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 REPLY BRIEF ON THE MERITS

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JURISDICTION

This Court should exercise its discretion under article V, section 3(b)(4) of the Florida Constitution to accept jurisdiction because, as the en banc Fourth District Court of Appeal recognized, the certified question is one of great public importance. Florida has the highest percentage of residents aged sixty-five and older in the nation and 74,874 residents living in nursing homes (IB 10-11).[1] The four amici briefs filed in this case attest that resolution of the issue is important because it impacts all residents in nursing homes and assisted living facilities throughout the state.[2]

STATEMENT OF THE CASE AND FACTS

To prevent the Court from being misled by the nursing home's factual arguments, petitioner points out that the photographs depicting Mr. Knowles' horrific condition were indeed admitted into evidence (T 894). The size of Mr. Knowles' pressure sores were described by nurse De Los Santos (T 658-59) and Dr. Reines (T 1272-74). The medical records show Mr. Knowles received no pain medication (T

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[1]The abbreviation IB will be used to refer to petitioner's Initial Brief and AB will refer to the nursing home's Answer Brief. All emphasis is supplied.

[2]Contrary to the suggestion of the nursing home on AB 4, the possibility that the Legislature may amend the Nursing Home Act is no reason to discharge jurisdiction. Resolution of the certified question remains critical to the viability of petitioner's cause of action. See Metropolitan Dade County v. Chase Fed. Housing Corp., 737 So. 2d 494, 503 (Fla. 1999) ("Generally, due process considerations prevent the State from retroactively abolishing vested rights.")

313-14, 616-17, 620). Mrs. Knowles testified that drugs changed her husband drastically (T 813).

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 Legislature created the cause of action in section 400.023, Florida Statutes (1995), because existing administrative and common law remedies were inadequate to protect nursing home residents. The Fourth District's construction of this statute in this case and in First Healthcare Corp. v. Hamilton, 740 So. 2d 1189, 1195-96 (Fla. 4th DCA), review dismissed, 743 So. 2d 12 (Fla. 1999), extinguishes this statutory action for violation of resident's rights **whenever** the resident dies before entry of final judgment--regardless of whether the death is caused by the violation of the Act.[3]

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[3]This is because the damages available under the wrongful death act practically equate to **no damages** for statutory survivors of elderly nursing home residents. See Stiffelman v. Abrams, 655 S.W.2d 522, 530 (Mo. 1983) ("As a practical matter, common sense and common knowledge tell us that rarely will there be found a loss of support or services to anyone from the death of an elderly, enfeebled nursing home patient"). The Third District recently certified conflict with Hamilton in Somberg v.

1. and 2. (combined) Established Principles of Statutory Construction and Existing Law Confirm the Legislature's Intent that the Statutory Action for Violation of the Nursing Home Act Survives the Resident's Death.

The rationale of the Fourth District and the nursing home completely eviscerates the cause of action provided in section 400.023(1). The majority of rights listed in section 400.022, Florida Statutes (1995), will never **cause** the resident's death. Thus, where the resident dies before entry of final judgment, their interpretation renders these rights meaningless. Remedial statutes, which this clearly is, must be liberally construed in order to provide 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).

The nursing home and its amici incant the mantra that the "plain language" of the statute controls, but, contrary to settled rules of statutory construction, fail to read section 400.023 in context with related statutes and existing law regarding survival of actions.[4] The plain language of section 400.023 supports the construction of the

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Florida Convalescent Centers, Inc., 26 Fla. L. Weekly D28 (Fla. 3d DCA Dec. 20, 2000).

[4]The nursing home is correct that a de novo standard of review applies to questions of statutory interpretation. See Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376, 377 (Fla. 5th DCA 1998). Contrary to the nursing home's argument on AB 5, however, no deference is due to the interpretations of lower courts when questions of law are reviewed de novo. See Philip J. Padovano, Florida Appellate Practice § 9.4 (2d ed. 1997 & 2000 Supp.).

Fourth District in Greenfield v. Manor Care, Inc., 705 So. 2d 926, 933-34 (Fla. 4th DCA 1997), and the original opinion in Beverly Enterprises-Florida, Inc. v. Knowles, 24 Fla. L. Weekly D1986 (Fla. 4th DCA Aug. 25, 1999). See also Beverly Enters.-Florida, Inc. v. Estate of Maggiacomo, 651 So. 2d 816, 817 (Fla 2d DCA), quashed on other grounds, 661 So. 2d 1215 (Fla. 1995) (recognizing a survival action for violation of resident rights, although that issue was not squarely before the court).

