IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-731

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

Petitioner/Appellant,

vs.

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

Respondent/Appellee.
_____/

3DCA CASE NO. 3D00-818

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT ON THE MERITS

DOUGLAS F. EATON of
FORD & SINCLAIR, P.A.
Datran II, Penthouse 1-C
9130 S. Dadeland Boulevard
Miami, Florida 33156
(305) 670-2000 / Fax (305) 670-1353

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I. STATEMENT OF THE CASE AND FACTS

We do not take exception to the Petitioner's Statement of the Case and Facts.[1]

II. ISSUE ON APPEAL

WHETHER THE PERSONAL REPRESENTATIVE OF THE ESTATE CAN RECOVER ACTUAL DAMAGES TO A NURSING HOME RESIDENT UNDER CHAPTER 400, WHEN THE DEPRIVATION OF RIGHTS CAUSES THE DEATH OF THE RESIDENT, OR WHETHER THE PERSONAL REPRESENTATIVE IS LIMITED TO THOSE DAMAGES RECOVERABLE UNDER THE WRONGFUL DEATH ACT.

III. SUMMARY OF ARGUMENT

Florida's Nursing Home Statute, Chapter 400, contains a private attorney general provision that allows a nursing home resident to bring a claim against a nursing home for a violation of the resident's rights specifically enumerated in §400.022, Fla. Stat. (1997). This private attorney general provision was amended in 1986 to close a loophole where the resident's cause of action against a nursing home would be extinguished upon the death of the resident. The amendment provided that

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[1] The abbreviation IB will be used to refer to petitioner's initial brief and App. will be used to refer to the petitioner's Appendix. S.App. will refer to respondent's Supplemental Appendix.

the personal representative of the estate could maintain a claim against the nursing home to recover actual damages that the resident suffered as a result of a violation of the resident's rights prior to his or her death, even when the violation caused the death of the resident. In adding this amendment, the legislature created a separate cause of action to recover damages that would have otherwise been subsumed by Florida's Wrongful Death Act. This is clearly evidenced by both the legislative history and the statutory language which states that §400.023 is "*in addition to* and cumulative with other legal or administrative remedies available to a resident."

Three appellate courts have since attempted to interpret the meaning of the 1986 amendment to §400.023. In *Beverly Enterprises Florida, Inc. v. Spilman*, 661 So.2d 867 (Fla. 5th DCA 1995), *rev. denied*, 668 So.2d 602 (Fla. 1996), the 5th District held that the personal representative may recover actual damages suffered by the resident when the violation of the resident's rights was the proximate cause of his death. It held that these damages would not be limited in any way by Florida's Wrongful Death Act. In direct conflict with this decision, the Fourth District held in *First Healthcare Corp. v. Hamilton*, 740 So.2d 1189 (Fla. 4th DCA), *rev. dismissed*, 743 So.2d 12 (Fla. 1999), that the only damages that were recoverable by the personal representative of the estate were those damages set forth under the Wrongful Death Act. In the decision presently under review, the Third District agreed with the Fifth District.

The *Hamilton* court's interpretation of §400.023 is incorrect for several reasons. First, the *Hamilton* court failed to follow several basic tenets of statutory construction. It failed to read the Wrongful Death Act and §400.023 in harmony, as they easily can be. It failed to follow a more specific and later enacted statute and chose instead to follow an earlier enacted statute of general applicability. It failed to recognize the ambiguity of the statutory language, even though it has had extreme difficulty interpreting the language itself. It failed to examine previous case law to determine the meaning of the phrase "actual damages." And it failed to examine the legislative history of the statute in order to effectuate its purpose. Finally, This Court has the benefit of reviewing the recent 2001 amendment to §400.023, which demonstrates that the *Spilman* decision was correct all along.

Despite the *Hamilton* court's failure to properly apply the rules of statutory construction, it is more significant that the court also failed to address the very real public policy issues behind the 1986 amendment to §400.023, and instead chose to ignore them completely. The purpose of Chapter 400 is to improve the quality of nursing home care in the State of Florida. Section 400.023 was enacted because the legislature recognized that the State of Florida could not possibly police all nursing homes on its own. The threat of lawsuits by neglected and abused residents or their representatives would act as an incentive for nursing homes to improve care and

would help protect the most vulnerable and fastest growing segment of our population.

As a result, the *Hamilton* court has basically rendered the 1986 amendment to §400.023 meaningless, as now, in the Fourth District at least, the damages that are recoverable by a personal representative of the estate prior to the amendment are identical to those recoverable by a personal representative of the estate after the amendment. And because those damages are often minimal to none, there is no incentive for a nursing home to ensure that it is providing quality care. It is a basic principle of the justice system that every wrong should have a remedy. In the Fourth District, there will now be numerous circumstances when a nursing home resident is killed by a nursing home's negligence, yet there will be no damages to recover. In these circumstance, there will be no remedy, and thus, no justice.

