IN THE FLORIDA SUPREME COURT

CASE NO.: SC01-731
LOWER TRIBUNAL NO.: 3D00-818

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

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

INITIAL BRIEF ON THE MERITS AND ON JURISDICTION

Louise H. McMurray, Esq.
Carmen Y. Cartaya, Esq.
MCINTOSH, SAWRAN, PELTZ, & CARTAYA, P.A.
Biscayne Building, Suite 920
19 West Flagler Street
Miami, Florida 33130-4410
Phone: (305) 381-8922
Fax: (305) 381-6889

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

This discretionary review arises from a certification of conflict by the Third District Court of Appeal in a decision vacating a final judgment entered in favor of FLORIDA CONVALESCENT CENTERS, INC. d/b/a PALM GARDEN OF NORTH MIAMI BEACH (hereafter Petitioner/Appellant), a nursing home. The certified conflict was as to the construction placed upon § 400.023, Fla. Stat., by the Third District in the instant decision, and by the Fourth District in First Healthcare Corp. v. Hamilton, 747 So. 2d 1189 (Fla. 4th DCA), rev. dismissed, 743 So. 2d 12 (Fla. 1999). The Fifth District Court of Appeal is also in conflict with the Fourth District, as appears in its decision in Beverly Enterprises Florida, Inc. v. Spilman, 661 So.2d 867 (Fla. 5th DCA 1995), rev.denied, 668 So.2d 602 (Fla. 1996).

The Fourth District Court of Appeal has construed § 400.023, Fla. Stat., as creating a right of action under the Wrongful Death Act, § 768.16, et. seq., Fla. Stat., and subject to its measure of damages, § 768.21, Fla. Stat. Id. The Third and Fifth District Courts of Appeal have construed that same statute as providing an independent type of wrongful death action with a new and independent measure of damages. The facts of the case are as follows:[1]

---

[1]The Record will be "R". Plaintiff REED B. SOMBERG, as Personal Representative of the Estate of IRVING ELLIS, Deceased, will be Plaintiff or

The complaint alleged a violation of Chapter 400 that did, and alternatively did not, cause Plaintiff's decedent's death. The complaint also included a negligence survival claim and a negligence wrongful death claim. R.2-16; R. 33-54. Petitioner/Appellant moved for partial summary judgment based on the Fourth District Court of Appeal's decision in First Healthcare Corp. v. Hamilton, supra, which explicitly limited the damages permissible under § 400.023, Fla. Stat., to those recoverable pursuant to Florida's Wrongful Death Act. R. 105-108. In response, Respondent/Appellee urged the trial court to follow the Fifth District Court of Appeal's holding in Beverly Enterprises-Florida, Inc. v. Spilman, supra, which construed § 400.023, Fla. Stat., as creating a new cause of action for wrongful death independent of the Wrongful Death Act and permitting recovery for the decedent's pre-death pain and suffering. R. 113-125. The trial judge adopted the reasoning of the Fourth District and granted the Motion for Partial Summary Judgment.

Petitioner/Appellant then moved for partial summary judgment on the wrongful death claim, contending that § 768.21(8), Fla. Stat., limits damages recoverable by adult children when a death is caused by medical negligence.[2] R. 148-151.

"Respondent/Appellee". The Appendix will be referred to as "App." All emphasis is added unless otherwise noted.

[2]This Court found those limitations to be constitutional in Mizrahi v. North Miami Medical Center, Ltd., 761So. 2d. 1040 (Fla. 2000).

Respondent/Appellee then dismissed all other claims with prejudice in order to perfect an appeal, notwithstanding that the survival claim was still viable under Greenfield v. Manor Care, Inc., 705 So. 2d 926 (Fla. 4th DCA 1997).[3] R. 156. A final judgment appears at R. 161.

On appeal to the Third District, Respondent/Appellee again argued that the Fifth District's construction of § 400.023 as being unrelated and independent of the Wrongful Death Act was correct and the Fourth District's construction was in error. The Third District agreed and issued the decision which is the subject of this review. In following the Fifth District, the court nevertheless certified conflict with the Fourth District in order to facilitate discretionary review in this Court.

Petitioner/Appellant timely filed a notice to invoke discretionary jurisdiction. This Court entered an order delaying a decision on jurisdiction and directing the filing of briefs on the merits.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction to review decisions of district courts that are in conflict. Article 5, § 3(b), Florida Constitution (1980); Rule

---

[3]The Fourth District Court of Appeals has recently overruled its stance on this issue in its recent decision in Beverly Enterprises-Florida, Inc. v. Knowles, 766 So. 2d 335, (Fla. 4th DCA 2000). See, discussion and note 5, infra, at 11. That case is now pending in this Court

9.030(a)(2)(A)(iv) and (vi), Fla. R. App. P. Because express and direct conflicts exists among the three districts and because the Third District certified that conflict, this Court has jurisdiction over this proceeding. This Court should exercise that jurisdiction because the issue upon which the districts conflict is one of great importance to the public and to nursing homes and their residents.

