purposes articulated in section 400.011. An interpretation that extinguishes such claims upon the resident's death nullifies the right of action provided in this statute.

Further, the Fourth District's interpretation "place[s] a possible premium on delay" because, by definition, nursing home residents are always elderly and ill. See Bohannon v. McGowan, 222 So. 2d 60, 61 (Fla. 2d DCA 1969) (holding that a parent's cause of action for the wrongful death of his child and wife survived the parent's death and could be brought by the administrator of his estate, citing the survival statute, and the policy consideration that "[a]batement of the action would place a possible premium on delay").[11] In many cases, if not all, the nursing home resident will be unable, as a result of the passage of time, to effectively enforce his or her rights.

[11]In section 415.1115, Florida Statutes (2000), the Legislature recognized the need to expedite civil trials in which one of the parties is over the age of sixty-five by providing trial courts with the ability to advance these trials on the docket.

Mr. Knowles sustained injuries during his lifetime. His medical expenses and personal pain and suffering constitute actual damages to which he is entitled to recover under section 400.023(1). For over sixty-seven days, he lay chemically and sometimes physically restrained, in a great deal of pain, soaked in urine, increasingly contracted from no physical therapy, with huge pressure sores on multiple parts of his body. During this period he was totally dependent upon defendant for all activities of daily living. If, as defendant contends, Mr. Knowles' death wiped out all actual damages he sustained before his death and his personal representative is restricted to the remedies afforded in a traditional negligence action, he is left without a remedy. Thus, defendant will not be held accountable for its numerous and well-documented acts of inhumanity. Exposure to such a claim would be scant help in enforcing compliance by the nursing home with observance of the resident's rights to be free from mental and physical abuse during his stay there.

For these reasons, the Court should construe section 400.023 as allowing the personal representative of a deceased resident to bring an action for violation of the Nursing Home Act, which survives pursuant to section 46.021 when the resident dies from causes unrelated to the violation of the Act. The express legislative intent in enacting the Nursing Home Act and, specifically, section 400.023(1) was to protect fragile residents of nursing homes. As a remedial statute, section 400.023 should be liberally construed in favor of granting access to the legislative remedy. This

interpretation accords with the plain statutory language and gives full meaning and effect to the statutory rights granted in section 400.022. As confirmed by the legislative history, the purpose of the statutory language was to clarify that while violations of the Act that did not cause the resident's death survived pursuant to section 46.021, a violation that caused the resident's death would not be extinguished by the Wrongful Death Act. The opinion of the Fourth District should be quashed and the case remanded for the new trial ordered by the trial court.

## POINT II

### IF THIS COURT REINSTATES THE NEW TRIAL ORDER, IT SHOULD DIRECT THE TRIAL COURT TO GRANT PLAINTIFF'S MOTION TO STRIKE THE COMPARATIVE FAULT OF NONPARTIES' DEFENSE.

The trial court allowed the nursing home to argue the fault of nonparties and instructed the jury on the comparative fault statute, section 768.81, Florida Statutes (1995).[12] Comparative fault of nonparties is not a defense in an action to enforce statutory rights. The comparative fault statute only "applies to negligence cases." § 768.81(4). The statute provides that:

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[12]Because the Court has jurisdiction on the basis of a certified question, it has the discretion to review other issues raised in the case. See PK Ventures, Inc. v. Raymond James & Assocs., Inc., 690 So. 2d 1296, 1297 n.2 (Fla. 1997). This issue was raised in the Fourth District, but was not reached because it was rendered moot by the holding. See Knowles, 766 So. 2d at 336 n.1.

> For purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case falls within the term "negligence cases," the court shall look to the substance of the action and not the conclusory terms used by the parties.

§ 768.81(4).

A statutory enforcement action under Section 400.023 is **not** a negligence action in form or substance. This statutory rights claim is designed to protect a specific class of persons, nursing home residents, because the legislature deemed them unable to protect themselves. The statute imposes liability without regard to negligence or fault and entitles the resident to damages and attorney's fees upon proof that the nursing home violated this statute.

Chapter 400 places the obligation for providing the statutory rights **solely** on the nursing home as the licensee and provides the resident with a cause of action against the "licensee responsible for the violation." See §§ 400.022, 400.023. Under the statute, a nursing home is immune from fault for a treating physician's medical negligence. § 400.023(3). Under chapter 400, no other person or entity except the licensee nursing home has a statutory duty or obligation to the resident; thus, the fault of others is irrelevant.