IV. ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT ACTUAL DAMAGES TO A NURSING HOME RESIDENT ARE RECOVERABLE UNDER CHAPTER 400 WHEN THE DEPRIVATION OF RIGHTS CAUSES THE DEATH OF THAT RESIDENT.

Petitioner expends a great deal of time and energy discussing the numerous rights provided under Fla. Stat. §400.022, and still more time explaining why there

was no private right of enforcement of §400.022 until §400.023 was enacted, but very little time on its lone argument in support of the Fourth District's holding in *First Healthcare Corp. v. Hamilton*, 747 So.2d 1189 (Fla. 4th DCA), *rev. dismissed*, 743 So.2d 12 (Fla. 1999). The petitioner's argument is (we think) as follows: prior to the 1986 amendment to §400.023, the personal representative of the estate of a deceased nursing home resident *had no claim whatsoever*, if the actions of the nursing home caused the death of the resident. We find this an odd claim to make, in light of these statements taken from petitioner's brief in the district court:

> Prior to the 1986 amendments to §400.023, the only remedies available to deceased residents and their survivors and estates were through the Wrongful Death Act and Survival Statutes
>
> [Prior to 1986,]...the personal representatives of the estate of a deceased nursing home resident could bring suit and recover damages...
>
> and
>
> The Wrongful Death Act does not abolish the remedies which were available prior to 1986 amendment. Prior to the 1986 amendments, personal representatives could bring lawsuits sounding in negligence, breach of contract, medical malpractice, and could file written complaints with the appropriate administrative agencies and/or departments at both the state and federal levels, but the attorney's fees and costs were borne by the personal representative and reimbursed by the estate. The 1986 amendment supplemented the remedies available to the personal representative of a nursing home resident by permitting the personal representative to bring a cause of action not previously permitted.

(Answer Brief of Appellee, at 15, 16, and 17) (S. App. 1)

We wholeheartedly agree with these statements made by the petitioners below, not only because they directly contradict the petitioner's argument before this Court, but because they are a correct statement of the law. These statements provide a stark contrast to the argument petitioner has placed before the Court in its present brief -- that somehow, out of all the citizens of Florida, only the relatives of those who died in nursing homes prior to 1986 could not avail themselves of the state's Wrongful Death Act. The adoption of this new argument[2], and the abandonment of all the other arguments made below before the Third District, severely undermines whatever strength there may have been in either argument.

The focus of this appeal is not whether the 1986 amendment created a new cause of action for personal representatives. That much is clear. What is unclear is what damages are recoverable by the personal representative of the estate: the actual damages (i.e., pain and suffering) of the resident or the same wrongful death damages available to the personal representative prior to the 1986 amendment.

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[2] We find it ironic that petitioner relies heavily on legislative history to support its argument, an approach the *Hamilton* court specifically prohibited.

A. The Purpose Behind Chapter 400

In order to understand the rationale behind the 1986 amendment and for allowing recovery of pre-death pain and suffering, it is important to examine the formation and development of Chapter 400, Fla. Stat., and the subsequent case law interpreting it.

The nursing home Residents' Bill of Rights set forth in §400.022, Fla. Stat., was expanded to its current form, and the accompanying enforcement provision of §400.023 was enacted in the wake of two critical Grand Jury reports and a series of scandals involving abuse and neglect of Florida nursing home residents.(See IB, App.A. and B) One of the Grand Jury reports graphically described nursing home deficiencies, including "rats in patients' beds and roaches in their food", and "lack of social, leisure, rehabilitative and therapeutic services; disregard for the personal dignity of residents; the use of chemical and physical restraints; and the lack of privacy". (See IB, App. B, at 75, and App. C, at 1) Florida's then-existing nursing home statutes were criticized as focusing too much on the structural aspects of nursing homes, while failing to adequately assess the quality of life in the nursing home.

The 1980 amendments were adopted to remedy the problem of "inadequate care and dehumanizing living conditions for frail older people". (See IB, App. C, at 1) The law was developed to address the major problems of financial exploitation, abuse,

neglect, and even death that resulted from substandard nursing home care and an ineffective regulatory scheme. The statute included a "private attorney general" provision, §400.023, which allowed for civil actions to enforce the resident's rights.

At the time of its enactment in 1980, §400.023 provided that:

> Any resident whose rights as specified in this part are deprived or infringed upon shall have a cause of action against any licensee responsible for the violation. The action may be brought by the resident or his guardian or by a person or organization acting on behalf of the resident with the consent of the resident or his guardian, to enforce such rights.

§400.023, Fla. Stat. (1981).

At that time, Florida's survival statute, §46.021, Fla. Stat. (1997), had been a part of the Florida Statutes for almost thirty years. The survival statute provided 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.

§46.021, Fla. Stat. (1997). Until the Fourth District's decision 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) (Currently on review before this Court, case # SC00-1910), this statute preserved all causes of action for non-lethal violation of rights, in the event that the nursing home resident died from an unrelated cause. The personal representative could also bring a common law negligence action.