Although Petitioner/Appellant does not believe that resort to the legislative history is appropriate or necessary to ascertain the intent of this clear statutory provision, the result is the same whether that history is considered or not. The Third District's decision erroneously construes both the statute and its history as intending to create a cause of action independent of and unrelated to the Wrongful Death Act. To the contrary, the purpose of the original enactment of § 400.023 was to create a private right of action for residents where one did not otherwise exist under the Wrongful Death Act. Amendment to include a right of action for the personal representative expanded a narrowly defined private right of action and made the Wrongful Death Act available for the first time.

Hamilton, supra, correctly recognized the interplay between the two statutes. The Third District Court of Appeal in the instant case, and the Fifth District Court of Appeal in Spilman, supra, failed to apply the basic precepts of statutory construction. They created ambiguity where the statute was clear on its face, then resorted

improperly to legislative history to expand the damages recoverable by a personal representative of the estate of a nursing home resident beyond any recoverable by any other victim of any other wrongful act, no matter the heinous nature of the conduct leading to that death.

ISSUES PRESENTED ON REVIEW

Petitioner/Appellant submits two issues for resolution:

I. WHETHER THIS COURT HAS JURISDICTION OVER THIS PROCEEDING AND SHOULD EXERCISE IT FOR THE PURPOSE OF RESOLVING INTER-DISTRICT CONFLICT?

II. WHETHER § 400.023, FLA. STAT., CREATES A PRIVATE RIGHT OF ACTION THAT IS TO BE READ *IN PARI MATERIA* WITH THE WRONGFUL DEATH STATUTE?

ARGUMENT

For the reasons that follow, Petitioner/Appellant submits that this Court should exercise its discretionary jurisdiction for the purpose of resolving the inter-district conflict regarding the correct construction of § 400.023, Fla. Stat. Because the substantive issue presented is a pure question of law regarding the proper application of a statutory provision, this Court reviews the issue de novo. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126 (Fla. 2000); Execu-Tech Business

Systems, Inc. v. New Oji Paper Company Ltd., 752 So.2d 582 (Fla. 2000); Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So.2d 376 (Fla. 5th DCA 1998).

This Court should quash the instant decision that reversed the judgment entered in the trial court and should approve the holding of the Fourth District Court of Appeals in Hamilton.

I. THIS COURT HAS DISCRETIONARY JURISDICTION AND SHOULD EXERCISE IT TO RESOLVE IMPORTANT INTER-DISTRICT CONFLICT.

Article 5, § 3(b), Florida Constitution, gives this Court the discretionary jurisdiction to review decisions of district courts of appeal that conflict with each other on the same point of law. The three decisions referenced supra undeniably conflict with each other. The result of the conflict is that personal representatives in some jurisdictions are currently able to claim different elements of damage and, potentially, pain and suffering damages far in excess of those elements of damage available in other jurisdictions. The potential exposure of defendants in those jurisdictions, whether they be ultimately morally culpable, simply technically responsible, or entirely innocent, vastly increases the pressure to settle even defensible cases.

By contrast, those personal representatives whose actions would otherwise be filed in the more restrictive districts have every incentive now to forum shop if at all possible. If forum shopping is not possible under the venue statutes, those parties undeniably are pinning their hopes on a reversal of their controlling decisions by this Court.

Thus, because the issue is of such importance to the public and to nursing homes and their residents, this conflict should be resolved.

II. § 400.023, Fla. Stat., CREATES A PERSONAL REPRESENTATIVE'S PRIVATE RIGHT OF ACTION FOR WRONGFUL DEATH THAT DID NOT OTHERWISE EXIST AND IS TO BE READ *IN PARI MATERIA* WITH THE WRONGFUL DEATH STATUTE, WHICH SPECIFIES THE DAMAGES THAT CAN BE RECOVERED AND FOR WHOSE BENEFIT.

