IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-731

FLORIDA CONVALESCENT
CENTERS, INC. d/b/a PALM GARDEN
OF NORTH MIAMI BEACH,

Petitioner,

vs.

REED B. SOMBERG, as Personal
Representative of the Estate of
IRVING ELLIS, Deceased,

Respondent.
______________________________________/

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

AMICUS CURIAE BRIEF OF THE
ACADEMY OF FLORIDA TRIAL LAWYERS

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I
STATEMENT OF THE CASE AND FACTS

The relevant facts are stated in the brief of Respondent Reed B. Somberg, Personal Representative of the Estate of Irving Ellis. Mr. Ellis died as a result of medical malpractice committed at Petitioner Palm Garden of North Miami Beach (hereinafter "Palm Garden"), the nursing home where he resided. He did not leave a wife or minor children, and thus his estate could claim virtually no damages under Florida's Wrongful Death Act, §§768.16 et seq., Fla. Stat. (1997).

II
ISSUE ON APPEAL

WHETHER THE PERSONAL REPRESENTATIVE OF THE ESTATE OF A DECEASED NURSING-HOME RESIDENT CAN RECOVER DAMAGES FOR THE RESIDENT'S PRE-DEATH PAIN AND SUFFERING CAUSED BY A VIOLATION OF THE NURSING-HOME STATUTE WHICH RESULTED IN THE RESIDENT'S DEATH, OR WHETHER RECOVERY FOR THE RESIDENT'S PRE-DEATH PAIN AND SUFFERING INSTEAD IS GOVERNED AND BARRED BY THE WRONGFUL-DEATH STATUTE.

III
SUMMARY OF THE ARGUMENT

The Third and Fifth District Courts of Appeal and the Fourth District Court of Appeal are split on the question of whether the Wrongful Death Act controls the damages recoverable for a violation of the Nursing Home Act, Chapter 400, Fla. Stat., which results in the death of a nursing-home resident. The Fifth District Court held in *Beverly-Enterprises-Florida, Inc. v. Spilman,* 661 So. 2d 867 (Fla. 5th DCA 1995),

review denied, 668 So.2d 602 (Fla. 1996), that the damages recoverable under §400.023, Fla. Stat., for violation of the Nursing Home Act are not circumscribed by the Wrongful Death Act, which abolishes the estate's survival claim for the decedent's pain and suffering prior to death. The district court in the instant case agreed with *Spilman*. The Fourth District Court reached the opposite conclusion in *First Healthcare Corp. v. Hamilton*, 740 So.2d 1189 (Fla. 4th DCA), *review dismissed,* 743 So.2d 12 (Fla. 1999).[1/]

Whatever legislative objective motivated the express pre-emption of survival actions by the Wrongful Death Act--under which the personal representative of a nursing-home resident, no less than any other personal representative, has always had a cause of action for the wrongful death of a decedent--the legislature certainly had *some* purpose in mind in creating a cause of action under the Nursing Home Act; and some purpose in declining to expressly pre-empt survival actions, as does the

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[1/] The Fourth District Court also has held en banc that the Nursing Home Act has no independent significance--that is, is identical to the Wrongful Death Act--when the decedent nursing-home resident's death was *not* the result of the nursing home's alleged wrongdoing. *See Beverly Enterprises-Florida, Inc. v. Knowles,* 25 Fla. L. Weekly D1244 (Fla. 4th DCA May 24, 2000) (en banc). *Knowles* and *Hamilton* therefore reflect the Fourth District Court's opinion that the cause of action created by the Nursing Home Act is identical to the pre-existing cause of action which had already existed under the Wrongful Death Act, and therefore is entirely redundant, and therefore is meaningless.

Wrongful Death Act; and it is non-sensical to argue that the legislature would create a statutory cause of action which was intended to be entirely redundant of the Wrongful Death Act. The purpose of the Nursing Home Act, a sweeping piece of legislation, is to "provide for the development, establishment, and enforcement of basic standards for . . . [t]he health, care and treatment of persons in nursing homes." §400.011, Fla. Stat. (1997). Section 400.022 of the Act contains a 33-paragraph Patient's Bill of Rights, which includes the right to "receive adequate and appropriate health care and protective and support services" and the right to be "free from mental and physical abuse." Wholly apart from the many other important provisions of the Act which Palm Garden points to, in order to put teeth into the statute, and to give a voice to society's helpless and infirm citizens, the legislature enacted a "civil enforcement mechanism"--§400.023--to redress statutory violations.