However, from 1980 to 1986, if the violation of rights had caused the death of the resident, the Wrongful Death Act would apply, and eliminate both the chapter 400 claim and the common law negligence claim.

Specifically, the Wrongful Death Act provides that "[w]hen a personal injury to the decedent results in his death, no action for personal injury shall survive, and any such action pending at the time of death shall abate." §768.20, Fla. Stat. (1997). If the Wrongful Death Act applied to a nursing home resident *who was treated so badly that he or she died as a result of the deprivation or infringement of their rights*, the Wrongful Death Act would abolish the §400.023 remedies, and replace them with a wrongful death action. Thus, the remedy provided in §400.023 would not survive the death of the resident, even though the cause of action is based upon a violation of the resident's statutory rights and not "personal injury."

The reason for enacting a distinct measure of damages for neglect and abuse of nursing home residents, however, is compelling. If damages were controlled by the Wrongful Death Act, in most cases those damages would be non-existent or negligible. Most nursing home residents are elderly, frail, retired, and have adult children. Many are incompetent and suffer from senile dementia. A very large percentage have no surviving spouse and an extremely limited life expectancy. Medical bills are usually paid by Medicare or Medicaid. There are no lost earnings.

There are no losses of net accumulations to the estate. There are no losses for support or services to family members; accordingly, there is no "replacement value" for those services. In fact, economically, the estate may *benefit* by the death of the nursing home resident because the death stops depletion of the estate's assets.

Accordingly, under the Wrongful Death Act, the damages recoverable in the event that the nursing home actually caused the death of the resident would be non-existent or minuscule at best. It was, therefore, perfectly understandable that the legislature would not intend an economic benefit for causing the death of another. That benefit would arise from the application of the Wrongful Death Act to the cause of action created in §400.023. This issue was addressed by the Missouri Supreme Court with respect to their nursing home statute in *Stiffelman v. Abrams*, 655 S.W. 2d 522 (Mo. 1983). Missouri had passed a "private attorney general" provision as part of its resident's bill of rights that was identical in substance to Florida's §400.023. The Court noted that this provision was included based on the rationale "that government cannot do everything and that some requirements of the act can best be enforced by those most directly involved." *Stiffelman*, at 530. Similar provisions have also been enacted in New York, West Virginia, New Jersey, Massachusetts, Oklahoma and Ohio. *Stiffelman*, at 530, FN4.

The Court, faced with the very issue before this Court today, eloquently stated

its holding as follows:

> We conclude that the legislature, in the exercise of its police power, cognizant of the deficiencies of traditional remedies, by the enactment of § 198.093 intended to provide a remedy for physical and emotional abuse in the nursing home, fatal as well as nonfatal. To conclude that the legislature did not intend to allow recovery for actual damages for intentional injuries inflicted on a resident and for the pain and suffering sustained by him as a result of said injuries when it turns out, as would be expected, that the injury ultimately produced his death, would lead to the same incongruity expressed by Professor Prosser in his comment on the rule announced in Baker v. Bolton, 1Camp. 483, 170 Eng.Rep. 1033 (K.B.1808) that no cause of action existed at common law for death: "The result was that it was more profitable for the defendant to kill the plaintiff than to scratch him." W.Prosser, Handbook of the Law of Torts, § 127, at 902 (4th ed.1971)

Stiffelman, at 531.

Recognizing the flaw in its own civil enforcement provision, the Florida Legislature amended §400.023 in 1986 in order to permit a cause of action, under Chapter 400, when death resulted from the neglect or abuse, one which would not be subsumed by the Wrongful Death Act. The pertinent part of the amendment reads as follows:

> The [§400.023] 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.....

§ 400.023, Fla. Stat. (1986) (emphasis supplied).

Representative Canady, in sponsoring the 1986 amendment, stated its purpose to create a direct cause of action under §400.023:

> [T]here'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.

Beverly Enterprises Florida, Inc. v. Spilman, 661 So.2d 867 (Fla. 5th DCA 1995), *rev. denied*, 668 So.2d 602 (Fla. 1996) (emphasis supplied) (See Transcript of Record, S. App. 2). It is this direct action for lethal violations of rights *under §400.023* (as opposed to Chapter 768), that was created in 1986.

In 1995, a nursing home decided to test the new amendment to Chapter 400 in the same manner that the defendants in the *Stiffelman* case had attempted to test the Missouri statute. The defendant contended that the Wrongful Death Act acted to prevent any recovery for pain and suffering damages of the decedent prior to his death when the deprivation or infringement of the resident's rights actually caused the death.

The Fifth District rejected the defendant's arguments, and in doing so, quoted with approval the amicus brief of the Office of State Long Term Care Ombudsman:

> Under [the nursing home'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 (Fla. 1986) (statutes should not be given a meaning that leads to an absurd or unreasonable result).

Spilman, supra at 869. This decision went undisturbed and unchallenged by either the legislature or any other district court of appeal until 1999, when the Fourth District Court of Appeal decided *First Healthcare Corp. v. Hamilton*, 747 So.2d 1189 (Fla. 4th DCA 1999), *rev. dismissed*, 743 So.2d 12 (Fla. 1999).