A. The Nature of Chapter 400:

Chapter 400, Fla. Stat., is a comprehensive licensing and regulatory statute created to govern nursing homes and related health care facilities. It creates new duties, rights, and remedies that did not exist at common law. It requires licensing of every nursing home facility and makes each licensee subject to the administrative oversight of a state agency. § 400.062, Fla. Stat. It authorizes the agency to take action against the licensee in the event of enumerated conditions, including negligence

that materially affects the health of residents. § 400.102, Fla. Stat. It establishes a Resident Protection Trust Fund in order to fund transfer of nursing home residents when a nursing home is determined to threaten immediate danger to the health, safety, or security of residents. § 400.063, Fla. Stat. It requires the formation of an early warning system overseeing nursing homes to detect conditions that could be detrimental to the residents. § 400.118, Fla. Stat. It provides administrative penalties, including revocation or suspension of the license, fines, orders to increase staffing, and imposition of a moratorium on admissions. § 400.121, Fla. Stat. The agency is also authorized to obtain injunctive relief. § 400.125., Fla. Stat. § 400.022, Fla. Stat. also creates certain enumerated "rights" for residents. These rights include participation in the administrative enforcement system:

> The right to present grievances on behalf of himself or herself or others to the staff or administrator of the facility, to governmental officials, or to any other person; to recommend changes in policies and services to facility personnel; and to join with other residents of individuals within or outside the facility to work for improvements in resident care, free from restraint, interference, coercion, discrimination, or reprisal. **This right includes access to ombudsmen and advocates and the right to be a member of, to be active in, and to associate with advocacy or special interest groups.** The right also includes the right to prompt efforts by the facility to resolve resident grievances, including grievances with respect to the behavior of other residents.

§ 400.022(d). In a separate provision, Chapter 400 gives certain enumerated persons a right of action for violation of § 400.022. § 400.023, Fla. Stat.

400.021(10), Fla. Stat., incorporates § 400.0069, Fla. Stat., which requires the creation of the State Long-Term Care Ombudsman Council. That Council is authorized to receive complaints, to investigate them, to represent the resident making the complaint before governmental agencies and to seek administrative remedies to protect the resident. § 400.0069(c)(f), Fla. Stat. The nursing home statute specifically gives the resident unrestricted access to a representative of the Council and gives the Council the right to examine the resident's clinical records with the resident's consent and consistent with state law. § 400.022(c), Fla. Stat.

B. The Pertinent Principles of Statutory Application and Construction:

It is axiomatic that the extent to which a statute changes the common law is only the extent to which the statute clearly and explicitly says so:

> The presumption is that **no change in the common law is intended unless the statute is explicit and clear in that regard.** Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the law.

State v. Ashley, 701 So.2d 338, 341 (Fla. 1997), quoting, Thornber v. City of Walton Beach, 568 So.2d 914, 918 (Fla. 1990).

It is also axiomatic that mention of specific matters excludes those matters not mentioned, pursuant to *expressio unius est exclusio alterius.* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952). This familiar axiom applies to statutes which create a right and then also supply a remedy for violation of that right. Where a remedy is conferred by statute, it ordinarily excludes any other remedy. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 - 20, 100 S.Ct. 242, 247, 62 L.Ed.2d 146 (1979); Dorman v. Jacksonville, 13 Fla. 538 (1870); State v. Barquet, 358 So.2d 230 (Fla. 3rd DCA 1978). The right conferred is subject to any limitations expressed in the statute. Smitz v. Wright, 64 Fla. 485, 60 So. 225 (1912). A remedy conferred by statute can be invoked only to the extent and in the manner prescribed. Gunn v. Robles, 100 Fla. 816, 130 So. 463 (1930). Accord, City of Miami v. Cosgrove, 516 So.2d 1125 (Fla. 3rd DCA 1987). The Third District noted in Cosgrove that the rule is particularly true where the statute, as here, creates a new right[4]. 516 So.2d at 1127.

Further, statutes that relate to the same person, thing, or subject are regarded *in pari materia.* Willis v. Morgan, 176 So.2d 73 (Fla. 1965); Okaloosa County Water & Sewer Dist. V. Hilburn, 160 So.2d 43 (Fla. 1964).

---

[4]Thus, for example, the creation of liability for personal injury resulting in death extends only to the benefit of those persons specified in the statute and only for the specified damages. Flanders v. Georgia S. & F.R. Co., 68 Fla. 479, 484, 67 So. 68, 69 (1914).

C. Applying These Principles to Chapter 400:

In the instant case, it is unnecessary to address the legislative history to determine that the plain words of § 400.022 and § 400.023, Fla. Stat., create new rights and remedies that did not exist at common law, but which are limited by their terms. See, Acosta v. Richter, 671 So. 2d 149 (Fla. 1996)(the polestar of statutory construction is the plain meaning of the statute itself). The legislative history of a statute is irrelevant where the wording of a statute is clear. See, e.g., Aetna Cas. & Sur. Co. v. Huntington Nat'l. Bank, 609 So. 2d 1315, 1317 (Fla. 1992); Suwannee River Water Management Dist. v. Pearson, 697 So. 2d 1224, 1226 (Fla. 1st DCA 1997). The plain terms govern the application of the statute and no judicial interpretation is necessary:

> In matters requiring statutory construction, courts always seek to effectuate legislative intent. **Where the words selected by the Legislature are clear and unambiguous, however, judicial interpretation is not appropriate to displace the expressed intent**. Foley v. State ex rel. Gordon, 50 So. 2d 179, 184 (Fla. 1951); Platt v. Lanier, 127 So.2d 912, 913 (Fla. 2d DCA 1961). It is neither the function nor prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning.

