IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA 32399-1925

Integrated Health Care Services, Inc.; Rikad Properties, Inc., authorized to operate Integrated Health Services of St. Petersburg; Bon Secours Health System, Inc., Bon Secours Maria Manor Nursing Center, a/k/a Bon Secours Maria Manor Nursing Care Center a/k/a Bon Secours Maria Manor Nursing Care Facility,

Petitioners/Defendants,

v.

The Estate of Albert W. Redway, by and through Pauline Lang-Redway, Personal Representative

Respondent/Plaintiff.
_____/

CASE NO: SC01-792

L.T. Case No: 2D00-2905

PETITION TO INVOKE THE DISCRETIONARY JURISDICTION OF THE COURT

Initial Brief of Petitioner

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PREFACE

This Petition arises out of a civil action filed by the Respondent (and Plaintiff below), The Estate of Albert W. Redway, by and through Pauline Lang-Redway (as the personal representative of the estate), against the Petitioner (and Defendant below), Integrated Health Care Services, Inc., et al.

In this Petition, the Petitioner shall be referred to as "the Nursing Home," or simply as "Petitioner." The Respondent shall be referred to as "Mr. Redway," the "Respondent," or the "Plaintiff." References to the record below shall be denoted by a parenthetical containing the letter "R.," followed by the page number upon which the cited material is found. The Petition also contains an Appendix and, if cited material is found within the Appendix, it will be designated by the letter "A.," followed by the page number in the Appendix where the cited material can be found. All emphasis has been supplied unless noted.

STATEMENT OF JURISDICTION

The Second District Court of Appeals, in deciding this issue in the Respondent's favor below, expressly certified the following issue to this court:

> If a plaintiff files a lawsuit seeking to enforce only those rights enumerated in section 400.022, Florida Statutes, must the plaintiff comply with the present conditions in section 766.106?

Integrated Health Care Services, Inc. v. Lang-Redway, 26 Fla. L Weekly D699 (Fla. 2nd DCA, March 9th 2001). It is significant to note, however, in this Court's consideration of the wording of this certified question, that the Complaint in question actually contained both statutory claims under Chapter 400 and common law negligence claims.

Pursuant to Article 5 §3(b)(4) of the Florida Constitution, and Rule 9.030(2)(A) of the Florida Rules of Appellate Procedure - and in light of the certification of the question raised herein by the Second District Court of Appeals - Petitioner, by and through the undersigned Counsel, respectfully petitions this Court to invoke its Discretionary Jurisdiction over this matter, and answer the certified question in the *affirmative*.

STATEMENT OF THE CASE AND FACTS

This case is before this Court on a certified question - to determine whether the presuit requirements of Chapter 766 are mandated when allegations of medical negligence (e.g., allegations that professional nurse employees failed to render adequate and appropriate medical care) are alleged (as opposed to giving "notice" under §400.023(4) through the service of the Complaint with an attached affidavit).

The Respondent's Complaint sounded in both statutory claims under Chapter 400 alleging deprivation of Mr. Redway's "resident's rights" under §400.022, Florida Statutes (1997), and common law negligence (Wrongful Death, Negligent Survival) claims, (A. 1). The allegations all sound in medical negligence - namely, the failure of the Petitioner and its Nurses/Employees to provide Mr. Redway with adequate medical care, treatment and services, and particularly so with regard to Mr. Redway's pressure sores and upper respiratory infection. *Id.* More specifically, the Complaint makes the following factual allegations:

> a) Failing to adequately assure that ALBERT W. REDWAY received adequate and appropriate health care;
>
> b) Failing to properly provide a program for the prevention of pressure sores and the treatment of such sores after they have occurred;
>
> c) Failing to properly assess ALBERT W. REDWAY for the risk of development of pressure sores;

d) Failing to properly recognize the development of pressure sores on ALBERT W. REDWAY and failing to obtain treatment for prevention of the worsening of such pressure sores;

e) Failing to protect ALBERT W. REDWAY from foreseeable harm, including but not limited to the development of pressure sores;

f) Failing to properly assess ALBERT W. REDWAY for the risk of falling;

g) Failing to adequately monitor the nutritional intake of ALBERT W. REDWAY and appropriately treat him;

h) Failing to monitor significant signs and symptoms of infection of ALBERT W. REDWAY, such as Upper Respiratory Infections;

i) Failing to provide therapeutic and rehabilitative services to maintain ALBERT W. REDWAY'S mobility and range of motion.

Id. at 22-25, ¶81, 20-27, ¶95, 32-34, ¶111).

On March 7, 2000, the Nursing Home moved to dismiss the Respondent's Complaint on several different grounds, including the Respondent's failure to comply in good faith with the statutory pre-suit notice requirements for bringing a medical malpractice action under Chapter 766. (A. 2).

The Notice of Intent was originally sent to the Nursing Home on November 15, 1999. (A. 3). The Notice stated, in pertinent part:

This notice is being sent in contemplation of the possibility that there may eventually be a decision by an appellate court that some of the

> claims of the Estate of Albert W. Redway against Bon Secours Maria Manor Nursing Center, which are outside of Florida Statutes Chapter 400, constitute medical negligence.
>
> Notwithstanding the sending of this notice, it is our client's contention: (1) that the conduct of the nursing home licensee is not subject to provisions of Chapter 766; (2) that the actions of the nursing home do not constitute medical negligence as defined by Chapter 766; and (3) that a nursing home is not a health care provider. Nevertheless, because it may be determined that Chapter 766 does apply in some fashion to claims such as this arising out of nursing homes, this notice is being sent to preserve and protect the rights of the Estate of Albert Redway.