In *Hamilton*, a resident wandered away from a facility on several occasions before falling into a pond and drowning. The personal representative filed both a Chapter 400 claim and wrongful death claim on behalf of the survivor. The jury awarded $1 million for the Chapter 400 violation, which included damages for the resident's pain and suffering from the time he fell into the canal until the time he died, a matter of a few minutes. A separate and much lower award was given to his wife under the wrongful death claim. The Fourth District found that the damages for the

resident's pain and suffering were eliminated by the Wrongful Death Act, but upheld the Chapter 400 claim for punitive damages and attorney's fees.

The *Hamilton* court distinguished the resident rights violations in that case from any issues "regarding medical diagnosis or treatment." In its decision, the *Hamilton* court recognized the *Spilman* decision and stated ,"we hold, in direct conflict with *Spilman*, that the personal representative of a deceased nursing home resident, just as in the case of the personal representative of any deceased, may not recover damages for decedent's pain and suffering *arising from the same injuries causing death*" (emphasis supplied). *Hamilton*, at 1194.

The *Hamilton* court stated:

> Thus, in the absence of any language in the 1986 amendment to Section 400.023 (F.S. 1995), which clearly and explicitly gives to the personal representative of a deceased nursing facility resident, a right of action for the deceased's pain and suffering when the death results in deprivation of the deceased's rights, we hold that the elements of damages recoverable by the personal representative of a deceased nursing home resident whose death results from deprivation of a deceased's rights are limited to those which a personal representative is specifically authorized to recover under the Wrongful Death Act.

Hamilton, at 1196.

The *Hamilton* court felt that allowing multiple actions and multiple claims for

pain and suffering were contrary to the legislative intent of the Wrongful Death Act. Moreover, the *Hamilton* court felt that awarding compensatory damages to the survivors was enough to effectuate the purpose of the statute, and did not make it cheaper for the nursing home to kill its residents than to torture them. At no point did the *Hamilton* court consider circumstances where a survivor did not exist, or was not statutorily recognized.

While conflict between the two cases was originally certified to this Court, the parties settled the underlying dispute, so the conflict has yet to be resolved. Forced to choose between the *Hamilton* and *Spilman* decisions in the instant case, the trial court chose the *Hamilton* decision, thus eliminating any possible recovery for the personal representative of the estate. The district disagreed, and chose to follow *Spilman* instead.

B. Statutory Construction

When one applies the basic rules of statutory construction, it is easy to see that under all the circumstances, the *Spilman* court's interpretation of the statute is the correct one. The starting point for our statutory analysis is set forth quite nicely by this Court in its recent decision in *Irven v. Department of Health and Rehabilitative Services,* 26 Fla. L. Weekly S253 (Fla. April 19, 2001). *Irven* stated that even when an act is in derogation of the common law, it should not automatically be strictly construed, as the petitioner requests. When the act is remedial in nature, the act should be accorded a liberal construction so as to effectuate the legislative intent. Clearly, Chapter 400 and §400.023 are remedial in nature, and therefore should be liberally construed.

We do agree with the petitioner's contention that §400.023 and the Wrongful Death Act should be read *in pari materia.* Where we differ, however, is over the result of reading these two statutes in harmony. These two separate causes of action can exist in harmony because they are fundamentally different and independent causes of action. They each provide different and distinct remedies. Importantly, §400.023 also expressly provides: "The remedies provided in this section *are in addition to and cumulative with* other legal and administrative remedies available to a resident." §400.023, Fla.Stat. (1986). (emphasis supplied)

Section 400.023 provides that the estate may recover actual and punitive damages for any deprivation or infringement of the rights of a resident, attorney's fees, and costs of the action. The Wrongful Death Statute, on the other hand, allows the survivors of the decedent to recover for loss of support and services, for loss of the decedent's companionship and protection, for mental pain and suffering, for medical and funeral expenses, and for loss of net accumulations of the estate. §768.21, Fla. Stat. (1997).

It is axiomatic that these two statutes can exist in harmony, as they provide for different damages arising form different remedies. They do not limit each other in any way. By reading these statutes in harmony, the Court may also effectuate another basic tenet of statutory construction -- that the legislature is presumed to not enact meaningless law. *Williams v. State*, 492 So.2d 1051 (Fla. 1986). If the *Hamilton* court's interpretation is correct, then the Florida Legislature accomplished a useless act by amending Chapter 400 in 1986 to allow a personal representative to bring a claim, because the damages recoverable under this claim would be identical to those that were recoverable prior to the amendment, namely, only those damages provided for under the Wrongful Death Act. Critically, The *Hamilton* court completely ignored the last line of §400.023, which states that this section *is in addition to and cumulative with all other remedies*. This is simply a codification of the general rule that statutes

are to be read in harmony, unless they conflict. The import of this language is simply that this statute does not conflict with any other remedies, legal or administrative.

