

IN THE SUPREME COURT OF FLORIDA

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

Petitioner/Appellant,

vs.

CASE NO. SC01-731
L.T. CASE NO. 3D00-818

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

Respondent/Appellee.

**ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL**

BRIEF OF AMICUS CURIAE
THE COALITION TO PROTECT AMERICA'S ELDERS,
IN SUPPORT OF RESPONDENT'S POSITION

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PREFACE

Petitioner/defendant, Florida Convalescent Centers, Inc., will be referred to as defendant or the nursing home. Respondent/plaintiff, Reed B. Somberg, as personal Representative of the Estate of Irving Ellis, will be referred to as plaintiff.

All emphasis in this brief is supplied unless otherwise indicated. The following abbreviations will be used:

App. - Appendix

IB - Initial Brief

STATEMENT OF INTEREST

The Coalition to Protect America's Elders ("the Coalition") is an organization dedicated to improving the living conditions of Florida's elderly nursing home population. The Coalition is a non-profit, national advocacy organization founded in 1997, whose purpose is to improve the quality of care provided in our nation's nursing homes. The Coalition works closely with the country's most prominent elder organizations and other grassroots advocacy groups to create public awareness of the conditions that exist in America's nursing homes and to promote effective solutions for improving the quality of nursing home care.

Florida has one of the largest populations of elderly nursing home residents in the nation. The issue raised in this matter is of great public importance and affects the ability of nursing home residents to protect, defend and enforce their rights under Florida's nursing home resident rights statutes, sections 400.022 and 400.023(1), Florida Statutes (1997).

The Coalition has been involved with this issue at the legislative level and the court system. We have briefed this and similar issues in district courts in Florida and in this Court. Respectfully, we believe that our involvement would be of assistance to this Court.

SUMMARY OF ARGUMENT

Defendant does not dispute that the Legislature created a private cause of action in section 400.023 to protect frail and elderly residents of nursing home residents. To accomplish this purpose, the Legislature specifically authorized personal representatives to bring nursing home actions and recover "actual and punitive damages" and attorney's fees for a violation of resident's rights. See § 400.023(1). The plain language of section 400.023 grants personal representatives of deceased nursing home residents a **nursing home action**, not a significantly more restricted wrongful death action. See Somberg v. Fla. Convalescent Ctrs., Inc., 779 So. 2d 667,

668 (Fla. 3d DCA 2001); Beverly Enters.-Fla., Inc. v. Spilman, 661 So. 2d 867, 869 (Fla. 5th DCA 1995).

The contrary opinion of the Fourth District in First Healthcare Corp. v. Hamilton, 740 So. 2d 1189, 1195-96 (Fla. 4th DCA), review dismissed, 743 So. 2d 12 (Fla. 1999), eviscerates the recovery of a nursing home resident's personal representative in those cases involving the most severe violations of resident's rights and thereby emasculates the Nursing Home Act. This is because applying the Wrongful Death Act, sections 768.16-.27, Fla. Stat. (1997), would eliminate, among other things, recovery for the mental pain and suffering of the deceased nursing home resident. Only rarely will there be a loss of support and services to anyone from the death of an elderly and feeble nursing home patient, making a wrongful death recovery impossible. Indeed, under the Wrongful Death Act, the personal representative plaintiff here can recover only "minimal" damages--burial expenses. Somberg, 779 So. 2d at 668.

Florida has a disproportionate number of elderly residents in nursing homes who are being abused. Residents in nursing homes need to retain the full extent of their existing statutory rights against nursing homes. It is not, and should not, be the law in the State of Florida that it is cheaper to kill nursing home residents rather than to injure them. See Spilman, 661 So. 2d at 869.

ARGUMENT

POINT ON APPEAL

THE PLAIN LANGUAGE OF SECTION 400.023 GRANTS PERSONAL REPRESENTATIVES THE ABILITY TO RECOVER ACTUAL DAMAGES AND ATTORNEY'S FEES, NOT THE MORE LIMITED REMEDY AVAILABLE UNDER THE WRONGFUL DEATH ACT.

