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

REPLY BRIEF ON THE MERITS AND ON JURISDICTION

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TABLE OF CITATIONS

REPLY ARGUMENT

Respondent's claim that Petitioner's position has changed:

Respondent accuses Petitioner of changing its position on the existence of a cause of action for deceased residents before 1986. This Court need look no further than the quotation at page 5 - 6 of the Answer Brief[1] to see that Petitioner's position remains the same: before 1986, personal representatives could bring an action under the Wrongful Death Act for "lawsuits **sounding in negligence** ... The 1986 amendment supplemented the remedies ... by permitting the personal representative to bring a cause of action not previously permitted." Petitioner continues to urge that there was no wrongful death action **for violation of the Nursing Home Act** until 1986. The Wrongful Death Act cannot create a cause of action under a regulatory or penal statute just as the Survival Statute cannot. Only the legislature can do so when it enacts or amends the statute. It is the intent of the legislature expressed in the statute that determines whether a right of action has been created and its scope. Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 15 - 16, 100 S.Ct. 242, 245 - 46, 62 L.Ed. 2d 146, (1979); Murthy v. N. Sinha Corp., 644 So.2d 983 (Fla. 1994); Finkle v. Mayerchak, 578 So.2d 396 (Fla. 3d DCA 1991).

[1]All emphasis in all text and quotations is added unless otherwise indicated.

The continued erroneous premise that a wrongful death action for violation of resident rights preexisted the 1986 amendment:

Contrary to Respondent's assumption that a wrongful death action was always available **for violation of Section 400.022**, a wrongful death action was only available for negligence or medical malpractice. These causes of action require proof of different facts than violation of a statute. It is thus incorrect to argue that amendment of 400.023 did not add a new substantive vehicle for recovery under the Wrongful Death Act. The Coalition adopts the same false premise, arguing that otherwise the original enactment permitting "any resident" whose rights were infringed to bring an action was "useless." This conclusion is contrary to the Coalition's concession that the enactment was necessary to **create** the private right of action and to its corollary argument that it created a form of "strict liability" which is distinct from a cause of action for negligence.[2]

The Academy makes the same illogical and inconsistent assumptions: that an action for violation of the statute was available under the Wrongful Death Act (and

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[2]Judicial inference of a right of action may construe a violation as negligence per se or as evidence of negligence. See, deJesus v. Seaboard Coast Line R. Co. , 281 So.2d 198 (Fla. 1973); Murthy v. Sinha, 644 So.2d 983, 985 (Fla. 1994). However, under Transamerica Mortgage Advisors, supra, this act did not give rise to a private right of action absent Section 400.023. Thus, violation of the act was not "negligence per se" and did not create a form of "strict" liability. See, Fla. Stat. Section 400.023 (2001)(liability is not "strict"; plaintiff bears burden of proving negligence).

under the survival statute) on behalf of **a deceased resident before** the 1986 amendment but that **no** action was available to a **living** resident for violation of Chapter 400 **absent enactment** of Section 400.023. The Academy asserts that "it is nonsensical to argue that the legislature would create a statutory cause of action which was intended to be entirely redundant of the Wrongful Death Act." However, the nonsense is the argument that a specific enactment was necessary in the case of living residents but **not** necessary in the case of deceased residents.

In contrast to Respondent's constant theme, the amendment to create a cause of action for the personal representative in addition to the living resident was **not** useless, just as enactment of the original Section 400.023 was not useless. It created a right to assert a claim for a form of statutory liability under the Wrongful Death Act, a claim specifically for violation of the Nursing Home Act, that did not already exist.

In a dispositive concession at page 8 of the Answer Brief, Respondent agrees that the "private attorney general" provision, Section 400.023, "allowed for civil actions to enforce the resident's rights." Respondent is sticking his head in the sand in the hopes that the Court will not notice the enormity of the inconsistency of these arguments. For if enactment of Section 400.023 **was necessary**[3] to provide a civil

[3]As it must be for Respondent and amici concede that the legislature is presumed **not** to have enacted useless legislation. Williams v. State, 492 So.2d 1051 (Fla. 1986).

action, then such a private right of action did not otherwise exist. And if the private right of action did not otherwise exist, then its original scope, once created, extended only to the "resident or his guardian or ... person or organization acting on [his] behalf...." Section 400.023, Fla. Stat.; State v. Ashley, 701 So.2d 338, 341 (Fla. 1997); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Smitz v. Wright, 64 Fla. 485, 60 So. 225 (1912); Gunn v. Robles, 100 Fla. 816, 130 So. 463 (1930); City of Miami v. Cosgrove, 516 So.2d 1125 (Fla. 3d DCA 1987). See, also, page 5, infra.