This Court has reached this exact opinion recently in *Flo-Sun, Inc. v. Kirk,* 26 Fla.L.Weekly S189 (Fla. Mar 29, 2001). *Flo-Sun* involved a potential conflict between two statutes, both providing remedies for public nuisance. In ruling that the two statutes did not limit each other in any way, the Court pointed to the cumulative remedies/savings clause in the statute:

> The remedies included within chapter 403 are intended to be "additional and cumulative" to the remedies currently available (i.e. public nuisance suit under chapter 823). It would be less than intellectually credible to conclude that section 403.191 does not mean what its words plainly express.

Flo-Sun, at S191. Obviously, the same logic applies to the language in §400.023.

The *Hamilton* court's decision violates another basic rule of statutory construction. If the statutes cannot be read in harmony as providing two distinct remedies and two measures of damages and §400.023 is instead limited by the Wrongful Death Act, then they are in conflict. When two statutes are determined to be in conflict, the more specific one controls over the more general, and the later enacted statute is considered to be the last voice of the legislature on the matter. See *McKendry v. State*, 641 So. 2d 45 (Fla. 1994).

Obviously, the legislature saw that the damages recoverable under the Wrongful

Death Act would be minuscule, if non-existent, in many cases involving nursing home residents. Therefore, it enacted the 1986 amendment to provide for damages where there normally would be none. The Wrongful Death Act is an act of general applicability to personal injury actions where the personal injury proximately causes the death of the decedent. Chapter 400's civil enforcement provision, §400.023, is a law of specific applicability to situations where the deprivation of a specific set of enumerated rights causes an injury or death to a resident of a nursing home facility, and allows for recovery of damages to the estate of that individual, whether or not there are survivors.

The Wrongful Death Act was first enacted in 1972. The amendment to §400.023 in question before the Court was enacted in 1986. For fourteen years the two have co-existed without the legislature making changes to the language in either statute to limit the damages recoverable under either. Had they been in conflict, the legislature presumably would have taken steps to resolve the conflict. If this Court determines these statutes cannot be read in harmony, as basic statutory construction calls for, it would appear that, at the very least, it is §400.023, a specific statute, that cannot be limited by a statute of general applicability, such as the Wrongful Death Act. The *Hamilton* court wrongly treats the Wrongful Death Act as a statute of specific applicability by eliminating damages under §400.023.

This court addressed a similar conflict regarding the Wrongful Death Act in *St. Mary's Hospital, Inc. v. Phillipe*, 769 So.2d 961 (Fla. 2000). In *St. Mary's,* this Court held that the damages recoverable under the medical malpractice arbitration provisions were not limited by the Wrongful Death Act because the statute itself set forth the type of damages recoverable. In doing so, this Court stated: "If the legislature intended for the Wrongful Death Act to control the elements of damages available in a medical malpractice arbitration, it could have specifically provided for the application of the provisions of that Act in the Medical Malpractice Act. It has not done so." *St. Mary's*, at 973. Similarly, §400.023 makes no reference whatsoever to the Wrongful Death Act.

The *Hamilton* court relied on one principle of statutory construction, to the exclusion of all others. It stated that when a statute is unambiguous, as it believed §400.023 to be, then it must be given its ordinary meaning and there can be no attempts made to discern legislative intent.[3] The Hamilton Court treated this as if it

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[3]This position is robbed of its validity by the Fourth District's reversal of *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) (Currently on review before this Court, case # SC00-1910). Faced with the question of whether §400.023 actions survive the death of a resident, the Fourth District initially made a determination in *Greenfield v.*

were a bright line rule. It is not. The petitioner seems to concede as much in its brief. We find it noteworthy that, in defending a decision that is based on a steadfast refusal to examine legislative intent, the majority of the authority cited for petitioner's argument is drawn from Chapter 400's legislative history.

The Third District also refutes the idea that statutory unambiguity automatically prohibits examination of legislative intent. According to *Castillo v. Vlaminck de Castillo,* 771 So.2d 609 , 611 (Fla 3rd DCA 2000), "that principle is tempered by

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Manor Care, Inc., 705 So.2d 926 (Fla. 4th DCA 1999), that a §400.023 claim for an injury that did *not* cause the death of the resident would survive the death of a resident. In that opinion, Judge Warner dissented, and in deciding that the these claims should not survive the death of the resident, stated the following:

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

Greenfield, at 934. In reaching her opinion, Judge Warner clearly looks beyond the clear language of §400.023, going so far as to *guess* at what the legislature may have meant. In overturning its decision in *Knowles*, which initially upheld *Greenfield*, the Fourth District *en banc* adopted Judge Warner's dissent in *Greenfield* as the law. This reversal in *Knowles* is predicated on the very approach the Fourth District had earlier, in *Hamilton*, admonished the Fifth District for using in *Spilman* -- that is, attempting to discern legislative intent.

another cardinal tenet of statutory construction that cautions against giving a literal interpretation if doing so would lead to an unreasonable or absurd conclusion, plainly at variance with the purpose of the legislation as a whole." As demonstrated more clearly below, the *Hamilton* court's decision leads to an absurd result under many circumstances. Therefore, it is less important to adhere to any one of the various rules of statutory construction then it is to examine the issue from all angles and make sure that the right result is obtained.