And in 1986, obviously mindful that the Wrongful Death Act already existed, and that it covered nursing-home residents like everybody else, the legislature amended §400.023, establishing a *new cause of action*, which would permit the personal representative of a deceased nursing-home resident to sue the nursing home for violations of Chapter 400 which caused the death of the resident, and to recover actual and punitive damages. Palm Garden's position is that the legislature did so for purely cosmetic purposes, to duplicate word-for-word the already-existing Wrongful

Death Act, which covered nursing home residents already, thus adding *absolutely nothing* to Florida law.

We will urge this Court to follow the Third and Fifth District Courts in holding that a cause of action brought pursuant to the Nursing Home Act is by definition brought independent of the Wrongful Death Act, such that the personal representative can recover for the resident's pain and suffering when the abuse or neglect resulted in the resident's death. The decisions in this case and *Spilman* are squarely supported by the language of the Nursing Home Act, by public policy, by legislative history, and by plain common sense.

By its terms, the 1986 amendment to §400.023 created a unique cause of action for nursing-home residents who die as a result of abuse or neglect. The remedies created by the legislature to redress widespread problems in nursing homes are *independent* of and in addition to those provided by the already-existing Wrongful Death Act, under which the personal representatives of nursing-home residents had causes of action like any others, but causes of action for minimal damages in most cases. Section 400.023 was intended to redress that shortfall by adding a new statutory cause of action. Indeed, §400.023 says that explicitly. It expressly permits the recovery of "actual" damages, and thus--in the absence of statutory language like that in the Wrongful Death Act, abolishing survival actions (there is none)--the

personal representative clearly may bring a survival action to recover for the resident's pain and suffering prior to death. Such non-economic damages are clearly one component of the "actual" damages suffered by a nursing-home resident. The Nursing Home Act does not explicitly bar survival actions--as does the Wrongful Death Act; and it does not incorporate or refer to the Wrongful Death Act in any way.

If the provisions of the already-existing Wrongful Death Act were controlling in the context of nursing-home mistreatment, then the 1986 amendment to §400.023 would be meaningless. Contrary to Palm Garden's inexplicable refrain, even before the 1986 amendment, a personal representative could bring a wrongful-death action against a nursing home for any wrongful act resulting in death. There was no need, therefore, to enact a statute establishing a cause of action for wrongful death because of nursing-home neglect, unless the intent was to authorize a survival action for the resident's pain and suffering prior to death. That is certainly one element of "actual damages." And even if the phrase "actual . . . damages" were ambiguous, then resort to all of the traditional aids to statutory interpretation can point to only one conclusion.

To begin with, the Nursing Home Act speaks specifically to a nursing home situation; it thus it should control over the general Wrongful Death statute. Moreover, if the two statutes must be read together, then their conjunction is inherently

ambiguous, requiring resort to their legislative history, which reveals unequivocally that the legislature intended to create a survival action for statutory violations resulting in a nursing-home resident's death.

Finally, the denial of damages for pre-death pain and suffering because of nursing-home mistreatment would eviscerate the Nursing Home Act. Unlike the Wrongful Death Act, which expressly abolishes survival actions and then compensates survivors for their own losses, the purpose of the Nursing Home Act is to improve the lives of the frail and infirm by providing redress for statutory violations. That purpose is not achieved if §400.023 is strangled by the Wrongful Death Act. Nursing-home residents leave few, if any, statutory survivors within the meaning of the Wrongful Death Act. With no survivors, there are no damages under the Wrongful Death Act other than funeral expenses and medical bills not paid by medicare or medicaid. With no damages, even if the particular resident is already deceased, there is no deterrent to future misconduct. This is precisely the anomaly which the 1986 amendment to §400.023 was enacted to address. As Judge Sharp wrote in a special concurrence in *Spilman*, 661 So.2d at 874: "I write only to say we should never cease to be shocked by Man's inhumanity to Man, no matter the circumstances. And, a remedy must always be afforded."