Id.

The Nursing Home responded to the notice by serving discovery requests pursuant to §766.106, Florida Statutes (1997).[1] The Respondent however, failed to respond to the discovery requests within the statutory time frame, refused to sign authorizations to enable the Petitioner to obtain non-party records during the pre-suit investigation period, refused to provide a settlement demand during the pre-suit discovery period, and did not provide the Petitioner with any notice of her intention to pursue punitive damages during the pre-suit discovery period. On February 14, 1999, the Nursing Home denied the Notice of Intent, reserving its objections to the

[1]This Petition involves the construction of a number of Florida Statutes, some of which have been recently amended by the State Legislature, but only the "1997" revisions of the statutes in question are at issue.

Respondent's failure to comply with the pre-suit requirements of Chapter 766, Florida Statutes (1997). (A. 4).

In support of a contemplated motion for determination to be filed pursuant to §766.206(1) in which it intended to demonstrate that the presuit was not conducted in good faith, the Nursing Home also attempted to depose the Respondent's purported expert, Elaine Runnals, RN, whose affidavit was attached to both Respondent's Notice of Intent to initiate litigation pursuant to Chapter 766, and to Respondent's Complaint. (A. 1, 3). The Respondent moved for a protective order to prevent the deposition. (A. 5). The Honorable Judge David Seth Walker, sitting for Judge Quesada, heard the motion for protective order on May 9, 2000. (A. 6). The Petitioner maintained that it was necessary to take Ms. Runnals' deposition in order to prove that Respondent had not complied in good faith with the pre-suit requirements of Chapter 766. Judge Walker apparently did not address these arguments, instead issuing the Protective Order because he believed that the medical malpractice pre-suit requirements were "unconstitutional." (A. 7).

In the argument at the hearing on its Motion to Dismiss, Petitioner maintained that a good portion of Respondent's claims in the statutory and common law actions constituted "medical negligence" (e.g., the allegations relating to the failure to provide

adequate medical care and to properly treat the Respondent's pressure sores) and that the Complaint should thus be dismissed due to the Respondent's failure to comply with the pre-suit requirements of Chapter 766. The Trial Court, however - insisting that it had to stay consistent with its rulings on this issue in other cases - ruled that the pre-suit requirements of Chapter 766 do not have to be met in nursing - home cases like the one at bar, and thus denied the Motion to Dismiss and/or Strike. (A. 8 pp. 29-30). Judge Quesada made no distinction between statutory actions based on a violation of resident's rights and those based on common law negligence actions.

On June 23, 2000, the Trial Court entered an Order which denied the Nursing Home's Motion to Dismiss and/or Strike, and ruled that the personal representative of the estate of a nursing home resident does not have to meet the Section 766.106 pre-suit requirements for medical malpractice *under any circumstances*. (A. 9).

The Nursing Home filed a Writ of *Certiorari* in the Second District Court of Appeals, and after requesting supplemental briefing on the issue of whether the term "health care provider" should be defined using the definition set forth in §768.50(2)(b), the Second District held that Respondent was not required to comply with Chapter 766. *Integrated Health Care Services, Inc., v. Redway*, 26 Fla. L. Weekly D699 (Fla. 2nd DCA, March 9, 2001). While the Complaint in the instant case contained separate counts under Chapter 400 and common law negligence (Wrongful

Death and Negligent Survival claims), the Court certified the question as to whether a party filing an action only seeking enforcement of violations of rights under Chapter 400 was required to comply with Chapter 766.

SUMMARY OF ARGUMENT

The purpose of the medical malpractice statute is to promote the settlement of meritorious medical malpractice claims at an early stage so as to avoid the advent of a full blown adversarial hearing. In conjunction with this, the pre-suit requirements of Chapter 766 compel claimants in cases arising out of medical care or treatment to conduct reasonable and diligent inquiry into the merit of their claims and put potential defendants - whoever they may be - on notice of claimant's intent to initiate such litigation. A Nursing Home Facility which employs state-licensed nurses and other "health care providers" to provide medical care and services to its residents, should be entitled to the statutory protections found in the Medical Malpractice Reform Act when it is named as a defendant in such a suit.

The Petitioner respectfully submits that a claimant who styles her action as if it was being brought under Chapter 400 and general negligence principles - when in fact the action is grounded upon factual allegations involving the rendering of medical care by a licensed health care provider - ostensibly establishes a claim for "medical

malpractice," and then must comply with the pre-suit requirements found in Chapter 766. In the instant case, the allegations which constitute "medical malpractice" are not only found in Respondent's two Chapter 400 claims, but also in her Wrongful Death and Negligence Survival Claims.

The Respondent correctly asserts that a Nursing Home Facility is not specifically defined as a "health care provider" under §766.102, but inaccurately concludes from that premise that she does not have to comply with the pre-suit requirements of Chapter 766 in any case in which a nursing home is a defendant. This argument has been considered and rejected by a number of courts, including this Court, which have found that compliance with Chapter 766 is mandatory where there are claims of medical negligence of a health care provider or where there are allegations of vicarious liability for the acts of professional nurse employees. There is no real "presuit" notice in Chapter 400 - the first "notice" required under §400.023(4) is with the service of the Complaint.