Unfortunately for the *Hamilton* court, its decision rests on the faulty premise that §400.023 is unambiguous. This Court has recently stated, in *Rollins v. Pizzarelli,* 761 So.2d 294, 297 (Fla. 2000), that "[a]mbiguity suggests that reasonable persons can find different meanings in the same language," quoting *Forsythe v Longboat Key Beach Erosion Control Dist.,* 604 So.2d 452, 455 (Fla. 1992). Surely, petitioner would not suggest that the judges of the Fourth, Fifth, and Third Districts, who have read the statute to mean two entirely different things, are not "reasonable people". [4] This Court went on to state that when a statute is "susceptible to more than one reasonable interpretation, it is necessary to resort to principles of statutory construction to

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[4] Indeed, we find it difficult to accept, with a straight face, the Fourth District's assertion that §400.023 is unambiguous when it has had so much difficulty interpreting it, itself. One need look no further than the *en banc* reversal of its own panel decision in *Knowles*.

ascertain legislative intent." *Rollins,* at 297.

The ambiguity in the statute arises from the meaning of the phrase "actual damages." This term is not specifically defined in the statute. As *Rollins* notes, "it is a well settled rule of statutory construction that in the absence of a statutory definition, courts can resort to definitions of the same term found in case law." *Rollins,* at 298. This Court has previously defined the phrase 'actual damages' as follows:

> actual damages are compensatory damages, and include (1) pecuniary loss, direct or indirect, or special damages; (2) damages for physical pain and incovenience; (3) damages for mental suffering; and (4) damages for injury to reputation.... Actual damages are synonymous with 'compensatory damages' and with 'general damages'.

Miami Herald v. Brown, 66 So.2d 679 (Fla. 1953). *See also Ross v. Gore*, 48 So.2d 412 (Fla. 1950) (actual damages are compensatory damages).[5] While both of these cases dealt with 'actual damages' in the context of libel cases, the Missouri Supreme Court defined 'actual damages' in its equivalent of §400.023 in the *Stiffelman* decision:

> Actual damages are compensatory and measured by the loss

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[5] This shows that, for over 50 years, the term "actual damages" when used in a statute has meant "compensatory damages" and has included pain and suffering. The legislature is presumed to know the meaning of words as construed by the courts at the time they adopt statutory language.

> or injury sustained. (citation omitted). The injury here was sustained by the decedent, during his lifetime, not by his executors or his estate. Medical expenses would likewise be actual damages to the decedent.

Stiffelman, supra, at 531.

The *Hamilton* court incorrectly interpreted the phrase "actual damages." It should be clear that actual damages are those that are suffered by the *resident,* not the personal representative of the estate, who is merely authorized to bring an action to recover those damages. For the defendant's interpretation to work, it requires the meaning of the phrase "actual damages" to change depending on the status of the resident – that is, whether the resident is dead or alive. No rule of statutory construction allows for this kind of uncertainty.

This Court, in *Rollins,* recommends further inquiry into statutory ambiguity in the interest of obtaining the right result: "When the statutory language is susceptible to more than one meaning, legislative history may be helpful in ascertaining legislative intent." *Rollins, supra,* at 299. Obviously, because we are before this Court on conflict review, the language of §400.023 is susceptible to more than one meaning. Under these circumstances, the Court should examine the legislative history to ensure that the purpose of the statute is effectuated. As in *Rollins*, "the legislative history in this case is most persuasive." *Rollins,* at 299. The *Spilman* court reviewed the

legislative history and found that the legislative intent of this statute was to do that which the *Hamilton* court has expressly and specifically forbidden -- allow the personal representative to recover pain and suffering damages for a resident when the deprivation of his rights causes his death.

The *Spilman* court cited the statement of Representative Canady, which was quoted earlier, and which is reproduced again here:

> [T]here'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.

Spilman, at 869 (emphasis supplied).

After examining the legislative intent behind this amendment, there can be no question as to what its purpose was. The *Hamilton* court held that there was no language in the amendment to the statute to show that the statute was intended to change the common law and allow the personal representative of the deceased nursing facility resident to recover damages for the resident's pain and suffering from injuries causing the resident's death. With all due respect, that is *exactly* the very purpose of the 1986 amendment. Because, if the 1986 amendment did not have that effect, as the

Hamilton court claims, then it had no effect whatsoever. Currently, the only existing remedies for a deceased nursing home resident in the Fourth District are those that existed before the enactment of Chapter 400, and Chapter 400 has therefore been rendered meaningless. As discussed earlier, the legislature is presumed to not enact meaningless legislation.