Section 400.023(1) 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 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 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 express terms grant "[a]ny resident" whose rights are violated a cause of action cumulative to all other available remedies. Id. The plain language allows personal representatives to bring a cause of action when the violation of the Act causes the resident's death--instead of limiting personal representatives to a wrongful death action--and provides that the remedies provided by the Act are cumulative. § 400.023(1). Conspicuously, this statute does not provide that an action may **only** be brought by a personal representative when the violation causes the death.

When the Legislature amended section 400.023(1) to include the language in question, actions for violations that **caused** the resident's death were governed by the Wrongful Death Act, see § 768.20, Fla. Stat. (1995), while actions for violations that did **not cause** the resident's death survived under section 46.021, Florida Statutes (1995). See, e.g., 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). Thus, there was no need for the Legislature to clarify that section 400.023(1) permits a personal representative to bring a survival action. The plain language of the statute already stated that the remedies are cumulative to those existing, which includes survival actions.

The Legislature's intent to expand nursing home actions to include those actions otherwise governed by the Wrongful Death Act is explained in the staff analysis:

> **In cases where there is a personal representative, under s. 768.26,** Florida Statutes, which addresses wrongful deaths, **attorney's fees and other expenses of litigation are to be paid by the personal representative and deducted from the awards to the survivors and the estate** in proportion to the amounts awarded to them. Expenses incurred for the benefit of a particular survivor or the estate shall be paid from their awards.
>
> B. Effect of Proposed Changes
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> The proposed revision to s. 400.023, Florida Statutes, adds the personal representative of the estate of a deceased resident to the list of persons who can bring action [sic] against the licensee for violation of a resident's

> rights when the case of death resulted from deprivation or infringement of the decedent's rights. . . .
>
> **The revision allows the personal representative of the estate of a deceased resident to bring action [sic] against the licensee and if they prevail, recover attorney's fees in addition to costs of the action and the actual and punitive damages.**

Fla. H.R. Comm. on HRS, HB 79 (1986) Staff Analysis 3 (final June 23, 1986) (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 1572, Tallahassee, Fla.) (A-1). In Beverly Enterprises-Florida v. Spilman, 661 So. 2d 867, 868-69 (Fla. 5th DCA 1995), the Fifth District correctly observed that prior to the 1986 amendment, there was no cause of action for violation of resident rights if the resident died as a result of the violation; the amendment corrected that loophole.[5]

In an attempt to show a contrary legislative intent, the nursing home and its amici rely heavily on the fact that the language in question--"when the cause of death resulted from the deprivation or infringement of the decedent's rights"--was added to the prefiled version of the bill in a floor amendment. The nursing home relies upon the fact that the House and Senate Journals described the floor amendment by stating "a cause of action may be brought by the personal representative of the estate of a

[5]Because the resident in Spilman died from the nursing home's violations of the Act, the court did not address whether a personal representative could bring a nursing home action when the resident survived the violation of the Act, but died from unrelated causes. See Spilman, 661 So. 2d at 868-69.

deceased resident of a nursing home under certain circumstances."[6] This description however, was the same as the introduction to the prefiled versions of the Bill, evidencing no intent to change the meaning of the statute. See Fla. SB 128 (1986) (proposed section 400.023, Florida Statutes) (IB A-7); Fla. HB 154 (1985) (proposed section 400.023, Florida Statutes) (AB A-3).

The nursing home also argues that had the Legislature intended to include survival actions, it could have been more explicit, relying upon language in section 415.1111(3), Florida Statutes (1995), which provides that personal representatives may bring an action for the abuse, neglect, or exploitation of an elderly person "without regard to whether the cause of death resulted from the abuse, neglect, or exploitation." As discussed above, no explanation was necessary because existing law affords personal representatives a cause of action when the violation of the Act does not cause the resident's death. § 46.021.

Further, section 415.1111(3) was enacted in 1995, nine years after the language at issue was added to section 400.023(1) in 1986. Because of the long gap, the language in section 415.1111(3) sheds little light on the Legislature's intent when it amended section 400.023(1). See M.W. v. Davis, 756 So. 2d 90, 103 n.26 (Fla. 2000) (finding a legislative amendment passed thirteen years after the original statute does little to clarify the legislative intent in enacting the statute); State Farm Mut. Auto.

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[6]Fla. S. Jour. 258 (Reg. Sess. 1986) (IB A-11); Fla. H. Jour. 232 (Reg. Sess. 1986) (IB A-9).

Ins. Co. v. Laforet, 658 So.2d 55, 62 (Fla.1995) ("It would be absurd, however, to consider legislation enacted more than ten years after the original act as a clarification of original intent."). The failure of the Legislature to also amend 400.023(1) in 1995 does not support the nursing home's argument. See Duer v. Moore, 765 So. 2d 743, 745 (Fla. 1st DCA 2000) (stating legislative silence or failure to pass a law should not be considered as evidence of legislative intent). This is especially true when a long gap exists between the original enactment and the amendment of a purportedly similar statute.