Requiring claimants - like the Respondent here - to comply with Chapter 766 will not unreasonably limit or deny such claimants access to the courts, and in fact, will work to prevent and discourage Chapter 400 claimants from shrouding medical malpractice claims into simple common law/statutory claims, just to be able to circumvent pre-suit requirements found in Chapter 766. Here, the gravamen of

Respondent's Complaint is found in the Petitioner's failure to provide adequate medical care. As such, the notice requirements of Chapter 766 should be applicable to all her claims that either involve medical negligence or otherwise seek to scrutinize the professional judgment or attention provided by a health care provider. This is especially true in the Counts in her Complaint which are not based on a violation of the resident's rights found in §400.022 and brought under the civil remedy provisions of §400.023, but which are in fact based on a common law negligence theory arising from the actions of statutory health care providers (e.g., professional nurse employees who are statutory health care providers).

Additionally, the new, quite specific and detailed changes in the statute on this issue certainly support that the "notice" requirement originally set forth in §400.023(4) was not intended to supplant the presuit notice requirements of Chapter 766 in cases involving medical negligence and/or vicarious liability.

Finally, this Court should apply the plain language of Fla. Stat. 766.106(2) which quite specifically requires "notice" be given in all cases involving medical negligence - including those involving health care providers. This Court should review and/or expand upon its holding in *Weinstock v. Groth*, 629 So.2d 835 (Fla. 1993), finding that all prospective medical malpractice defendants - including "health

care providers" - must be given the proper notice as set forth in Chapter 766. Indeed, the Legislature's use of the words "and if" in the Statute specifically contemplate two different factual situations: one in which the medical malpractice defendant is a "health care provider" licensed under the referenced authorities; and one in which a prospective medical malpractice defendant is not licensed.

Thus, defendants such as the Nursing Home here are entitled to the protections of Chapter 766, and compliance is appropriate and logical in light of the statute and applicable case law.

ARGUMENT

The Home's argument here is quite simple. In her Complaint, the Respondent alleges that the Home's professional nurse employees deviated from the prevailing professional standard of care in providing medical care or treatment which establishes a "claim for medical malpractice," as that term is defined by §766.106(2) Florida Statutes (1997). To describe this alleged failure in both the statutory and common law actions as a failure to provide "adequate and appropriate health care" does not render the presuit provisions of Chapter 766 or the underlying policies inapplicable. As a result, the Respondent *should* have been required to comply with the pre-suit

requirements of Chapter 766, and the Trial Court *should* have dismissed the Respondent's action for lack of jurisdiction.[2]

I. A PLAINTIFF WHO ASSERTS A CLAIM UNDER §400.023(1) OF THE FLORIDA STATUTES AND SETS FORTH FACTUAL ALLEGATIONS WHICH ESTABLISH A CLAIM FOR MEDICAL NEGLIGENCE MUST COMPLY WITH THE STATUTORY REQUIREMENTS OF CHAPTER 766, WHICH GOVERNS PRE-SUIT PROCEDURES IN ALL SUCH DIRECT OR VICARIOUS CLAIMS.

Courts in Florida have quite uniformly found that the primary purpose of Chapter 766 is to "promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding." *Cohen v. Dauphinee*, 739 So. 2d 68, 71 (Fla.1999). As the Fifth District stated in *Pavolini v. Bird*, 769 So.2d 410 (Fla. 5th DCA 2000):

> [A]ll of the pre-suit requirements [of Chapter 766] have at least two purposes. The first is to force the claimant to conduct an investigation of the suspected malpractice and the defenses which may be asserted. The burden is on the medical malpractice claimant to make a "reasonable investigation" to determine that there are grounds for a good faith belief that there has been negligence. The second purpose is evaluation and

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[2]In *Berry v. Orr*, 537 So.2d 1014(Fla. 3rd DCA 1989), the Third District noted that a claimant's failure to comply with the statutory requirements of section 768.57, Florida Statutes (1985), deprived the trial court of jurisdiction in that case, and it thus issued a "writ of prohibition" remanding the case back to the trial court for dismissal. *Id.* at 1015. To the extent that this court believes that "prohibition" is the appropriate remedy in this sort of case, the Petitioner would respectfully request that it be considered as an alternative remedy here.

> settlement. Once the claimant's investigation is complete, §766.106(2) requires that the claimant serve all potential defendants with a notice of intent to initiate litigation. It is then incumbent upon the potential defendants to evaluate the claim.

Id. at 411.

As the Court in *Pavolini* notes, once a malpractice defendant is able to evaluate the purported claim, the defendant will have four options, each of which carry its own risks: 1) the defendant may simply *reject* the claim as unfounded; 2) the defendant can make a settlement offer of some type or amount; 3) the defendant may *admit* liability, but submit the amount of the claim to arbitration to determine damages within certain parameters; or 4) may simply make no response at all. *Id.* at 412.

The notice requirements of §766.106(2) are inextricably intertwined into the fabric of the overall statutory scheme, which is *designed* to weed out *meritless* medical malpractice claims - and promote the prompt resolution of *valid* claims. *Id.* Through the Act, the Legislature expressed its intent to "provide a plan for prompt resolution of medical negligence claims," and the plan consists "of two separate components - a pre-suit "investigation" and "arbitration." Fla. Stat. §766.201(2) (1997). While participating in the arbitration component of the Act is voluntary, the Pre-suit investigation is *mandatory*. Thus, the notice requirements of §766.106(2) cannot be considered in isolation, because they are directly related to the pre-suit investigation requirements contained in §766.203.