Finally, this past legislative session has provided still more evidence of legislative intent. As a result of the well publicized nursing home tort reform battle, Chapter 400 was significantly altered earlier this year. The new statutes included several substantive changes ranging from tort reform to quality of care issues.. Section 400.023 was significantly altered as well, although none of the changes were to be applied retroactively. Some changes, such as removing the attorneys fee provision and the "additional and cumulative" language, were substantive. There were changes made to §400.023, however, which serve to clarify the previous law. This Court has stated that when "an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." *Metro Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 502 (Fla. 1999), *quoting Lowry v. Parole & Probation Comm'n*, 473 So.2d 1248, 1250 (Fla.1985). This Court has also stated that "courts may consider subsequent legislation to determine the

intended result of a previously enacted statute," particularly when "there had been a judicial interpretation after the original enactment of [a statute] which the legislature believed was contrary to its original intent." *Palma Del Mar Condominium v. Commercial Laundries of West Florida,* 586 So.2d 315, 317 (Fla.1991) (citations omitted).

We know that there has been judicial interpretation of §400.023 with respect to the whether the cause of action for injury survives the unrelated death of the resident in *Knowles.* And we are here because of the varying interpretations in *Spilman, Hamilton,* and *Somberg* as to what damages are available when the death of the resident is caused by the violation of a resident's rights. Both of these questions have been put to rest in the new §400.023. The pertinent language now reads as follows:

> Any resident whose rights as specified in this part are violated shall have a cause of action. The action may be brought by the resident or his guardian or by a person or organization acting on behalf of the resident with the consent of the resident or his guardian, or by the personal representative of the estate of a deceased resident *regardless of the cause of death.* ***If the action alleges a claim for the resident's rights or for negligence that caused the death of the resident, the claimant shall be required to elect either survival damages pursuant to §46.021 or wrongful death damages pursuant to § 768.21****. If the action alleges a claim for the resident's rights or for negligence that did not cause the death of the resident, the personal representative of the estate may recover damages for the negligence that caused injury to the resident.*

Fla.Stat §400.023 (2001) (S. App. 3) (new language emphasized). The language relevant to the instant controversy is in bold.[6] By requiring a choice between the two types of damages, this amendment necessarily recognizes that both sets of damages were available previously. Only now, instead of being able to recover both types of damages, the personal representative must choose between the two. We don't feel that the petitioner will be able to argue that, in the midst of this tort reform battle, the legislature agreed to *expand* recoveries beyond what was previously available. The only logical conclusion to be drawn form the 2001 amendment is that the 1986 amendment was correctly interpreted in both *Spilman* and the decision presently under review.

The *Hamilton* court completely ignored all these basic tenets of statutory construction in arriving at its decision. It refused to read these two statutes *in pari materia*, as they can and should be read. It chose a statute of general applicability over a statute of specific applicability. It chose the statute that was enacted in 1972, rather than the one enacted in 1986. It failed to correctly read a statute that was presumably clear on its face. It failed to recognize that its conflict with the *Spilman* court created ambiguity, and then failed to make an inquiry into the legislative intent

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[6] The rest of the language addresses the *Knowles* decision, demonstrating that the panel decision, not the *en banc* reversal, was the correct statement of the law.

behind the statute. For these reasons alone, the opinion of the *Hamilton* court should be rejected, and the decisions of the *Spilman* court and the district court below should be embraced.

C. Public Policy

But there are still more compelling reasons to approve the decision under review, those of public policy. The policy behind the enactment of Chapter 400 was clear and was set forth with specificity in §400.001 -- to improve the quality of care in Florida nursing homes. The policy behind creating the civil enforcement procedure was to put some teeth into the statute, in order to provide a further incentive for nursing homes to clean up their act. Prior to Chapter 400 and its civil enforcement procedure, there was little or no incentive for a personal representative to bring a nursing home claim because there were no damages recoverable. There were never any economic damages to speak of, such as loss of support or net accumulations. There was usually no surviving spouse or the resident probably would not have been in the nursing home in the first place. Finally, due to a negative life expectancy and the generally poor condition of the life of the nursing home resident, it is doubtful that pain and suffering damages would be recoverable for an adult child, as more than likely, the passing of a nursing home resident often brings a family tremendous relief.

In order to improve nursing home care, the legislature sought to provide an

abused elderly resident with access to the civil courts by creating a specific set of resident's rights and a civil cause of action that provided for attorney's fees. The Fourth District, in *Hamilton*, and in the *en banc* reversal of *Beverly v. Knowles*, has, respectfully, lost sight of the purpose behind the statute, and has effectively emasculated it. The Fourth District has based both of these opinions on the premise that the language of the statute is unambiguous. However, this argument is undermined by its reversal of *Knowles* and *Greenfield,* which conclusively demonstrates that the language of §400.023 is subject to varying interpretations even among its own judges. Finally, At no time did the court address or discuss the *practical* effect of its decisions in *Hamilton* and *Knowles*.