In addition, the nursing home and its amici ignore the canon of construction requiring that courts determine legislative intent by harmonizing closely related statutes. See Woodgate Dev. Corp. v. Hamilton Inv. Trust, 351 So. 2d 14, 16 (Fla. 1977); Agency for Health Care Admin. v. In re Estate of Johnson, 743 So. 2d 83, 87 (Fla. 3d DCA 1999).[7] Section 400.023(1) must be read in pari materia with section 400.022. See St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961, 967 (Fla. 2000); Golf Channel, 752 So. 2d at 564. The Fourth District misapplied this canon and the canon requiring that specific statutory language controls over general statutory language. Section 400.023 operates as an exception to the Wrongful Death Act, not to the rule of survival

[7]The opinion in Baumstein v. Sunrise Community, Inc., 738 So. 2d 420 (Fla. 3d DCA 1999), shows that there is no prohibition on "personal" actions surviving pursuant to section 46.021. The statutory right that survived in Baumstein, a violation of section 393.13, Florida Statutes (1993), the "Bill of Rights of Persons Who Are Developmentally Disabled," was as "personal" as a violation of the Nursing Home Bill of Rights.

in section 46.021. This interpretation harmonizes sections 400.023(1), 768.20, and 46.021 and gives full effect to all.

The statutory scheme in the Nursing Home Act is closely analogous to that reviewed in Golf Channel, where this Court read two statutes together--one statute set forth the right of employees not to be retaliated against for "blowing the whistle" on their employer and the other statute created a cause of action for the violation of this right. This Court held that the two statutes "are closely related" and "should be construed together 'so that they illuminate each other and are harmonized.'" Golf Channel, 752 So. 2d at 564 (quoting McGhee v. Volusia County, 679 So. 2d 729, 730 n.1 (Fla. 1996)).

The nursing home's harmless error argument fails. Mrs. Knowles did **not** have her day in court when the trial judge substituted a common law negligence action for her statutory action for violation of resident rights. The differences between the two actions are not "hyper-technical" (AB 46). Causes of action for common law negligence and for statutory violation of section 400.022 are procedurally and substantively different, with different elements, defenses, instructions and verdict forms. Indeed, section 400.023(1) was created specifically because existing common law and administrative remedies were inadequate to protect elderly nursing home residents. See generally Garcia v. Brookwood Extended Care Ctr., 643 So. 2d 715, 717 (Fla. 3d DCA 1994); Fla. S. Comm. on HRS, CS/SB 1218 (1980) Staff Analysis 1-2 (rev. June 10, 1980) (IB A-4).

The original panel of the Fourth District, citing well-settled law, explained the differences between a common law negligence action and a statutory action under section 400.023:

> A plaintiff is required in a **common law negligence** cause of action **to prove that the defendant owed a duty of care to the plaintiff, that the defendant breached that duty, that the breach proximately caused plaintiff's injury, and that damages are owed**. See Miller v. Foster, 686 So. 2d 783, 783 (Fla. 4th DCA 1997). A **statutory negligence cause of action**, however, is based upon a duty of care established by statute, and a **violation of the statute is negligence per se**. Negligence per se statutes are of the **"strict liability"** type designed to protect a particular class of persons from their inability to protect themselves and to establish a duty to take precautions to protect a particular class of persons from a particular injury or type of injury. See deJesus v. Seaboard Coast Line R.R. Co., 281 So. 2d 198, 200 (Fla. 1973). A **plaintiff must establish that he is of the class the statute is intended to protect, he suffered the type of injury the statute is designed to prevent, and the violation of the statute was the proximate cause of the injury**. See id. at 201. The nursing home's Patient's Bill of Rights, which is designed to protect elderly Floridians in need of nursing home care, fits squarely within the definition of negligence per se statutes.
>
> **Since the elements necessary to prove statutory negligence differ slightly from the elements of common law negligence, the trial court did not abuse its discretion in granting appellee's motion for new trial.**

Knowles, 24 Fla. L. Weekly at D1987. The en banc panel on rehearing did not disagree with these conclusions, but instead found that section 400.023(1) does not

authorize a personal representative to bring an action when the violation did not cause the resident's death. See Beverly Enters.-Florida, Inc. v. Knowles, 766 So. 2d 335, 336-37 (Fla. 4th DCA 2000) (en banc).