The State of Florida has the highest percentage of residents aged sixty-five and older in the nation.¹ In January 2000, the Florida Department of Elder Affairs reported that there were 74,874 persons over the age of sixty living in nursing homes in Florida.² Residents of nursing homes are frail and weak, completely dependent on nursing home employees. See Spilman, 661 So. 2d at 873. The abuses to which nursing home residents are susceptible are well known and documented, as graphically demonstrated by the documents in defendant's appendix (IB App. A, B, C).

¹According to the 2000 United States Census figures, there are 2,807,597 persons aged 65 and older living in Florida, which is 17.5 percent of the state's population. See U.S. Census Bureau, Profile of General Demographic Characteristics for Florida: 2000, at http://www.census.gov/Press-Release/www/2001/tables/redist_fl.html#demoprofile (visited Jun. 27, 2001). The most recent census estimate is that Florida has the highest per capita number of residents over age 65. See U.S. Census Bureau, Population 65 Years and Over and 85 Years and Over, Region, and State: 1998, at <http://www.census.gov:80/population/estimates/state/st98elderly.txt> (visited Jun. 27, 2001).

²See Florida Dep't of Elder Aff., Florida County Profile: 2000 1 (Jan. 2000), at <http://www7.myflorida.com/doea/healthfamily/learn/studies/doeacountyprofile2000.pdf> (visited Jun. 27, 2001).

For example, the legislative history of the bill creating section 400.023(1) in 1980 cited a Dade County Grand Jury report describing substandard conditions existing for years in nursing homes. See Fla. S. Comm. on HRS, CS/SB 1218 (1980) Staff Analysis 1-2 (rev. June 10, 1980) (IB App. A). These pervasive problems continue into the present, as detailed in a recent congressional study of nursing homes in the 19th Congressional District of Florida (App. 1). Eighty-one percent of the nursing homes in that district had serious violations of state and federal regulations potentially causing harm to residents (App. 1, at 2).

With these concerns in mind, 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 (IB App. A, B, C). The express legislative purpose of the Nursing Home Act, sections 400.011-.335, Florida Statutes (1997), 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; see Beverly Enters.- Fla., Inc. v. McVey, 739 So. 2d 646, 648 (Fla. 2d DCA 1999), review denied, 751 So. 2d 1250 (Fla. 2000). The Nursing Home Act “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 Nat’l Healthcorp Ltd. P’ship v. Cascio, 725 So. 2d 1190, 1191 (Fla. 2d DCA 1998) (describing rights as “wide-ranging”); Beverly Health and Rehab. Servs., Inc. v. Freeman, 709 So. 2d 549, 550 (Fla. 2d DCA 1998) (describing rights as “extensive and diverse”). 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

§ 400.022(1).

The Legislature put “muscle” into the Act in 1980 by affording nursing home residents 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, with the inducement of actual and punitive damages and attorney’s fees. See Garcia, 643 So. 2d at 717; Mang, 559 So. 2d at 673-74. As defendant acknowledges, this section was created to provide a “private attorney general enforcement mechanism” because of a “need for additional enforcement” of basic standards in nursing homes (IB 19, 28).

Section 400.023 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 statute imposes “strict liability” upon proof of violation of the statute without regard to negligence or fault. See Beverly Enters.-Fla., Inc. v.

Knowles, 24 Fla. L. Weekly D1986, D1987 (Fla. 4th DCA Aug. 25, 1999), reversed on other grounds, 766 So. 2d 335 (Fla. 4th DCA 2000) (en banc).³

Accepting Hamilton's interpretation means that the legislature's decision in section 400.023(1) 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 was a useless act. Hamilton's construction further renders it impossible for a resident to enforce his or her right under section 400.022(1)(h)4., which provides:

Upon the death of a resident with personal funds deposited with the facility, the facility must convey within 30 days the resident's funds, including interest, and a final accounting of those funds, to the individual or probate jurisdiction administering the resident's estate, or, if a personal representative has not been appointed within 30 days, to the resident's spouse or adult next of kin

Because this right can only be enforced after the resident's death, the interpretation of the Fourth District would make it impossible for a personal representative of a deceased resident to bring a nursing home action for its violation. Settled Florida law, however, presumes that the legislature did not intend for any part of a statute to

³The Fourth District's decision in Knowles is pending before this Court in case number SC00-1910.

be without meaning or effect. See Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 456 (Fla. 1992).