The Fourth District may have intentionally avoided a discussion of the practical effect of its decision because it had no way to justify the rather alarming state of the law in its district. In the Fourth District, the only time a nursing home resident may recover damages under Chapter 400 for a deprivation of his rights is if he is currently still alive. Under *Knowles,* if a resident suffers beatings at the hands of the staff, develops pressure sores, suffers dehydration, and other medical insults, but dies from an unrelated medical cause, such as a heart attack, there is no Chapter 400 claim. A resident's right to recover for a violation of his rights is extinguished, and the only recourse for the family is to bring a common law negligence survival claim. If,

however, the pressure sores or abuse by a staff member does in fact proximately cause the death of a resident, then the personal representative of the estate may bring a Chapter 400 claim. However, under *Hamilton*, the personal representative cannot recover any damages under Chapter 400. Instead, the family is limited to the damages set forth under the Wrongful Death Act, which, as discussed earlier, are minimal to none.

These decisions have created an absurd result where a nursing home resident can be deprived of his rights in a manner that proximately causes his death, and the estate can be left with absolutely zero remedy. It is difficult to accept that this was the legislature's intention in drafting this statute.

At the trial level, the *Hamilton* decision forces attorneys in the Fourth District to engage in a bizarre shell game with their pleadings. First, in drafting a Chapter 400 claim, the Plaintiff must allege that the deprivation of rights was not the proximate cause of death for the individual, or he will be limiting himself to wrongful death damages only. This places the defendant in the obscene position of insisting that it has actually caused the death of the decedent in order to limit its exposure for damages From a damage point of view, it is actually beneficial from the defendant's standpoint for the deprivation of rights to have caused the death of the decedent. This is the result the *Spilman* court sought to avoid: where it would be cheaper for the defendant

to kill the resident, rather than merely injure him. Such is the case here. Had Mr. Ellis simply developed pressure sores, and died from an unrelated heart attack, there would at least be a negligence survival action for the damage done to him by those sores.

However, if the *Hamilton* court is correct, because the deprivation of rights was the proximate cause of his death, the estate is limited to damages under the Wrongful Death Act. And since the proximate cause of Mr. Ellis' death was related to the failure to diagnose and provide medical care for Mr. Ellis, this case fell under the medical malpractice exception to the Wrongful Death Act, and only statutory survivors may recover. In this case, there are no statutory survivors, so there is no remedy. No remedy equals no incentive for the nursing home to provide the best possible care for our elderly citizens. No remedy encourages nursing homes to cut staff and services to increase profits, at the expense of the elderly resident. Again, this cannot be what the legislature intended in creating this statute.

The *Hamilton* decision is flawed in many, many respects. The court makes no examination of the practical effect of its decision. It completely ignores the text of the statute which states that §400.023 is an addition to and cumulative with other legal or administrative remedies, yet offers no reason for ignoring it. And, it confers a benefit upon a defendant whose actions caused the death of an individual. With the *Hamilton* decision, and the reversal of *Knowles*, the Fourth District has effectively made it

harder to bring a claim against a nursing home in its district than if Chapter 400 did not exist at all.

Respectfully, we ask this Court to see the flaws in the *Hamilton* court's logic, and approve both *Spilman* and the decision under review.

V. CONCLUSION

It is respectfully submitted that the district court's decision should be approved.

Respectfully submitted,

FORD & SINCLAIR, P.A.
9130 S. Dadeland Boulevard
Penthouse 1C, Two Datran Center
Miami, FL 33156
(305) 670-2000

BY:_____
DOUGLAS F. EATON
FBN#: 129577

VI. CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been sent by mail, this 29 day of June, 2001, to:

LOUISE H. McMURRAY
CARMEN Y. CARTAYA
McINTOSH, SAWRAN, PELTZ
& CARTAYA, P.A.
Suite 920 Biscayne Building
19 W. Flagler Street
Miami, FL 33130

JOEL PERWIN, ESQ.,
PODHURST, ORSECK,
JOSEFSBERG, EATON, MEADOW,
OLIN, AND PERWIN, P.A.
25 W. FLAGLER Suite 800
Miami, FL 33130

JANE KREUSLER-WALSH
REBECCA J. MERCIER
JANE KREUSLER-WALSH, P.A.
Suite 503- Flagler Center
501 S. Flagler Drive
West Palm Beach, Fl 33401

By:_____
DOUGLAS F. EATON
FBN#: 129577

CERTIFICATE OF FONT

Respondent's Answer Brief on the Merits has been typed using the 14 point Times New Roman font.

By:_____
DOUGLAS F. EATON
FBN#: 129577

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-731

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

Petitioner/Appellant,

vs.

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

Respondent/Appellee.
_____/

3DCA CASE NO. 3D00-818

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

APPENDIX TO ANSWER BRIEF OF RESPONDENT ON THE MERITS

DOUGLAS F. EATON of
FORD & SINCLAIR, P.A.
Datran II, Penthouse 1-C
9130 S. Dadeland Boulevard
Miami, Florida 33156
(305) 670-2000 / Fax (305) 670-1353