The requirements of a pre-suit investigation appear to apply to "all medical negligence" claims and defenses. Fla. Stat. §766.203(1) (1999). The pre-suit investigation portion of the statute requires that:

> [p]rior to issuing notification of intent to initiate medical malpractice litigation pursuant to §766.106, the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that: (a) [a]ny named defendant in the litigation was negligent in the care and treatment of the claimant; and (b), [s]uch negligence resulted in injury to the claimant."

§ 766.203(2)(a),(b), Fla. Stat. (1999).

A claimant under Chapter 766 is defined as "any person who has a cause of action arising from medical negligence." Fla. Stat. §766.202(1) (1999). Section 766.104(1) provides that "[n]o action shall be filed for personal injury or wrongful death arising out of medical negligence, whether in tort or contract, unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for good faith belief that there has been negligence in the care or treatment of the claimant. The complaint or initial pleading shall contain a certificate of counsel certifying that such reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant." *Id.*

A. A Nursing Home Facility Should be Entitled to the Protections of the Pre-Suit Notice Requirements of the Medical Malpractice Statute if the Allegations in the Complaint Seek

to Hold the Facility Vicariously Liable for the Medical Malpractice of its Employees or Agents

The Respondent here has maintained that she should not be required to comply with Chapter 766, simply because "nursing homes" are not specifically defined as "health care providers" under §766.102. (A. 6). This argument has been considered and rejected by several different courts, including this Court, and the Second District Court of Appeal - the Court from which this Petition has arisen. *See, e.g., NME Properties, Inc. v. McCullough,* 590 So. 2d 439, 441 (Fla. 2nd DCA 1991); *Pinellas Emergency Mental Health Services, Inc. v. Richardson*, 532 So. 2d 60 (Fla. 2nd DCA 1988); *Linkemar v. Health Care & Retirement Corp. of America,* 1999 WL 984428 (S.D. Fla. 1999).[3] *Cf. Preston v. Health Care Retirement Corp. of America*, 26 Fla. L. Weekly D919 (Fla. 4th DCA, April 4, 2001) and *Redway*.

In *NME*, the Court explained just how a nursing home *could* be entitled to the protections of Chapter 766:

> Although a nursing home is not itself a health care provider for purposes of section 766.102, it may be vicariously liable under that higher standard of care for the acts of some of its agents or employees. For

[3]It should be pointed out that the recent passed legislation on Chapter 400, and more particularly, the "new" Section 400.0233 (2001) now expressly provides Nursing Home Facilities (like the one Petitioner operates here) with statutory prerequisites which are virtually identical or remarkedly similar to those contained in Fla. Stat. §766.106. In so doing, the Legislature has finally made it clear that it intends for Nursing Home Facilities to receive the same sort of pre-suit protections as do hospitals, and the doctors and nurses who work within them.

> example, East Manor probably employs nurses who are licensed under chapter 464. Under *respondeat superior*, East Manor may be liable under the higher professional standard of care when its agent, who is actively involved in the incident, is a health care provider rendering medical care or service. On the other hand, East Manor may be liable under an ordinary negligence standard of care when other nonprofessional employees commit alleged negligence, or when an incident does not involve medical care.

Id. at 440.

In approving the Second District's decision of *NME*, this Court in *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993), also explained just how the broad sweep of the pre-suit protections of Chapter 766 might be afforded to potential employer-defendants such as Petitioner here. As Justice Kogan stated:

> It is equally clear that under the doctrine of *respondeat superior*, an employer of a health care provider also may be a "prospective defendant" in a medical negligence action, even if the employer does not fall within the statutory definition of health care provider. As noted by the *McCullough* court, such a defendant may be vicariously liable under the professional medical negligence standard of care set forth in section 766.102(1) when its agent or employee, who is a health care provider, negligently renders medical care or services. 590 So.2d at 441. Thus we agree with the *McCullough* court that the proper test for determining whether a defendant is entitled to notice under section 766.106(2) is whether the defendant is directly or vicariously liable under the medical negligence standard of care set forth in section 766.102(1).

Id. at 838.

The pre-suit requirements of Chapter 766 are a condition precedent to any claimant filing a medical malpractice action in this State, and under well established Florida law, they apply to any defendant who is alleged to be liable, either vicariously or directly, for claims arising out of the rendering of, or failure to render, medical care or services.

A good number of appellate cases support this position.

For example, in *Pinellas Emergency Mental Health Servs., Inc. v. Richardson*, 532 So. 2d 60 (Fla. 2nd DCA 1988), the Second District had to decide whether a provider of mental health emergency services was entitled to the protections afforded by the medical malpractice pre-suit requirements. Although the mental health provider in that case was not specifically defined in the medical malpractice statutes as a "health care provider," the Second District Court held that it was entitled to pre-suit notice because the mental health emergency services it provided were also regularly provided in a hospital - and a hospital is defined as a "health care provider" under the Act. 532 So. 2d at 62.

Similarly, in *Barfuss v. Diversicare Corp. of America*, 656 So. 2d 486 (Fla. 2nd DCA 1995), *disapproved on other grounds, H.B.A. Management, Inc, v. Estate of Schwartz,* 693 So. 2d 541 (Fla. 1997), the Second District Court was called on to address various issues in a case filed against a nursing home in which the plaintiff had

asserted various claims of negligence and violations of the nursing home statute. In *Barfuss*, the Court specifically noted that Chapter 766's requirements might be applicable to some of the actions complained of by the plaintiff in that case - namely, the "allegations of failure to treat pressure ulcers properly and to keep [the plaintiff's] catheter bag free from leakage indicate the necessity of the services of a health care professional." *Id.* at 487.