Heredia v. Allstate Ins. Co., 358 So.2d 1353 (Fla. 1978).

§ 400.022, Fla. Stat., creates new rights for nursing home residents that did not exist at common law. Rights of enforcement are contained within the same section establishing those rights. However, those rights of enforcement are solely through the administrative oversight of the agency and the Ombudsman Council. § 400.022 does not create a private right of civil action in a court of law. Absent the specific provisions of § 400.023, § 400.022 permits entry into the regulatory and enforcement framework for residents **only** through the administrative processes of the Ombudsman Council. Under the axiom *expressio unius est exclusio alterius*, the administrative remedy contained within § 400.022 excludes a right to file a civil lawsuit.

§ 400.023 thus creates an additional remedy for certain persons that would otherwise not exist, either at common law or by the terms of 400.022. § 400.023 provides that certain persons have standing to assert a private right of civil action under the statute: residents themselves or through a guardian, and the personal representative, but only when the violation of the statute caused the resident's death.

Unless § 400.023 clearly specified that a personal representative had standing to sue, that is, had the personal representative not been enumerated as a person with standing to allege a violation of 400.022, there would otherwise have been no right of action for wrongful death at all. Dorman, supra; Gunn, supra; Cosgrove, supra; Smitz, supra.

Under all of the principles mentioned above, these clear terms permit, for the first time, a personal representative of a deceased resident to bring a wrongful death action when the violation of § 400.022 caused the death. Keeping in mind that the common law did not permit an action for wrongful death at all, § 400.023 does no more in derogation of that common law that it specifically expresses. Ady v. American Honda Finance Corp., 675 So. 2d 577, 581 (Fla. 1996)("statute in derogation of common law must be strictly construed"). There was no remedy and there were no damages recoverable at common loaw.

Enter the Wrongful Death Act, with which § 400.023 must be read *in pari materia*.

The common law did not allow recovery for "the negligent or wrongful death of another." Louisville & N.R. Co. v. Jones, 45 Fla. 407, 414, 34 So. 246, 248 (Fla. 1903). The Florida Legislature created this remedy by enacting § 768.16, et. seq. Jones, supra; Florida East Coast Ry. Co. v. Hayes, 67 Fla. 101, 64 So. 504 (Fla. 1914). However, as recognized by the Supreme Court of Florida in Hayes, supra, 67 Fla. 101, 105, 64 So 504, 505:

> The object of the statute giving the right of action is compensation to those who have sustained damages or loss by reason of the death of a person caused by the fault of another.

See, § 768.17, Fla. Stat.

Being also a statute in derogation of the common law, the Wrongful Death Act must also be applied only to the extent and in the conditions and terms expressed within the act:

> [b]ecause wrongful death actions did not exist at common law, all claims for wrongful death are created **and limited** by Florida's Wrongful Death Act.

Cinghina v. Racik, 647 So.2d 289, 290 (Fla. 4th DCA 1994). § 768.20, Fla. Stat., expressly precludes claims for pain and suffering. Metropolitan Life Ins. v. McCarson, 429 So.2d 1287, 1291 (Fla. 4th DCA 1983), modified, 467 So.2d 277 (Fla. 1985). This court has sustained and affirmed the "unmistakable legislative intent" of the Act as shifting the recovery for death from the dead to the living:

> The claim for pain and suffering of the decedent from the date of injury to the decedent was eliminated. Substituted therefore was a claim for pain and suffering of close relatives, the clear purpose being that any recovery should be for the living and not for the dead.

Martin v. United Security Services, Inc., 314 So.2d 765, 767 (Fla. 1975).

Thus, when common law negligence causes the death of a nursing home resident (rather than a technical violation of § 400.022), damages for pain and suffering are precluded by the Wrongful Death Act. Arthur v. Unicare Health

Facilities, Inc., 602 So.2d 596, 598 n.1 (Fla. 2nd DCA 1992), rev. denied, 613 So.2d 4 (Fla. 1992).[5]

Had the legislature intended to change the common law **or** to circumvent the application of the Florida Wrongful Death Act and permit the personal representative to recover for pre-death pain and suffering, the law requires the Legislature to have explicitly said so. Ashley, supra.

However, § 400.023 does **not** expressly change or repudiate the "actual damages" that are recoverable under the Wrongful Death Act. It does **not** expressly change or repudiate the persons who are survivors under the Wrongful Death Act. Accordingly, reading the two statutes *in pari materia*, and affording them their plain and ordinary meaning, § 400.023 gives the personal representative the standing and the right to file a civil action under the Wrongful Death Act.