That remedy was the Nursing Home Act. It is unthinkable, and frankly, inhumane, to believe that the Nursing Home Act was enacted to be a simple mirror of the Wrongful Death Act, and therefore a useless and meaningless piece of paper. It was, in fact, enacted for precisely the opposite reason, and this Court should say so in the strongest possible terms.

IV
ARGUMENT

A. Palm Garden's Argument. Palm Garden has devoted 16 pages--half its brief (pp. 10-26)--to the tautology that the Nursing Home Act did not contain its own cause of action until the legislature created one in 1986. That seems to us pretty obvious. Before there was a separate cause of action under Chapter 400, there wasn't.

The second half of Palm Garden's brief consists of a single argument which has not heretofore been presented to any court. It is that before §400.023 was amended to create a cause of action in 1986, there was *no* cause of action in Florida for the wrongful death of a nursing-home resident. Palm Beach has argued, with a straight face, that the Wrongful Death Act had not theretofore covered nursing-home residents! Apparently it had covered every *other* citizen of Florida; and its language is all inclusive; but for some reason Palm Garden thinks that it excluded nursing-home residents.

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Thus Palm Garden says (brief at 4) that "the purpose of the original enactment of §400.023 was to create a private right of action for [nursing home] residents where one did not otherwise exist under the Wrongful Death Act." And it says (brief at 17) that "§400.023 [was] necessary to **create** a right of action under the Wrongful Death Act" (emphasis in original). And it says (brief at 17-18) that "no right of action would exist absent express provision in [Chapter 400] . . . ." And it says (brief at 24) that "§400.023 was enacted purely and simply to create a private right of action that did not otherwise exist." And on this preposterous foundation, Palm Garden builds it's contention that the Nursing Home Act merely sought to insert a wrongful-death entitlement for nursing-home residents into the Wrongful Death Act, where it had not theretofore been, *ipso facto* subjecting such residents to its terms.

The argument, of course, evaporates with its premise. Nursing-home residents, before adoption of the §400.023, were, like everybody else, covered by the Wrongful Death Act. Section 400.023 did create a right which "did not exist at common law" (Palm Garden's brief at 11), but there certainly *was* a *statutory* wrongful-death right under §768.16 before §400.023 was enacted.

Therefore, the question remains--the question addressed by three district courts--the question before this Court--whether §400.023 was enacted to duplicate a statutory right which already existed. By abandoning all of its prior arguments in favor of the

single absurd contention addressed above, Palm Beach has forfeited any participation in responsible analysis of that question. We will therefore turn to the three district courts' reasoning.

B. The Nursing Home Act. When enacted in 1980, §400.023 provided a cause of action for nursing-home residents who survived institutional neglect and abuse, but neglected to provide a cause of action for those who died from it:

> Any patient 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 patient or his guardian or by a person or organization acting on behalf of a patient with the consent of the patient or his guardian. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any deprivation or infringement on the rights of a patient. Any plaintiff who prevails in any such action may be entitled to recover reasonable attorney's fees, costs of the action, and damages, unless the court finds that the plaintiff has acted in bad faith, with malicious purpose, and that there was a complete absence of a justiciable issue of whether law or fact. Prevailing defendants may be entitled to recover reasonable attorney's fees pursuant to s. 57.105. The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a patient and to the department.

Section 400.023, Fla. Stat. (1981).

Prior to 1986, therefore, only those fortunate enough to survive nursing-home abuse or neglect could recover actual and punitive damages for violations of the Nursing Home Act. Those who eventually died from the mistreatment could not recover damages for their months or years of suffering because the Wrongful Death Act precludes survival actions. Only statutory survivors could recover damages for their own pain and suffering under §768.21, Fla. Stat.