The pertinence of the unrefuted history of the need to create specific private rights of action:

Respondent next notes "irony" in Petitioner's discussion of legislative history, urging that Hamilton prohibits such an approach. Respondent again misreads the Initial Brief, for Petitioner clearly stated that resort to legislative history is unnecessary but review **as Respondent urges** proves Petitioner's point:

> **Having said that the legislative history is not necessary or appropriate** in order to apply the statute ... **reference to the legislative history, as Petitioner/ Appellant (sic) insists is required**, reveals that the Legislature appreciated the correctness of Petitioner/Appellant's position: ... no right of action would exist absent express provision in the statute ....

Initial Brief at 17-18.

Respondent and amici totally fail to address the history set forth in the Initial Brief, including the report of the Committee on Health and Rehabilitative Services.

App. C at I.A. The Committee explicitly stated that the inclusion of an express cause of action was necessary **because** it might not otherwise be inferred judicially. Accordingly, it is indisputable that the legislature intended to create a private right of action that did not[4] otherwise exist. The subsequent "anomaly" is clear - the privateright of action extended only to living residents, not to personal representatives.[5] Consequently, amendment was not "useless."

Respondent's claim that the Wrongful Death Act eliminated actions:

Respondent asserts that under the 1980 version of Section 400.023, which lacked the inclusion of a cause of action for a "personal representative," the Wrongful Death Act "eliminated" Chapter 400 claims and common law negligence claims. Answer Brief at 9. Respondent suggests that nursing home residents had no cause of action for wrongful death for common law negligence unrelated to a "violation of rights" under Chapter 400. It is unnecessary to address this assertion since we are not here concerned with a common law negligence action. The important concession in

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[4]Or might judicially be construed not to ....

[5]Respondent incidentally assumes there was a survival action for violation of the Nursing Home Act. However, **no** personal representative was given a cause of action until 1986, regardless of whether a violation did or did **not** cause death. After 1986, there still was no survival action, for the legislature limited actions to instances in which a violation of the act caused the resident's death. That language cannot be ignored without rendering **it** totally useless. See, note 3, supra.

this argument is that a Chapter 400 claim was lost, as recognized by Representative Canady. The 1986 amendment was necessary to restore/create an action under Section 768.19, Fla.Stat.

The Missouri allowance of pain and suffering damages:

Respondent next argues that the Court should follow the lead of Missouri in its analysis of its own nursing home statute to permit recovery of pain and suffering. Stiffelman v. Abrams, 655 S.W. 2d 522 (Mo. 1983)(en banc). However, Respondent declines to acquaint the Court with a crucial difference in the wrongful death acts of the two states. Missouri's Wrongful Death Act has been combined with its Survival Statute so as to permit recovery of a decedent's pre-death pain and suffering without regard to whether the alleged negligence caused death.[6] Id., at 533. See also, Powell v. American Motors Corp., 834 S.W. 2d 184 (Mo. 1992). Therefore, despite substantial discussion in that case, pain and suffering damages were already available under the Missouri Wrongful Death Act.

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[6]It is difficult to glean the true issues because of the duplication of damages by the two acts. Id., at 533. The trial court, ruling that the exclusive remedy was a wrongful death action and the nursing home act provided no additional remedy, dismissed the estate's case for failure to state a cause of action. The statutes require different parties and defenses. Id., at 532 (no wrongful death action for estate or executor), 533-534 (no defense of contributory negligence in nursing home action). Despite the attractiveness of its sentiment, the reasoning of the decision does not translate easily, or at all, to this case. As noted in the Initial Brief, sentiment or compassion should not usurp the legislative will.

Respondent's misinterpretation of Representative Canady's remarks:

Respondent ignores the heart of Representative Canady's statement, "if they're abused so badly that they die, **the cause of action is lost**...." Loss of the cause of action altogether means that a wrongful death action (as well as a survival action) grounded upon a violation of the Nursing Home Act "**is lost**" and must be restored.

Liberal versus narrow construction of Chapter 400:

Respondent next argues that Irven v. Department of Health and Rehabilitative Services, 26 Fla. L. Weekly S253 (Fla. April 19, 2001) requires the Court to construe the act liberally, as a remedial statute. Such a construction, according to Respondent, requires an expansion of damages to give teeth to the Act. The Academy joins the refrain that expanded damages are necessary to enforcement of the Nursing Home Act.

The legislature knows how to assure that a statute is considered remedial in nature. Section 400.0237, Fla. Stat. (2001)(pleading requirements and burden of proof for recovery of punitive damages under 400.023). Subsection 5 states, "This section is remedial in nature ...." See, also, Sections 400.0238(5) and 768.735(3), Fla. Stat. (providing that the statutes are remedial). Section 400.023 is not described this way.