In 1986, the Legislature added the language at issue here, that an action may 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 plain language of section 400.023(1) expressly provides that the personal representative of an estate of a deceased resident has the authority to bring an action for violations of a resident’s rights and recover “**actual and punitive damages** for any deprivation or infringement on the rights of a resident.” This remedy is “**in addition to and cumulative with other legal and administrative remedies available to a resident.**” Id.

The plain language of the statute allows personal representatives to recover **actual** damages from the infringement, not the more limited remedy of the Wrongful Death Act. See Somberg, 779 So. 2d at 668; Spilman, 661 So. 2d at 869. Considering this unambiguous language, the courts in Somberg and 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." Somberg, 779 So. 2d at 668-69 (quoting Spilman, 661 So. 2d at 869).

Defendant and the Fourth District in Hamilton, 740 So. 2d at 1196, attempt to apply the canon of construction that section 400.023 should be narrowly construed because it is in derogation of common law. To the contrary, section 400.023(1) is a remedial statute, and, thus, must 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). In Golf Channel, this Court stated it had "previously resolved" any tension between these canons of construction "in favor of **liberally construing a remedial statute to ensure access to the remedy provided by the Legislature.**" Golf Channel, 752 So. 2d at 566 n.4; see Irven v. Dep't of Health and Rehab. Servs., 26 Fla. L. Weekly S253 (Fla. Apr. 19, 2001).

Defendant is correct that the Wrongful Death Act must be considered when construing the meaning of section 400.023 (IB 4, 15), but defendant misapprehends its significance. As a general rule, "**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. In addition, 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.**” State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). Thus, section 400.023 must be harmonized with the Wrongful Death Act because both statutes relate to actions seeking damages for negligent conduct that causes the resident’s death.

The Wrongful Death Act 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, Fla. Stat. (1997). 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. (1997).

Section 768.21, Florida Statutes (1997), limits the damages under the Wrongful Death Act. Statutory survivors can recover the value of the decedent’s lost support and services and lost companionship, while the estate can recover for medical and

funeral expenses, loss of net accumulations to the estate, and the decedent's loss of earnings. See § 768.21(1)-(6). While a surviving spouse can recover for his or her **own** pain and suffering from the date of the injury, an adult child of the decedent cannot. See § 768.21(2)-(3). No one can recover under the wrongful death statute for the mental pain and suffering to **the decedent** from the injury. See § 768.21.

Under the law existing in 1986 when the legislature amended section 400.023 to include personal representatives, nursing home actions for violations of resident's rights so severe they caused the resident's death were **extinguished** and replaced with a wrongful death action. See Spilman, 661 So. 2d at 868-69. Contrary to defendant's assertion on page 17 of its Initial Brief, it was not necessary to add personal representatives to section 400.023 to create a wrongful death action for violations of resident's rights resulting in death. The wrongful death statute itself already extinguished all actions for personal injury that caused death and replaced them with actions for wrongful death. See §§ 768.19-.20.

The Legislature amended section 400.023 to specifically include personal representatives to eliminate this loophole extinguishing nursing home actions for the most severe violations of resident's rights. See Spilman, 661 So. 2d at 868-69. The amendment was necessary 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.

Defendant's interpretation renders the 1986 amendment meaningless, contrary to settled principles of statutory construction. Courts are "compelled by well-established norms of statutory construction to choose that interpretation of statutes and rules which renders their provisions meaningful. Statutory interpretations that render statutory provisions superfluous 'are, and should be, disfavored.'" Hawkins v. Ford Motor Co., 748 So. 2d 993, 1000 (Fla. 1999) (quoting Johnson v. Feder, 485 So. 2d 409, 411 (Fla. 1986)).