Recognizing this anomaly--that there would be no real vindication (or subsequent deterrence) for nursing-home residents who died as a result of institutional abuse and neglect--the legislature amended §400.023 in 1986 to permit the personal representative to recover damages for the decedent's pain and suffering, thereby providing meaningful financial incentives for nursing homes to prevent acts of negligence resulting in the deaths of their clients (amendment shown in italics):

> (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 in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any deprivation or infringement of the

> rights of a resident. Any plaintiff who prevails in any such action may be entitled to recover reasonable attorney's fees, costs of the action, and damages, unless the court finds that the plaintiff has acted in bad faith, with malicious purpose, and that there was a complete absence of a justiciable issue of either law or fact. Prevailing defendants may be entitled to recover reasonable attorney's fees pursuant to s. 57.105. 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.

Please note that the legislature established a *new* cause of action with its *own* remedies--the recovery of actual damages and punitive damages, plus attorney's fees, suffered by a nursing-home resident--as a result of a fatal violation of the Nursing Home Act. By definition, actual damages are *all* compensatory damages, including non-economic damages for pain and suffering. *See Miami Herald Publishing Co. v. Brown,* 66 So.2d 679 (Fla. 1953). And §400.023 does not (like the Wrongful Death Act) expressly or impliedly rule out a survival action for nursing-home violations. Indeed, the statute places *no* limitation on nursing-home liability. To the contrary, it states that the remedies are in *addition* to any other remedies provided by law.[2/] Thus,

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[2/] Palm Garden contends (brief at 16 n.6) that this language in §400.023 ("remedies") covers only injunctive relief--not damages. But damages are a subset of remedies. Palm Garden itself cites the authority--*St. John's Village I, Ltd. v. Department of State,* 497 So.2d 990 (Fla. 5th DCA 1986) ("a remedy is the means employed in enforcing a right *or in redressing an injury*") (emphasis added). That includes damages.

§400.023 clearly appears to include survival damages, which are certainly part of the "actual" damages suffered.

B. *Beverly Enterprises-Florida, Inc, v. Spilman*. The first case to address the issue of damages under the Nursing Home Act was *Beverly Enterprises-Florida, Inc. v. Spilman,* 661 So.2d 867 (Fla. 5th DCA 1995), *review denied,* 668 So.2d 602 (Fla. 1996), in which a nursing-home resident died after being admitted to a hospital for treatment of an infection which he contracted in a nursing home. The nursing home contended that although a cause of action was alleged under §400.023 for death resulting from a statutory violation, the nature and measure of damages were controlled by the Wrongful Death Act rather than the survival statute, §46.021, Fla. Stat. The Fifth District Court ruled that the personal representative could recover for the deceased resident's pain and suffering, 661 So. 2d at 869:

> Both the plain language of the statute and the transcripts of the committee hearings indicate 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.

The court reasoned that when §400.023 was first enacted it addressed only the rights of residents who survived nursing-home violations and that this "problem" was

recognized and reflected in 1985 House Bills 154 and 79, which sought to cure the anomaly, *id.* at 868-69:

> HOUSE BILL NO. 154:
> 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. In my home county we had this exact same situation come up. So the proposed--the proposal here would be to simply extend that cause of action to the personal representative of the estate of a deceased nursing home resident* (emphasis added).
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> * * * * *
>
> REP. BILL BANKHEAD: Would you have any idea as to the limits of liability for the nursing home owners that might arise out of a suit so foul?

CHAIR: Don't get yourself going, Mr. Bankhead, he may know the answer to that.

REP. CANADY: It would be the same as the--if a cause of action were brought by a living resident.

REP. DAVE THOMAS: Could I make one comment to Mr. Bankhead? . . . Are you implying that we should limit the liability of nursing homes that beat people to death?

CHAIR: All in jest. Secretary call the roll on the bill. [Bill passes].

* * * * *

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 changes Chapter 400. Under Chapter 400 currently the residents of nursing homes are given certain rights, basically the right to be treated decedently 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].

The *Spilman* court also quoted with approval the brief of the Office of State Long-Term Care Ombudeman, 661 So.2d at 869:

> Under [Eastbrooke's] theory, it would be cheaper for a nursing home to kill its residents and thereby limit claims by personal representatives to the damages listed in the Wrongful Death Act. Such construction not only offends the strong public policy that nursing homes are to "promote maintenance or enhancement of the quality of life of each resident," but basic statutory construction. *See Williams v. State,* 492 So.2d 1051, 1054 (1986) (statutes should not be given a meaning that leads to an absurd or unreasonable result).