Moreover, the Coalition's cited cases reveal that the liberal construction that is to be accorded remedial statutes is in terms of assuring **access** to the remedy provided.

E.g., Golf Channel v. Jenkins, 752 So.2d 561, 566 n.4 (Fla. 2000)("we have previously resolved this tension in favor of liberally construing a remedial statute **to ensure access to the remedy**..."; addressing issue whether written notice was a condition precedent to the bringing of a whistle-blower action); Joshua v. City of Gainesville, 768 So.2d 432 (Fla. 2000)("chapter 760 is a remedial statute and requires a liberal construction to preserve and promote **access to the remedy intended**."; addressing which statute of limitations applied); Martin County v. Edenfield, 609 So.2d 27, 29 (Fla. 1992)("As a remedial act, the statute should be construed liberally **in favor of granting access** to the remedy;" addressing issue whether a statutory defense to a whistle-blower action created an exception to the act).

The assurance of access does not contradict the traditional construction of statutes in derogation of common law, by which such statutes are not construed so as to expand the **remedy** or the **nature** of the right conferred. The accommodation of the two principles of construction was recognized in Stokes v. Liberty Mutual Ins. Co., 213 So.2d 695 (Fla. 1968):

> Nolan v. Moore, [88 So. 601 (Fla. 1920)] reminds us that since the statute is remedial in nature it should be construed so as to afford the remedy clearly intended. On the other hand, it should not be extended to create rights of action not within the intent of the lawmakers as reflected by the language employed when aided, if necessary, by any applicable rules of statutory construction. (Cite omitted).

Stokes, supra, at 697, as quoted in Irven v. Department of Health and Rehabilitative Services, 26 Fla. L. Weekly S253 (Fla. April 19, 2001).

Interpretation of Section 400.023 to afford a wrongful death action **before** the 1986 amendment offends the principle that the statute should not be construed to **create additional** rights or remedies, and contradicts the legislative history showing that the legislature amended the statute in 1986 in order to provide such an action.

The Act's penalties provide ample incentive to comply absent pain and suffering damages:

In arguing that Beverly Enterprises Florida, Inc. v. Spilman, 661 So.2d 867 (Fla. 5th DCA 1995), rev.denied, 668 So.2d 602 (Fla. 1996), was wrongly decided, Respondent argues that the district court failed to consider the fact that some residents leave no survivors. This is true for all victims of all classes of wrongdoing - some have no survivors. The amendment to the Act does not hint that the legislature intended to create a class of plaintiffs whose recoveries would be expanded on account of that common reality. Moreover, Respondent and amici continue to dismiss the many other remedies in the Act which provide compliance incentive. First within the civil action context is the authorization for recovery of attorneys' fees. The Wrongful Death Act does **not** create a right to attorneys' fees. Accordingly, the Nursing Home Act creates a **financial damage** incentive even for the most technical of violations.

Further, the Act provides for punitive damages. Respondent recites a "parade of horribles" as examples of egregious actions that might result in little financial reward to the personal representative: beatings, abuse, dehydration, pressure sores. However, punitive damages create significant financial recompense and punishment for truly egregious intentional conduct.

Beyond providing for damages and fees in a civil action, the Nursing Home Act provides many other administrative and regulatory remedies including the right to present grievances to the staff or administrator of the facility, to governmental officials, or to any other person. Section 400.022(d), Fla. Stat. Invoking these administrative remedies could lead to administrative penalties, including revocation or suspension of licenses, fines, orders to increase staffing, and imposition of a moratorium on admissions. Section 400.121, Fla. Stat. It is only by ignoring these remedies, to which the private right of action is "cumulative," that Respondent can make such bold assertions as "... no survivors, so...no remedy. No remedy equals no incentive ...." Answer Brief at 32. Respondent's argument boils down to this: the entire regulatory framework is essentially useless and can only be salvaged by reading pain and suffering damages into the Act. This argument again violates the very principle that a statute should not be construed so as to render it useless, on which Respondent devotedly relies. See, note 3, supra. To the contrary, administrative and

regulatory remedies, together with attorneys' fees and, in egregious cases, punitive damages are **not** "no" remedy and "no" incentive: they are remedies and incentives - perhaps not sufficient to satisfy Respondent, but sufficient to constitute the Legislature's intended multi-pronged plan of approach to overall quality of care.