The broad scope of Chapter 766 was also illustrated in *NME Hospitals, Inc. v. Azzariti*, 573 So. 2d 173 (Fla. 2nd DCA 1991), in which the Court held that the pre-suit requirements of Chapter 766 applied in a suit against a hospital being sued for product liability. Rejecting the contention of the plaintiffs in that case that, "compliance is not required as the suit alleges causes of action based on strict or product liability theories," the Second District reasoned that if a defective product at issue was alleged to have been used in providing *medical services*, the suit was for *medical malpractice* - regardless of what "title" the plaintiffs assigned to their claim, and because it had been asserted against a hospital - which is a "health care provider" under the medical malpractice statute. *Id.* at 173. In the case at bar, Respondent has attempted to merely assign her statutory and negligence claims the "title" of claims for failure to

provide adequate and appropriate health care in an obvious attempt to circumvent the presuit requirements of Chapter 766.

Comparatively, a related issue was recently addressed in *First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189 (Fla. 4th DCA 1999). The plaintiff in that case alleged certain violations of §400.022, including the defendant having allowed the resident to wander from the facility, of failing to employ adequate alarms to prevent such occurrences, and of failing to have adequate staff to provide supervision. *Id.* at 1191-92. The Fourth District Court applied the test set out in *McCullough* (i.e., the same test adopted later in *Weinstock)*, and determined that the defendant in that case was not entitled to the statutory prerequisites - because the "gist of plaintiff's complaint, and the substance of his proof in that case did not "involve **any** issue "regarding medical diagnosis or treatment." *NME*, 590 So. 2d at 441 (emphasis supplied). In contrast, the Complaint in the case at bar presents issues "regarding medical diagnosis are treatment" such as a failure to provide care and treatment of wounds, a function recognized by the *Barfuss* court as falling directly within the province of medical care or treatment.

Just as recently, the United States District Court for the Southern District of Florida distinguished *Hamilton,* and in doing so determined that the pre-suit requirements of Sections §766.106 and §766.203 were applicable to the complaint in

that case - which also asserted various violations of §400.022. See *Linkemar v. Health Care & Retirement Corporation of America*, 1999 WL 984428 (S.D. Fla. 1999). In *Linkemar*, the plaintiff, as personal representative of the estate of a nursing home resident, filed an action under Chapter 400, in which it was alleged that the defendant:

> - failed to provide timely medical attention and to respond to the plaintiff's medical conditions, including fecal impactions, and her nutritional and proper cleaning requirements, and
>
> - failed to prevent, recognize and treat the plaintiff's severe lower back condition, fecal impaction, and skin rashes.

The District Court noted that *Hamilton* was inapposite, as the allegations which were contained in the complaint in *Hamilton* had not involved issues regarding *medical diagnosis* or *treatment*. Indeed, in stark contrast to *Hamilton*, the plaintiff in *Linkemar* had specifically alleged inadequacies in the medical treatment which had been received by the deceased nursing home resident in that case. Accordingly, the Court in *Linkemar* held that the pre-suit requirements of §766.106 and §766.203 were applicable to the claims brought under §400.022, and dismissed the action without prejudice for failure to satisfy those pre-suit requirements. As such, it appears as if the test for determining whether a Chapter 400 claimant should have to comply with the statutory requirements of Chapter 766 - is whether the allegations contained within

the subject Complaint arise out of a failure to provide adequate medical care, and are directed against a defendant who could be held directly or vicariously liable for that failure. *See Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993), *NME Properties, Inc. v. McCullough*, 590 So. 2d 439, 441 (Fla. 2nd DCA 1991). *See also Kelley v. Rice*, 670 So. 2d 1094 (Fla. 2nd DCA 1996) (simple negligence claim could be maintained against a sheriff for breach of his custodial obligations to the plaintiff, although medical negligence claim was barred by shorter limitations period); *Paulk v. National Medical Enterprises, Inc.,* 679 So. 2d 1289 (Fla. 4th DCA 1996) (holding that claim against hospitals alleging that they had defrauded patients by extending their hospitalization to exhaust their insurance was governed by medical malpractice statute of limitations because the plaintiffs could not prove their claims without adducing evidence of the medical necessity of their hospitalization); *Tunner v. Foss*, 655 So. 2d 1151 (Fla. 5th DCA 1995) (quashing trial court's order denying dismissal of claim for failure to comply with pre-suit notice and screening requirements of §766.106, and ruling that a claim which alleged that a doctor refused to refer a patient to a specialist or admit the patient to the hospital due to the doctor's own economic self-interest was a claim for medical malpractice); *O'Shea v. Phillips*, 746 So. 2d 1105 (Fla. 4th DCA 1999) (holding that Chapter 766 pre-suit requirements apply to a claim that a health-care facility negligently supervised an employee who sexually assaulted

a patient - because the claim was for medical malpractice - as opposed to a theory of negligence apart from medical malpractice).

In sum, it is now clear that under Florida law, any person or entity, including a nursing home, may be entitled to the protections of the pre-suit notice requirements of the Medical Malpractice Reform Act when a claimant seeks to hold them directly or vicariously liable for acts arising out of the rendering of, or failure to render, medical care or services. *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993), *NME Properties, Inc. v. McCullough*, 590 So. 2d 439, 441(Fla. 2nd DCA 1991), *Barfuss v. Diversicare Corp. of America*, 656 So. 2d 486, 487 n. 2 (Fla. 2nd DCA 1995), *disapproved on other grounds H.B.A. Management, Inc. v. Estate of Schwartz,* 693 So. 2d 541 (Fla. 1997); *Linkemar v. Health Care & Retirement Corporation of America*, 1999 WL 984428 (S.D. Fla. 1999).