Thus, the Fifth District Court properly held in *Spilman* that the cause of action established in Chapter 400 exists independent of the Wrongful Death Act; it does not, like the Wrongful Death Act, expressly abolish survival actions; and it clearly intends to preserve survival actions, in order to achieve its legislative purpose. In the instant case, the Third District Court agreed with *Spilman*.

C. *First Healthcare Corp. v. Hamilton*. Framing the issue in terms of whether a personal representative is entitled to recover damages for a nursing-home resident's pre-death pain and suffering when the personal representative of a deceased non-nursing-home resident is not, the Fourth District Court held in *First Healthcare Corp. v. Hamilton,* 740 So.2d 1189 (Fla. 4th DCA), *review dismissed,* 743 So.2d 12 (Fla. 1999), that the Wrongful Death Act (which explicitly abolishes survival actions)

barred recovery for the decedent nursing-home resident's pain and suffering caused by nursing-home mistreatment. The Fourth District Court reasoned that the 1986 amendment to §400.023 "simply created in the personal representative of a deceased nursing facility resident, whose death resulted from deprivation or infringement of the decedent's rights, a cause of action against the nursing facility to enforce such rights and recover actual and punitive damages for any deprivation or or infringement on the rights of a resident." *Id.* at 1195. In the Fourth District Court's view, the amendment did not expressly state that it intended to change the Wrongful Death Act's abolition of survival actions, by permitting recovery of damages for the decedent's pain and suffering before death. Finding the 1986 amendment unambiguous, the court declined to consider any statutory purpose or legislative history. For the same reason, the *Hamilton* court rejected the policy argument that substitution of a survivor's cause of action for the decedent's cause of action for pain and suffering would make it "cheaper" to kill than to injure.

D. Spilman Was Correctly Decided. The *Spilman* court was correct in holding that the damages under §400.023 are not limited by the Wrongful Death Act, and consequently that a personal representative can recover for the resident's pain and suffering prior to death. The 1986 amendment to §400.023 provides that an action for violation of the Nursing Home Act may be brought by the personal representative of

the nursing-home resident "when the cause of death resulted from the deprivation or infringement of the decedent's rights." The amendment, by its terms, established a specific cause of action for fatal nursing-home mistreatment which is independent of the Wrongful Death Act and thus independent of its proscriptions and limitations--including the explicit prohibition of survival actions for pre-death pain and suffering (which does not exist in the Nursing Home Act).

Section 400.023 does not incorporate or even refer to the Wrongful Death Act. Rather, it states explicitly that the remedies afforded by §400.023--actual and punitive damages and attorney's fees--are "in addition to and cumulative with other legal and administrative remedies." It does not refer to any recovery for the benefit of survivors, and it does not specifically limit the damages recoverable by the personal representative. The legislature, therefore, drew a clear distinction between the damages recoverable by the personal representative of a nursing-home resident and a claimant under the general Wrongful Death Act.

The *Spilman* holding is also supported by the principle that statutes are intended to serve a useful purpose and not be meaningless. *See, e.g., Neu v. Miami Herald Pub. Co.,* 462 So.2d 821, 825 (Fla. 1985); *Smith v. Piezo Technology & Professional Administrators,* 427 So.2d 182, 184 (Fla. 1983); *Littman v. Commercial Bank & Trust Co.,* 425 So.2d 636, 638 (Fla. 3rd DCA 1983). If §400.023 did not permit the

personal representative to recover for the resident's pre-death pain and suffering, the 1986 amendment to §400.023 would be utterly meaningless. Before the amendment was passed, the personal representative could bring an action under the Wrongful Death Act for nursing-home mistreatment. There was no reason for passing legislation which would simply create a cause of action which already existed. The legislation would be meaningless *unless* it provided a remedy unavailable under the Wrongful Death Act--recovery for a resident's pre-death pain and suffering.