"Actual" damages are not just a decedent's pain and suffering - the Wrongful Death Act's damages are also "actual":

Respondent next argues that "actual" damages means "pain and suffering" damages. Under this reasoning, damages available under the Wrongful Death Act must **not** be "actual" damages. Respondent does not come right out and say this, because stated straightforwardly the assertion seems silly. Of course the Wrongful Death Act provides for "actual" damages: loss of support and services, loss of net accumulations; pain and suffering of the survivors - "actual" damages for "actual" losses suffered by the estate and survivors.[7] Martin v. United Security Services, Inc., 314 So.2d 765, 770 - 771 (Fla. 1975)("pain and suffering" of decedent exchanged for "pain and suffering" of survivors; punitive damages also recoverable if there are "actual" or "compensatory" damages shown).

The 2001 amendments to Chapter 400:

[7]"Actual" damages are "compensatory" damages and are contrasted with "nominal" damages, where there is no actual loss, and "punitive damages, which punish and deter. E.g., Ross v. Gore, 48 So.2d 412 (Fla. 1950).

Respondent's last argument is that the recent amendments to Section 400.023, Fla. Stat., merely "clarify" the original intent of the legislature. New language making survival damages or wrongful death damages available to the personal representative where death results from the misconduct is thus said to reveal a legislative intent to have made such an election of damages available under the former version. However, Respondent concedes that **none of the changes to Section 400.023 are to be applied retroactively**. Consequently, a provision for damages under the survival statute when a violation causes death cannot be applied retroactively.

Further, the title to the amendments to Chapter 400 demonstrates that the legislature chose not to use the term "clarify":

> An act relating to long-term care; ... **clarifying** duties of the local ombudsman councils ...defining the terms "controlling interest" and ... **providing for election of survival damages, wrongful death damages or recovery for negligence**....

The legislature used "clarify" with respect to ombudsman councils, but not with respect to Section 400.023. Many amendments to Chapter 400 are thus substantive changes, including new "provisions" in Section 400.023. These substantive changes include: giving the personal representative a right of action "regardless of the cause of death" thus creating a survival action; the choice of proceeding under the survival act, thus creating an opportunity to opt-out of survivor and estate damages;

elimination of attorneys' fees in a civil action for damages; creation of a right to attorneys' fees for residents who prevail in obtaining injunctive relief or an administrative remedy; capping those fees at $25,000; making 400.023 an exclusive remedy for all injuries and deaths for nursing home residents.

When an act is amended, the general rule is that the legislature is presumed to have intended to change its meaning. State v. Burr, 79 Fla. 290, 334, 84 So. 61, 74 (Fla. 1920). The rule's exception that an amendment may serve to clarify operates when that intention appears. Id.; Hall v. Oakley, 409 So.2d 93, 97 (Fla. 1st DCA 1982)("[W]e may assume in the absence of contrary indication that the legislature intended the amended statute to have a meaning different from that accorded to it before the amendment"), citing, Carlile v. Game and Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1977). Cf., Aetna Casualty and Surety Company v. Buck, 594 So.2d 280, 283 (Fla. 1992)(amendment of statute to omit words presumed to intend a different meaning than that accorded before amendment). Accordingly, survival damages in a wrongful death action are new.

Finally, the process of regulation is often circular; causes and effects are intermingled and interdependent. For example, shortages of staffing may make neglect more likely, yet appropriations are necessary to hire staff; civil actions may assist in enforcement yet increasing claims and large damage verdicts may drive

insurers out of the market, making collection uncertain; requiring nursing homes to have insurance may make civil damage awards collectible, but the cost of insurance may put nursing homes out of business; placing video cameras in resident rooms and permitting civil actions against individual employees may facilitate enforcement by family members, but may make individual caretakers unwilling to work in nursing homes.

The comprehensive amendments to the act reveal that the legislature addressed these multitudinous competing concerns: e.g., requiring liability insurance to assure collection of damage awards with implementation of risk management, quality assurance and a limitation of damages to attract insurers into the market (Section 400.071(12), 400.147; compare App. H at 10, 400.023(8), CS for CS for CS for SB 1202 with Section 400.023(1), Fla. Stat.); increasing required staffing with a corollary increase in appropriations (Section 400.23, App. H).

The goals of the former and current Act include, first, the assurance that Florida will have sufficient institutions to care for its growing elder population, that those institutions will be able to employ the necessary and properly trained staff in sufficient number to serve their residents, that the quality of care in the industry as a whole will thus reach and remain at an adequate level, and that, in instances of neglect or abuse, compensation will be available and collectible. In light of the interdependence of these

goals and the various provisions of the Act, it is unlikely that the Legislature intended to create such an expansion of damages absent express statement of such an intention in the former Act. Construing the former Act to do so would have a chilling effect on the competing goals of financial accountability and viability and thus ultimately availability and quality of care.

CONCLUSION

The decision should be reversed and the judgment of the trial court reinstated.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was served via regular mail on this 3August 2001on: 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.

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