Here, the Respondent has alleged in her Complaint that the nurse-employees employed by the Nursing Home committed acts which constitute "medical malpractice" under Florida law, and as such, she should have been required to comply with the requirements of the Medical Malpractice Reform Act. Her failure to comply with these requirements deprived the Trial Court of jurisdiction over her claim, and the case should therefore, have been dismissed.

B. The Respondent has Sought to Disguise Her "Medical Malpractice" Claim As a Simple Negligence Claim Or a Claim Under Chapter 400, And is Attempting to Submit the Case to the Jury Without having to Provide Expert Testimony Typically Required in Medical Negligence Cases.

Upon reviewing some of the allegations included within the Respondent's Complaint, one can easily see how they establish a "claim for medical malpractice," as that term is defined in §766.106(1)(a) (i.e. as "a claim arising out of the rendering of, or the failure to render, medical care or services").

Essentially, the Respondent's Complaint seeks here to impose vicarious liability on the Petitioner for the failure of its state-licensed nurses and other employees to render adequate medical care and treatment to Mr. Redway while he was a resident at the Petitioner's facility. For example, in her Complaint the Respondent alleges:

A. That the Petitioner employed **licensed professionals**; hired, supervised and or controlled **licensed professional** as consultants; and employed unlicensed persons to provide care and services to residents at BON SECOURS MARIA MANOR NURSING CARE CENTER, including Mr. Redway. (Comp. ¶¶ 84).

B. That the Petitioner owed a duty to residents, including Mr. Redway, to hire, train, and supervise employees, both **licensed** and unlicensed so that such employees delivered care and services to residents in a safe and beneficial manner. (Comp. ¶¶ 86 and 101).

C. **Licensed employees** and consultants of the Petitioner owed a duty to residents (including Mr. Redway) to care for and treat them according to accepted standards of care for **similar professionals in Florida and similar communities**. (Comp. ¶¶ 87 and 102).

D. That the Respondent and its employees and consultants breached their *common law duties* as set forth above when it violated the rights of Mr. Redway as set forth in §400.022 Florida Statutes. (Comp. ¶¶ 94 and 109).

In addition to the above, in Paragraph 35 of her Complaint, the Respondent specifically alleges that:

> The Nursing Home was required to have sufficient nursing staff on a twenty four hour basis to provide nursing and related services to residents in order to maintain the highest practicable, physical, mental and psychosocial well being of each resident as determined by resident assessments and individual plans of care.

The Respondent also alleges (in paragraph 79 of her Complaint) that the Petitioner is liable for the acts and omissions of all persons or entities under its control, either direct or indirect, including its employees, agents, consultants and independent contractors, whether inhouse or outside entities, individuals, agencies or pools.

Ultimately, the Respondent alleges that Mr. Redway died because the Petitioner's nursing personnel failed to properly provide him with adequate and appropriate health care (¶94(a)); failed to maintain accurate medical and /or clinical records which contain sufficient information to justify the diagnosis and treatment and to accurately document the results, including at a minimum documented evidence of

assessments of the needs of the resident, of establishment of appropriate plans of care and treatment, and of the care of the services provided (¶ 94(i)); failed to appropriately monitor Mr. Redway and recognize significant signs and symptoms of the change in his health condition (such as those which were alleged to have occurred immediately following an undocumented fall or drop from the Hoyer Lift) (¶94(k)); failed to protect Mr. Redway from developing pressure sores (¶94(m)); failed to adequately monitor his nutritional intake and treat him appropriately (¶94(s)); failed to monitor significant signs and symptoms of infection such as Upper Respiratory Infections (¶94(t)).

As a result of all this, the Respondent alleges that Mr. Redway suffered "unexplained injuries" and ultimately died. ¶95. Therefore, although the Respondent's action is masked as one for common law and statutory negligence, it is, in all actuality - a *medical malpractice* case. As such, the notice requirements of the Medical Malpractice Reform Act should have been applicable - because the gravamen of Respondent's Complaint is found in the Nursing Home's (and its nurse-employees) alleged failure to provide Mr. Redway with adequate *medical care*.

In *NME,* the Second District warned against permitting against the disguise of

what was ostensibly a medical negligence claim as one for "simple negligence," and that such a tactic is not appropriate. 590 So. 2d at 441. It reiterated the same concern noted in *Feifer v. Galen of Florida, Inc.*, 685 So. 2d 882 (Fla. 2nd DCA 1996), stating:

> We would caution Plaintiffs in those actions where they allege that a medical care provider has committed an act of ordinary negligence that they will not be allowed, in presenting their case, to slide back and forth between the standards of care and proof required to show ordinary negligence as opposed to medical negligence.

Id. at 885 (holding that plaintiff did not have to comply with pre-suit notice requirements in ordinary slip and fall claim against a hospital).[4] Yet here, the Respondent appears to have acknowledged the necessity for expert testimony by attaching the expert affidavit of Elaine Runnals to the Complaint. If her claim is not one for medical negligence, a medical expert is unnecessary. If a medical expert is necessary because the claim involves criticisms of professional judgment of the Petitioner's licensed health care providers, or simply involves claims of medical negligence, the medical malpractice provisions apply.