The Fourth District Court of Appeal recognized this by observing that the 1986 amendment to § 400.023 "simply created" a right of action for the personal representative of a deceased resident whose death resulted from a violation of the residents' rights. Hamilton, supra, 740 So.2d 1189,1195.

---

[5]Correspondingly, because § 400.023 does not create a right of action for pain and suffering when death results from causes other than a violation of 400.022, there is no survival action for pre-death pain and suffering.

D. Where the Third and Fifth Districts Went Astray - Reliance on a False Premise:

The conclusions of the Third and Fifth Districts, and the arguments posed by Respondent/Appellee below, are based upon the **false premise** that the personal representative could always have brought a wrongful death action so that there was always a **remedy** for a violation of Chapter 400 when the violation caused the death of a resident. Consequently, pursuant to this false premise, § 400.023 must be construed to expand the **damages** available under the Wrongful Death Act.[6] Otherwise, goes the argument, the enactment of 400.023 to include the personal representative accomplishes nothing, offending another principle of statutory construction, that a statute must be construed to give it some meaning.

---

[6]The Legislature demonstrates comprehension of the inherent difference between damages and remedies in subsection 1, the very same subsection granting the personal representative a right of action. That subsection specifically creates the "cause of action" and states that the "remedies" are in addition to other "remedies" available to the resident and the agency. As for damages, the subsection simply provides that a plaintiff who prevails may recover fees, costs, and "damages." The Legislature is presumed to have carefully and precisely **chosen** the language employed and is presumed to know the meaning of the words it uses. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); Florida State Racing Comm'n v. Bourquardez, 42 So. 2d 87 (Fla. 1949). The Legislature specifically legislated that the "**remedies**" of § 400.023 are "in addition to and cumulative with other legal and administrative **remedies**," not additional to other "damages."

The distinction between "remedies" and "damages" is not simply cosmetic, but fundamental. By definition, "a remedy is the means employed in enforcing a right or in redressing an injury." St. John's Village I, LTD. v. Dept. of State, Division of Corp., 497 So. 2d 990 (Fla. 5th DCA 1986).

Respondent has argued:

> ...the Hamilton court has basically rendered the 1986 amendment to § 400.023 meaningless, as 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....
>
> ...from 1980 to 1986, if the violation of rights had caused the death of the resident, the Wrongful Death Act would apply, and eliminate any survival action.
>
> If the Hamilton court's interpretation is correct, than (sic) 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 recoverable by survivors under the Wrongful Death Act.
>
> ...if the 1986 amendment did not have that effect [allowing recovery for pain and suffering of the deceased], as the Hamilton court claims, then it had no effect whatsoever.

Initial Brief of Appellant at 5-6 , 8, 15, 18.

Once the premise of this argument, the prior availability of a wrongful death action, is examined in the light of applicable law, supra, and is seen to be false, then all of Respondent's arguments, and the conclusions of the Third and Fifth Districts, are revealed as equally false.

E. Legislative History: Proof Of A New Right of Action Under the Wrongful Death Act:

Having said that the legislative history is not necessary or appropriate in order to apply the statute, and having shown that, as a matter of law, § 400.023 is necessary to **create** a right of action under the Wrongful Death Act, reference to the legislative history, as Petitioner/Appellant insists is required, reveals that the Legislature appreciated the correctness of Petitioner/Appellant's position: the premise upon which Respondent/Appellee's argument is based is **false**; the true premise - that no right of action would exist absent express provision in the statute - was recognized by the Legislature.[7]

§ 400.023 was not originally a part of the Nursing Home Act when it was enacted. It was added in 1980, but at that time did not include a right of action for a personal representative. The rights of action added in 1980 were limited to living residents, their guardians, or entities acting on their behalf with their consent.[8]

§ 400.023 was prompted, in part, by a Grand Jury Report which criticized the Department of Health and Rehabilitative Services for inadequate policing of nursing

---

[7]References to the legislative history are to the Appendices submitted herewith.

[8]This seems to coordinate with the right of association with advocacy groups set forth in § 400.022.

homes. App. A, Senate Staff Analysis and Economic Impact Statement, CS/HB 1218 (June 10, 1980).

The Staff Analysis recognized that § 400.022 created patient rights but lacked a private right of enforcement:

> § 400.022, Fla. Stat., contains a list of nursing home patients' rights, copies of which must be provided to each patient or to his or her guardian at the time of, or before, the patients's admission to the facility. The law further requires nursing homes to provide staff training with regard to patients' rights to ensure compliance with the law. **Florida's nursing home legislation, however, does not include a private right of action which explicitly provides a patient with the statutory authority to take legal action** against any facility that deprives a patient of his rights, pursuant to Chapter 400, Part I.

App. A, at 1-2.