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 868-69. The Legislature chose to allow personal representatives to recover "actual and punitive damages" for any deprivation or infringement of a resident's rights and attorneys fees. § 400.023(1). In contrast, 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' loss of earnings. See § 768.21(1)-(6).

Limiting the personal representative of a resident to damages available under the Wrongful Death Act essentially results in **no recovery**.⁴ This is because while the Nursing Home Act allows recovery for the pain and suffering endured by the nursing home resident from the violation of resident's rights, the Wrongful Death Act does not. See §§ 400.023(1), 768.21 (1995); Spilman, 661 So. 2d at 868. "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." Stiffelman v. Abrams, 655 S.W.2d 522, 530 (Mo. 1983). Because an elderly resident has a short projected life span and no income, wrongful death 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).

Legislative history confirms the Legislature intended the 1986 amendment 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 often consider legislative history to help determine the Legislature's intent in enacting the amendment if the statute is considered ambiguous. See Rollins v. Pizzarelli, 761 So. 2d 294, 299 (Fla. 2000). Legislative history can also

⁴See H. Glenn Boggs & Ken Connor, Nursing Home Tort Victims--Rights and Remedies, Fla. B. J., Feb. 1989, at 11, 12.

be used to support the Court's interpretation of the plain meaning of unambiguous statutes, such as section 400.023. See Hawkins, 748 So. 2d at 1000. The courts in Somberg and Spilman concluded that although the plain language of section 400.023 provides that personal representatives could recover actual damages, rather than the more limited remedy available under the Wrongful Death Act, the legislative history provided further support for its construction. See Somberg, 779 So. 2d at 668-69; Spilman, 661 So. 2d at 869.

Transcripts of committee meetings discussing the effect of the amendment and the staff analysis all support interpreting the plain language of the statute as eliminating restrictions on recovery imposed by the Wrongful Death Act. The following discussion occurred during committee debate:

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).

This discussion is in accord with the Legislative staff analysis, which explains that the purpose of the amendment is to ensure that the resident’s personal representative is not limited to the damages available under the Wrongful Death Act:

A. Present Situation

. . . .

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

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.) (hereinafter 1986 Staff Analysis) (App. 2).⁵

Both the committee discussion and the staff analysis show that the Legislature was concerned that in the anomalous situation where the violation of resident's rights was so severe that the resident died, the resident's cause of action under the nursing home was extinguished and replaced with a wrongful death action. The more restrictive Wrongful Death Act impinges on the recovery available to the personal representative under the nursing home act. The Legislature wanted to make clear that the Wrongful Death Act does not extinguish a resident's right to recover "attorney's fees in addition to costs of the action and the actual and punitive damages." 1986 Staff Analysis, supra, at 3.

Construing the statute as allowing the full measure of damages for the violation of a resident's rights in those cases where the violation caused the resident's death accords with the policy goal of developing and enforcing basic standards of care in nursing homes. See § 400.011. If a contrary interpretation were adopted, in those cases in which egregious abuse of a nursing home resident predictably results in the

⁵The appendix to defendant's initial brief did not include the final version of the 1986 staff analysis, which is included in the appendix to this brief.

resident’s death, “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.” Spilman, 661 So. 2d at 869 (quoting the Answer Brief of the Office of State Long-Term Care Ombudsman filed in that case); accord Stiffelman, 665 S.W.2d at 531. “Exposure to such a claim would be scant help in enforcing compliance by the nursing home with observance of the right of the resident to be free from mental and physical abuse during his stay in the nursing home.” Stiffelman, 665 S.W.2d at 531. This result contravenes legislative intent to protect residents of nursing homes by bestowing personal representatives of deceased residents with a private cause of action to enforce minimum standards of care.

CONCLUSION

The Third District’s opinion in Somberg should be approved and the contrary opinion of the Fourth District in Hamilton should be disapproved.

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