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[4]This appears to be what has happened in this case. Put simply, the Respondent here seeks to hold the Nursing Home liable for acts which constitute "medical malpractice," without having to meet the more stringent standards of proof for medical malpractice by disguising her claims as nothing more than a violation of the nursing home statute. This approach exalts "form" over "substance," and does not give the proper respect or effect to the statutory requirements in question.

Since the Respondent's lawsuit ostensibly alleges a claim arising out of the rendering of, or failure to render, medical care or services, and the Respondent has failed to comply with the pre-suit requirements of Chapter 766, the Trial Court erred as a matter of law when it refused to dismiss the Respondent's Complaint, and the Second District departed from the essential requirements of law when it approved that decision.

C. Section 400.023(4) - Which Only Requires an Affidavit to Accompany a Complaint When a Plaintiff Alleges a Failure to Provide Adequate and Appropriate Health Care - Is Not a "Presuit Requirement" Intended to Replace the Presuit Requirements of Chapter 766.

§400.023(4) Florida Statutes (1993) states in pertinent part as follows:

> Claimants alleging a deprivation or infringement of adequate and appropriate health care… which resulted in personal injury to or the death of a resident, shall conduct an investigation which shall include a review by a licensed physician or registered nurse familiar with the standard of nursing care for nursing home residents pursuant to this part. Any Complaint alleging such a deprivation or infringement shall be accompanied by a verified statement from the reviewer that there exists reason to believe that a deprivation or infringement occurred during the resident's stay at the nursing home.

Respectfully, there is no adequate legal support for the Second District's "first impression" decision in *Redway* that §400.023(4) was intended to be equivalent to or replace the presuit requirements of Chapter 766. *See also Preston v. Health Care Retirement Corp. of America*, 26 Fla. L. Weekly D919 (Fla. 4th DCA, April 4, 2001).

Other than requiring an affidavit, the two statutes have nothing in common. §766.106(7) allows for an informal exchange of information, including but not limited to unsworn statements, production of documents, and physical and mental examinations. Under §400.023(4), there is no informal exchange of information prior to filing suit. The required affidavit is the only information available to a prospective Defendant.

Further, under §766.106(3)(b) a Defendant is to admit liability, elect arbitration, and cap the damages thereby eliminating punitive damages. See §766.106(3)(b) and §766.207(7). Under §400.023(4) a Defendant has none of the above options.

In an attempt not to oversimplify the obvious, one of the main purposes of the presuit provisions of Chapter 766 is for the prospective parties to evaluate and settle claims prior to filing suit. See *Pavolini v. Bird,* 769 So. 2d 410 (Fla. 5th DCA 2000). Simply put, §400.023(4) is not a "presuit" condition but rather a condition precedent to filing a Complaint alleging a failure to provide adequate and appropriate health care. Moreover, §400.023(4) is triggered only when a claimant alleges a failure to provide adequate and appropriate health care which is only one of twenty two enumerated resident's rights found in §400.022.

The Petitioner suggests that the reason why §400.023(4) was added to Chapter 400 was to bring some workable definition of "adequate and appropriate health care."

Since adequate and appropriate health care is an extremely vague phrase, the Legislature believed that requiring a claimant to secure an affidavit from a registered nurse or physician would alleviate the vagueness and shed some light on its meaning. That is why the affidavit requirement only applies when claimants allege a failure to provide adequate and appropriate health care.

It is also interesting to note that in the last Legislative session, the Legislature in the newly created section §400.0233 (2001) (titled "Presuit notice; investigation; notification of violation of resident's rights or alleged negligence; claims evaluation procedure; informal discovery; review") created a detailed presuit notice requirement which the legislature developed to truly replace the presuit provisions of Chapter 766. The language of this Amendment can serve to help determine the meaning of the prior statute.[5]

This newly created section is virtually identical to the presuit provisions of Chapter 766 in that it provides for:

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[5]The legislature's subsequent amendment of a statute may properly be used to ascertain the legislative intent behind an earlier version of the statute. *See Burgos v. State*, 765 So.2d 967 (Fla. 4th DCA 2000) (citing *Palma Del Mar Condominium Ass'n No. 5 of St. Petersburg, Inc. v. Commercial Laundries of West Florida, Inc.,* 586 So.2d 315, 317 (Fla.1991) (noting "courts may consider subsequent legislation to determine the intended result of a previously enacted statute"); *Lowry v. Parole & Probation Comm'n,* 473 So.2d 1248, 1250 (Fla.1985); *Gamble v. State,* 723 So.2d 905, 907 (Fla. 5th DCA 1999) (stating "our courts have a duty to consider subsequent legislation in arriving at a correct interpretation of a prior statute").

1) Presuit notice prior to filing suit

2) Prohibits the filing of suits for specified periods of time

3) Requires a response to the notice

4) Tolls the statutes of limitations

5) Limits the liability of presuit investigation participants

6) Authorizes the obtaining of the opinion from a nurse or doctor, and

7) Authorizes informal discovery such as the obtaining of unsworn statements and discovery of relevant documents.

The only significant difference between §400.0233 (2001) and the presuit provisions of Chapter 766 is that under §400.0233 the presuit time period to conduct an investigation and informal discovery was shortened to 75 days as opposed to 90 and under §400.0233, prospective Defendants cannot elect arbitration, cap damages, and thereby eliminate punitive damages. (The Legislature limited the amount of punitive damages a claimant can recover against a nursing home pursuant to the newly created section §400.0237 (2001), titled "Punitive damages; pleading; burden of proof").