Other reports also indicated a need for additional enforcement mechanisms, including a private right of action.

The 1979 report of the House Health and Rehabilitative Services Committee, Subcommittee on Aging entitled "Interim Aging Subcommittee Issues," reviewed and summarized the history and the current condition of nursing homes. Its conclusion recommended several options to improve the industry and its regulation. The second option was:

> Amend the patients bill of rights to include provisions for a private right of action; provide further that legal settlements awarded to residents not be assessed as assets which would result in termination of their Medicaid eligibility.

App. B, at "82" (1979). On April 22, 1980, the Committee on Health and Rehabilitative Services rendered a report to the Florida House of Representatives. At the beginning, summarizing the "present situation," the report stated:

> Florida's nursing home legislation, however, does not include a private right of action which explicitly provides a patient with the statutory authority to take legal action against any facility that deprives a patient of his rights, pursuant to Chapter 400, Part I, Fla. Stat..

App. C at I.A., page 1. In commenting upon the "Probable Effect of Proposed Changes" the Committee noted that "a resident would have the explicit right to take legal action against any facility that infringed upon his or her rights as stated in Chapter 400, Part I, Fla. Stat.." Id., II., at 2-3. In analyzing the fiscal impact of the proposed private right of action, the Committee further noted:

> A. State and Local Impact .... It is difficult to estimate how often the private right of action will be invoked and the fiscal impact of such action on federal, state, and local resources currently committed to legal services for the elderly. ...
>
> B. Private Impact .... The private right of action could result in a financial loss to facilities that deny a resident his or her

> rights. Again, it is difficult to estimate the fiscal impact of the private rights of action on the nursing home facility.

Id., II., at 2-3.

Finally, the Committee explicitly addressed the problem that underlies the difference between Petitioner's and Respondent's positions. The Committee acknowledged that the inclusion of an express cause of action was necessary **because** it might not otherwise be inferred judicially. Under then existing law, there was great uncertainty as to whether residents of nursing homes could enforce their rights under such statutes by resort to civil actions:

> Nursing home residents in various states who have taken legal action to enforce their rights have not met with uniform success. "Courts must now look to the 1975 Supreme Court case of Cort v. Ash, which establishes the current tests to determine whether a plaintiff can state a cause of action directly under a ... law which does not provide expressly for suit by such a party... **Rather than leave interpretation of whether or not a private right of action exists for nursing home residents, the Legal Services Corporation maintains that it is best to establish, through law, the rights of residents to a private cause of action.**

Id., at 3.

This Committee report spotlights the true intention of the Legislature in including a right of action in the first place. Perhaps as the Committee recognized at

the time the report was rendered, the law was even then changing to restrict judicial implication of private rights of action even more.

In 1979, the year before this Committee report was given, the United States Supreme Court revised the Cort tests for implication of a private right of action and adopted instead a stricter examination of the intent of the legislature in determining whether a statute could support a private right of action. Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 15 - 16, 100 S.Ct. 242, 245 - 46, 62 L.Ed. 146, (1979)("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted").

The change articulated in TAMA was ultimately acknowledged by this Court. Murthy v. N. Sinha Corp., 644 So.2d 983 (Fla. 1994). In Murthy, this Court decided that the licensing and regulatory statutes governing construction contracting, which provided administrative remedies but did not expressly provide for a private civil cause of action, did not provide an implied private right of action.

This Court applied the TAMA standard:

> Today, however, most courts generally look to the legislative intent of a statute to determine whether a private cause of action should be judicially inferred. Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 15 - 16, 100 S.Ct. 242, 245 - 46, 62 L.Ed. 146, (1979)("[W]hat must ultimately be determined is whether

> Congress intended to create the private remedy asserted.")... [remaining cites omitted]

Id., at 985. A district court had reached the same result regarding the same licensing and regulatory act **five years earlier**. Finkle v. Mayerchak, 578 So.2d 396 (Fla. 3rd DCA 1991).

Under this test for implication of a private right of action, courts in this state have since held that there is no private cause of action under § 415.504, Fla. Stat., for violation of the duty to make child abuse reports, or under § 415.1034, Fla. Stat. for violation of the duty to report elder abuse. [9] Freehauf v. School Board of Seminole County, 623 So.2d 761 (Fla. 5th DCA 1993); Fischer v. Metcalf, 543 So.2d 785 (Fla. 3rd DCA 1989); Mora v. South Broward Hospital District, 710 So.2d 633 (Fla. 4th DCA 1998). In Mora, an elderly lady told her psychologist that her live-in care giver was stealing from her and abusing her. The matter was not reported. The elderly lady continued to suffer emotional and physical abuse until her death eight weeks later.