3. Public Policy Supports Survival.

The nursing home incorrectly argues that there is no need for actions of deceased residents to survive because the intent of the Act is to protect living residents. Limiting actions to only those violations that cause death abrogates the purpose of the Act and leaves an entire class of residents unprotected. The Legislature enacted the Nursing Home Act to develop, establish, and **enforce** basic standards for the "health, care and treatment of persons in nursing homes" and to "ensure safe, adequate, and appropriate care, treatment, and health of persons in such facilities." § 400.011. The Legislature afforded "any resident" a private right of action to ensure the nursing home's compliance with minimum statutory rights and to serve the broader purpose of preventing future violations. Thus, even after the elderly resident dies from other causes, the survival of the action serves the policy goal of enforcing minimum standards to protect the remaining residents. The Legislature's determination that lawsuits are needed to enforce basic, minimum standards of care in nursing homes must be given deference.[8]

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[8]Actions for damages and provisions for awards of attorney's fees are tools used by state legislatures to enforce minimum standards of care in nursing homes:

> The private remedy for violations of the rights of residents

If, as the nursing home's amici contend, nursing homes in Florida incur a disproportionate amount of litigation costs, it is because Florida has a disproportionate number of elderly residents in nursing homes who are being abused (IB 10-11). A recent congressional study of nursing homes in the 19th Congressional District of Florida illuminates serious deficiencies in the level of care these residents receive (A-2). Eighty-one percent of the nursing homes in that district had serious violations of state and federal regulations, potentially causing harm to residents (A-2 at 2). Residents in nursing homes need to retain the full extent of their existing statutory rights against nursing homes.

> . . . looks to private parties for some degree of policing under the Act. It is a key feature of the Act, adopting the "private attorney general" concept, with the inducement of recoverable actual damages, and in some instances, punitive damages and attorney's fees, all to the end of securing maintenance of nursing home standards. The legislature well could have included it upon the rationale "that government cannot do everything and that some requirements of the Act can best be enforced by those directly involved."

Stiffleman, 655 S.W.2d at 530 (footnote omitted); see also Bell v. U.S.B. Acquisition Co., Inc., 734 So. 2d 403, 410 (Fla. 1999) ("It is true that one of the purposes of certain statutory attorney's fees provisions is to obtain public enforcement of legislative acts through private lawsuits.").

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.

Knowles did not sue the nursing home for medical malpractice or negligence, but for the nursing home's violation of resident rights.[9] Cf. Integrated Health Care Servs., Inc. v. Lang-Redway, 25 Fla. L. Weekly D2815 (Fla. 2d DCA Dec. 6, 2000) (explaining why the medical malpractice presuit notice requirements do not apply to nursing home actions). This was not and is not an action for negligence subject to section 768.81, Florida Statutes (1995).[10]

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[9]Contrary to the nursing home's representation on AB 40, this point was raised in both the trial and district courts. (AB A-6, Reply and Cross Answer Brief at 42-50).

[10]The nursing home hypothesizes on AB 44 that a violation of resident's rights results in hospitalization, a nursing home should not be liable for subsequent medical negligence. This argument contravenes Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977) (when a tortfeasor's negligence results in the injured party's seeking medical care, the initial tortfeasor is liable for the subsequent medical malpractice). See Letzter v. Cephas, 26 Fla. L. Weekly D293, D294-95 (Fla. 4th DCA Jan. 24, 2001); Assoc. for Retarded Citizens-Volusia, Inc. v. Fletcher, 741 So. 2d 520, 525 (Fla. 5th DCA 1999).

Notably, the nursing home fails to respond to Knowles' alternative argument that, even if the comparative fault statute applies to a statutory violation suit, it cannot apply here because the nursing home is not a joint tortfeasor with Dr. Krant. See Beverly Enters.-Florida, Inc. v. McVey, 739 So. 2d 646, 650 (Fla. 2d DCA 1999), review denied, 751 So. 2d 1250 (Fla. 2000). Joint tortfeasors are defined as "[t]hose who act together in committing wrong, or whose acts if independent of each other, unite in causing a single injury." Letzter v. Cephas, 26 Fla. L. Weekly D293, D295 (Fla. 4th DCA Jan. 24, 2001). Only the nursing home has the obligation to ensure that the resident's rights are not infringed upon; accordingly, the nursing home action may be brought only against the nursing home. See §§ 400.022(1), 400.023(1). The nursing home's violation of Mr. Knowles' residents rights cannot combine with medical negligence to form a single injury; thus, section 768.81 does not apply as a matter of law.

CONCLUSION

For these reasons, the decision of the Fourth District should be quashed and the certified question should be answered in the affirmative. This case should be remanded for new trial, as ordered by the trial court, with directions to strike the comparative fault of nonparties' defense.

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