Importantly, the statute expressly prohibits any interpretation that would insulate or protect the nursing home from liability for a physician's comparative fault:

> (3) A licensee shall not be liable for the medical negligence of any physician rendering care or treatment to the resident except for the services of a medical director as required in this part. **Nothing in this subsection shall be construed to protect the licensee from liability for failure to provide a resident with appropriate observation, assessment, nursing diagnosis, planning, intervention, and evaluation of care by the nursing staff**.

§ 400.023(3). An interpretation of the statutory action that permits application of the comparative fault statute to reduce the nursing home's violations because of nonparties' fault violates the second sentence of subsection (3) by effectively allowing the nursing home to insulate or reduce its liability because of a treating physician's negligence, where the statute clearly provides otherwise. This Court should strike the defense and preclude the nursing home from arguing it on retrial.

Even if the comparative fault statute applies to statutory claims, the trial court erred in applying it here because Dr. Krant and the nursing home are not joint tortfeasors. The comparative fault statute is limited to incidents involving joint tortfeasors. See McVey, 739 So. 2d at 650.

The damages, if any, caused by Dr. Krant's leaving a staple in Mr. Knowles' left hip, although exacerbated by the nursing home's conduct, were separate from the injuries and damages the nursing home caused. See Gordon v. Marvin M. Rosenberg, D.D.S., P.A., 654 So. 2d 643, 645 (Fla. 4th DCA 1995). The claims are separate and distinct, as are the requirements for the separate causes of action. See Lauth By and Through Gadansky v. Olsten Home Healthcare, Inc., 678 So. 2d 447, 448-49 (Fla. 2d DCA 1996). As a matter of law, Dr. Krant's negligence cannot combine with the nursing home's violation of Mr. Knowles' resident rights to produce a single harm, rendering section 768.81 inapplicable. See Wells v. Tallahassee Mem'l Reg'l Med. Center, Inc., 659 So. 2d 249 (Fla. 1995) (holding that there is no setoff for damages under section 768.81 where there is no joint liability).

Finally, the trial court erred in failing to grant a directed verdict for the plaintiff on this issue because the nursing home adduced **no evidence of fault** on the part of the doctor or the hospital in treating Mr. Knowles. In order to include a nonparty's name on the verdict, the defendant must adduce legally sufficient evidence from which the jury could find that the nonparty was at fault. See Nash v. Wells Fargo Guard Servs., Inc., 678 So. 2d 1262, 1264 (Fla. 1996); W.R. Grace & Co.-Conn. v. Dougherty, 636 So. 2d 746 (Fla. 2d DCA 1994) (holding that manufacturers of asbestos-containing products were not entitled to a 768.81 instruction or a verdict form respecting liability of nonparties where the manufacturers failed to produce

evidence of fault at trial); Snoozy v. U.S. Gypsum Co., 695 So. 2d 767 (Fla. 3d DCA 1997) (same); Southern Bell Tel. & Tel. Co. v. Florida Dep't of Transp., 668 So. 2d 1039, 1041 (Fla. 3d DCA 1996) ("If a defendant wants a Fabre defendant on the verdict form, the defendant must see to it that there is legally sufficient evidence in the record from which the jury can find that the Fabre defendant was at fault. If there is no such evidence, the defendant is not entitled to have the Fabre defendant placed on the verdict form.").

The nursing home argued that Dr. Krant's leaving a surgical staple in the incision in Mr. Knowles' left hip deviated from the standard of care and was evidence of negligence. But the nursing home offered no expert testimony that Dr. Krant's leaving the staple in the incision deviated from the standard of care or caused the pressure sores. In fact, Dr. Crastnopol testified to the opposite (R6 1006-1007, 1010, 1028, 1037) and Mr. Knowles had bedsores on both hips and in other areas. Yet, defense counsel repeatedly argued that the decline in Mr. Knowles' condition was directly attributable to this staple and that the staple caused the infection and bedsores, without any evidence to support the argument.

A nonparty's negligence is not a defense to a statutory enforcement action. But even if it were, this Court should preclude the nursing home from arguing it on retrial because it failed to adduce any evidence of the nonparty's fault at trial. Therefore, if

this Court quashes the decision of the Fourth District and reinstates the grant of a new trial, it should direct the trial court to strike the comparative fault defense.

## CONCLUSION

For these reasons, the decision of the Fourth District should be quashed and this case should be remanded for the new trial ordered by the trial court, with directions to strike the comparative fault of nonparties defense.

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