Similarly, there is no private right of action under the Health Maintenance Organization Act or under § 465.003(5), Fla. Stat., the drug interaction counseling statute governing pharmacists. Greene v. Well Care HMO, Inc., 778 So.2d 1037 (Fla. 4th DCA 2001); Johnson v. Walgreen Co., 675 So.2d 1036 (Fla. 1st DCA 1996). In

[9] § 415.1111, Fla.Stat., now provides certain rights of private action.

Johnson, a patient died as a result of drug interactions; the pharmacist violated that act's requirement of assessing potential adverse interactions and counseling the customer on proper drug usage. There is no private right of action for violation of Florida's Food, Drug, Cosmetic and Household Products Act. T.W.M. v. American Medical Systems, Inc., 886 F.Supp. 842 (N.D.FL 1995). See also, Wilson v. Danek Medical, Inc., 1999 WL 1062129 (M.D.FL 1999)(applying Murthy rule to conclude that there is no private cause of action for violation of the Medical Device Amendments to the Food, Drug and Cosmetic Act, 21 U.S.C. 360).

In Alabama, the Fischer and Finkle decisions have been relied upon to deny a private right of action to a resident of an unlicensed nursing home who fell from a window and died. Thomas Learning Center, Inc. v. McGuirk, 766 So.2d 161 (Ct. of Civ.App. Ala. 1998).

Against the backdrop of legislative history, in the context of the principles of law addressed supra, there can be no question that § 400.023 was enacted purely and simply to create a private right of action that did not otherwise exist. See, also, App. D,Committee Draft ("creating s. 400.023, Fla. Stat., providing for the civil enforcement of patients' rights").

It follows by application of the same principles of law that the right of action is limited to those persons specified by the statute. Personal representatives were not

among those persons given standing or a right of action for death resulting from a violation of § 400.022, when § 400.023 was enacted in 1980. App. E, Staff Analysis, Committee on Health & Rehabilitative Services, B., page 2(revision will "add the personal representative of the estate of a deceased resident to the list of person who can bring action....").

The Florida Legislature was prompted to recognize the omission by an opinion rendered by Judge Dennis P. Maloney in the Polk County Circuit Court case of Campbell v. Payton Health Care Facilities, Inc., Case No. GOG84-1170 (Sept. 14, 1984) citing Cort v. Ash, 422 U.S. 66 (1975)(precluding implied private cause of action from statute not expressly providing one). App. F.

Judge Maloney recognized that the pre-1986 statute did not "confer a cause of action upon the personal representative of any decedent whose death may have been occasioned by a violation of the afore-mentioned rights [Part 1 of Chapter 400]." However, Judge Maloney invited the legislature's attention to this apparent incongruity with a view toward revising the Statute to eliminate the incongruity.

Even the sponsor of the bill amending § 400.023 to grant a right of action to personal representatives of the estates of residents who have died as a result of violation of § 400.022 acknowledged that **no** death action was available prior to the amendment:

> 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....**
>
> * * *
>
> [I]f 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**.

Comment by Representative Canady at vote on House Bill No. 154, as quoted in Spilman, supra, 661 So2d 867, 869.

Note that Representative Canady did **not** say that there was an anomalous situation because a living resident could obtain a recovery for pain and suffering but a deceased resident was limited to statutory damages under the Wrongful Death Act. **That** anomalous situation exists for all persons injured or killed as a result of the wrongful act of another, and does so for purposes within the wisdom of the legislature. Rep. Canady flatly said that the anomaly was that when a person was killed "**no suit could be brought.**"

Indeed, all of the pertinent proceedings on the amendment confirm its purpose. The House Summary of HB 124 states that the bill would permit the personal representative to sue with respect to a resident who died "having a cause of action."

App. G, HB 154, House Summary, p. 2. This summary clearly comports with the fact that the cause of action, as a matter of law, would otherwise have died with the person.

Moreover, the Legislature expressly contemplated application of the Wrongful Death Act in determining to amend § 400.023:

> In cases, **where there is a personal representative, under §768.26, Fla. Stat., 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. Probable Effects of Proposed Changes.
>
> The proposed revision to §400.023, Fla. Stat., will add the personal representative of the estate of a deceased resident to the list of persons who can bring action against the licensee for violation of a resident's rights....
>
> The revision would allow the personal representative of the estate of a deceased resident to bring an action against the licensee and if they prevail, recover attorney's fees in addition to the cost of the action and the actual and punitive damages.

App. E, Staff Analysis, Committee on Health and Rehabilitative Services, I.A., p.2.

When one corrects the premise, then the conclusion flows correctly from application of the same principles that Respondent/Appellee relied upon below.

First, the amendment serves a useful purpose and is not meaningless. It corrects the anomaly that **no** suit could be brought on behalf of a deceased resident because the private right of action granted in the original statute extended only to the resident or his guardian - not his personal representative.