This conclusion is further buttressed by the maxim of construction that a specific statute takes precedence over a general statute. *See McKendry v. State,* 641 So.2d 45, 46 (Fla. 1994); *Pedroso v. State,* 450 So.2d 902, 903 (Fla. 3rd DCA 1984); *Strahl v. Strahl,* 431 So.2d 729, 731 (Fla. 3rd DCA), *review denied,* 441 So.2d 633 (Fla. 1983). The specially-tailored remedies afforded by the Nursing Home statute supersede the general remedies of the Wrongful Death Act.

And from a policy standpoint, denial of a cause of action for a resident's pre-death pain and suffering caused by violation of the Patient's Bill of Rights would eviscerate the civil enforcement mechanism of the Nursing Home Act. As the original panel noted in *Beverly Enterprises-Florida, Inc. v. Knowles,* 24 Fla. L. Weekly D1986 (Fla. 4th DCA August 25, 1999), *rev'd en banc,* 766 So.2d 335 (Fla. 4th DCA 2000): "Section 400.023 affords muscle to the Patient's Bill of Rights." Without the recovery

of damages for the resident's pre-death pain and suffering, there can be no meaningful vindication of the resident's rights, and no deterrence of future violations. Although the Wrongful Death Act permits statutory survivors to recover certain losses, there are few if any statutory survivors of nursing-home residents, and few if any recoverable damages. "Survivors" under §768.18(1) include the decedent's spouse, children and parents. Minor children are children under 25 years of age. Although a surviving spouse may recover for his own pain and suffering, few nursing-home residents have surviving spouses. And even if they did, there would be no meaningful recovery for "lost support and services." As the court noted in *Stiffelman v. Abrams,* 655 S.W.2d 522, 530 (Mo. 1983), "[a]s 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 partient." Although minor children of the decedent may recover for lost parental companionship and their own pain and suffering, it is extremely unlikely that a nursing-home resident will have children under the age of 25.

If there is no surviving spouse, adult children may recover damages for their own pain and suffering, *see* §768.21(3), but only if the resident's death was not caused by medical malpractice. *See Mizrahi v. North Miami Medical Center, Ltd.,* 761 So.2d 1040 (Fla. 2000). Thus, even though the Patient's Bill of Rights gives a nursing-home

resident the right to receive appropriate health care, a medical blunder which kills a nursing-home resident will go unredressed except in the exceptional case of a surviving spouse. In all but the rarest of cases, nursing homes would have a financial incentive to neglect and abuse their residents to death. As the court put it in *Spilman*, 661 So.2d at 868: “There's an anomalous situation under the laws that now exist in that . . . if the resident is treated so badly that the resident actually dies as a result of [nursing-home mistreatment], the cause of action does not survive so that no suit can be brought.” The legislature could not have intended such an unconscionable result.

The question before the Court is very straightforward. When the legislature created Chapter 400, and by amendment expressly created a wrongful-death remedy when the nursing-home resident's death results from the violation of Chapter 400, knowing that the Wrongful Death Act already existed, did the legislature intend to do nothing? Under the Wrongful Death Act, survival actions are not permitted. Chapter 400, in contrast, says nothing about abolishing survival actions. It permits all “actual” damages. Why did the legislature go to all this trouble, in order to remand the personal representative to another statute which already existed? And how could that other statute possibly offer any help to nursing-home residents, who generally don't have any recovery under the Wrongful Death Act?

The answer is clear. Chapter 400 was passed for a reason. It created a *new* cause of action for a reason, and that cause of action survives the resident's death. *Spilman* and *Somberg* were correctly decided, and they should be followed.

V
CONCLUSION

For the foregoing reasons, the judgment of the circuit court should be reversed.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed June _____, 2001, to: LOUISE H. McMURRAY, ESQ. and CARMEN CARTAYA, ESQ., McIntosh, Sawran, Peltz & Cartaya, P.A., Biscayne Building, Suite 920, 19 W. Flagler Street, Miami, Florida 33130; and to DOUGLAS F. EATON, ESQ., Ford & Sinclair, P.A., 9130 So. Dadeland Blvd., Penthouse 1C, Miami, Florida 33156.

Respectfully submitted,

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