Second, statutes must be read *in pari materia*. The creation of a new person who has standing to bring an action for a violation of § 400.022 is read *in pari materia* with, and is in harmony and not in conflict with, the statute specifying what that class of persons may recover in damages and for whom.

Third, a specific statute takes precedence over a general statute, but only when the two are irreconcilably conflicting. Otherwise, the specific statute must be placed in the context of, and harmonized with, the general statute. Mann v. Goodyear Tire and Rubber Co., 300 So.2d 666 (Fla. 1974); Garner v. Ward, 251 So.2d 252 (Fla. 1971). Especially since the general statute was not available at all prior to amendment, the specific statute must be harmoniously construed as intended to make the general one available.

Finally, the policies of the Nursing Home Act are advanced by the reading of the two statutes together. Not all residents of nursing homes have no statutory survivors. Not all deceased residents' damages will consist of only pain and suffering. There are provisions for recovery of economic losses - for example

overcharging, theft, loss of personal property of the resident. To these are added punitive damages and attorneys' fees. The exposure of a nursing home to a wrongful death action is thus potentially substantial, certainly sufficient incentive to encourage compliance with the Act.

A brief discussion should be made about the purpose of adding attorneys' fees to the damages otherwise recoverable under the Wrongful Death Act. The private right of action is considered to create a private attorney general enforcement mechanism to supplement the administrative enforcement mechanisms. Respondent/Appellee has argued that the minimal damages that might be recoverable in some wrongful death cases charging a violation of the residents' rights will discourage most private lawsuits. But the very purpose of specifically authorizing an award of attorneys' fees is to resolve that impediment. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968); Wesley Group Home Ministries, Inc. v. City of Hallandale, 670 So.2d 1046 (Fla. 4th DCA 1996). See, e.g., App. F at II.A., Economic Impact, Public.

The problem that has occurred in the past is that plaintiffs had little incentive to pursue equitable remedies (as are provided by § 400.023) or legal remedies involving little potential damage award (as Respondent/Appellee argued below is the case for many estates of elderly nursing home residents) because of the cost of hiring

an attorney to prosecute the case. The provision of attorneys' fees gives personal representatives and their attorneys incentive to bring such lawsuits. Moreover, the statute inhibits the risk of doing so in the event that the suit is not successful, for attorneys' fees are not recoverable by an innocent nursing home unless the action was filed without justiciable issue of law or fact.

As a final note, when considering the policy and impact of creating a private right of action for living residents, the concerned Committees were able to make no projection of the effect upon the industry. Given the expressed ignorance of the potential fiscal impact, it is unlikely that such a sweeping expansion of damages for this single class of persons was contemplated. Indeed, creating additional damages that are not available to any other estate, no matter the heinousness of the wrongdoing that resulted in death, is clearly a legislative prerogative. It is hard to reconcile such a legislative intention as Respondent/Appellee proposes with the fact that the Legislature has not expanded damages for other statutory violations that cause similarly compelling injuries and death. See, discussion, supra, at 23-25.

"Construing" § 400.023 to create expanded damages when there is no explicit intent to do so invades the province of the legislature and ignores the longstanding limitation that "courts cannot legislate." State v. Wershow, 343 So.2d 605, 607 (Fla. 1977). By contrast, the lack of a different definition for "actual damages" in

§400.023 compels the conclusion that the Wrongful Death Act is intended to act in harmony with § 400.023 by specifying what those damages are and on whose behalf they may be recovered.

CONCLUSION

There is a substantial conflict among three district courts in applying or construing the Nursing Home Act's rights of action. This Court has discretionary jurisdiction to resolve this conflict and should do so.

The trial judge correctly applied § 400.023 *in pari materia* with the Wrongful Death Act. The Fourth District Court of Appeal reasoned correctly that the two statutes must be read *in pari materia*. § 400.023 created a new right of action under the Wrongful Death Act that did not exist before and that is subject to the limitations within each of those statutes.

Accordingly, the decision of the Third District Court of Appeal must be reversed and the final judgment must be reinstated.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on the Merits and on Jurisdiction was served via regular mail on this 14th day of May, 2001 to Douglas F. Eaton, Esquire, Ford & Sinclair, P.A., Two Datran Center, Penthouse 1-C, 9130 South Dadeland Boulevard, Miami, Florida 33156.

I HEREBY CERTIFY that the foregoing brief was prepared in Times New Roman font, size 14 point.

MCINTOSH, SAWRAN, PELTZ & CARTAYA, P.A.
Suite 920 Biscayne Building
19 West Flagler Street
Miami, FL 33130
(305) 381-8922

By: _____
LOUISE H. MCMURRAY
Florida Bar No. 264857
CARMEN Y. CARTAYA
Florida Bar No. 515736

C:\Supreme Court\02-06-03\01-731_ini.wpd