Further, the Legislature recognized the fact that many, if not all, claims leveled against nursing homes contain factual allegations directed to the acts or omissions of professional nurses employed by the nursing homes. As such, the Legislature

amended §400.023 and created in §400.023(4) a professional standard of care requirement for all nurses licensed under Part I of Chapter 464. Newly created §400.023(4) reads as follows:

> In any claim for resident's rights violations or negligence by a nurse licensed under Part I of Chapter 464, such nurse shall have the duty to exercise care consistent with the prevailing professional standard of care for a nurse. The prevailing professional standard of care for a nurse shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances is recognized as acceptable and appropriate by reasonably prudent similar nurses.

The Second District's Opinion in the above matter was premised, in part, on a belief that §400.023(4) Florida Statute 1997 was a separate presuit investigatory requirement for cases under Chapter 400. Respectfully, in reviewing the above and the newly created sections of Chapter 400, specifically §400.0233 (2001), it seems appropriate to conclude that the original version of §400.023(4) was not intended to constitute a "presuit" procedure at all, or to otherwise supplant the more specific, "true presuit" notice requirements of Chapter 766.

Last, the Second District cited to §400.023(3) Florida Statute, (1997) to support their opinion that Chapter 400 now contained significant restrictions on a claimant's ability to allege vicarious liability for the actions of a health care provider. Further, the Second District Court stated "the same year [this court] decided *Weinstock,* the

legislature amended §400.023 implying that a Complaint filed exclusively under Chapter 400 is not intended to invoke the presuit conditions of Chapter 766."

The fact, however, that newly created §400.023(5) Florida Statute (2001) is virtually unchanged is a clear indication that the 1993 amendment adding §400.023(3) did not imply that a Complaint filed exclusively under Chapter 400 was not intended to invoke the presuit provisions of Chapter 766.

The Respondent should have been required to comply with the presuit requirements of Chapter 766 here. The Respondent alleges that the Petitioner is liable for medical negligence and thus, the Court should also answer the certified question in the affirmative, requiring compliance with the presuit notice requirements for Chapter 766. Thus, this Court should reverse and remand the decision of the Second District Court of Appeals.

D. In Light of the Specific Language Found in §766.106(2) Fla. Stat. (1997), The Court Should Find *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993) To Require Compliance With Chapter 766 in All Cases Involving Medical Negligence (Including Those Involving "Health Care Providers")

The plain language of §766.106(2) requires the presuit notice in all cases involving medical negligence. It provides in relevant part

> After completion of the presuit investigation pursuant to s. 766.0203 and prior to filing a claim for medical malpractice, a claimant shall notify

> each prospective defendant and, if any prospective defendant is a health care provider under [the enumerated statutes] ..., the Department of Business and Professional Regulation by certified mail, return receipt requested, of the notice of intent to initiate litigation for medical malpractice .....

(Underline supplied).

This Court, in *Weinstock v. Groth,* 629 So.2d 835 (Fla. 1993) concluded that the notice requirements of the [Medical Malpractice Reform] Act applied where the defendant was a "health care provider" as defined in Chapter 766. *Id.* at 835-36. The statute specifically requires that the notice requirements must be complied with in all cases involving medical negligence (whether or not the defendant is a health care provider).

Indeed, by the statute's express language, the "notice" requirements of §766.106 should apply to all medical malpractice actions – not, just as the Court held in Weinstock - only to those actions in which a "health service provider" is identified as a "potential defendant." *Id*. Thus, while *Weinstock* actually supports the position of the Nursing Home here - holding that defendant health care providers such as the professional nurse employees of the Nursing Home here are entitled to the protections of Chapter 766 - it should be reshaped in accordance with the specific language of §766.106(2) to apply to all potential defendants who are subject to claims for medical

negligence. A review of §766.101 and §766.102 illustrate the need for clarification of this Court's holding.

§766.106(1)(a) specifically defines a "claim for medical malpractice" – as that term is used in that section – as a "claim arising out of or the rendering of, or the failure to render, medical care or services." It is important to note - at the outset - that §766.106(1)(a) does not even *refer* to the term "health care provider"- nor require that defendant be one in order for a particular claim to be characterized as one for "medical malpractice." The definition, and the notice provisions invoked by a claim which satisfies that definition – specifically include any claim which arises out of a potential defendant's "rendering of medical services." The statute is clear on its face, and contains no requirement whatsoever that the defendant be a "health care provider" as that term may be discussed or defined in *other* sections of the Medical Malpractice Reform Act. The limitation that the notice only be required for defendants who are "health care providers" is unduly restrictive and seeming contradictory to the specific language of §766.106(2).

The language in §766.106(2) expressly provides for two different situations – one in which the prospective defendant" is a "health care provider," and one in which it is not. In an action filed against a member of the latter group, only the individual

defendant is entitled to the notice. *Id*. In a suit in which a prospective defendant is a "health care provider," the Department of Health must also be notified. This grammatical reality cannot be disputed, and it should not have been ignored or summarily dismissed by the Court. Following the specific language of the statute also requires disapproving cases such as *Preston v. Health Care Retirement Corp. of America*, 26 Fla. L. Weekly D919 (Fla. 4th DCA, April 4, 2001).[6]

In fact, the Legislature – through its purposeful use of the words "and, if" in §766.106(2) expressly acknowledged the fact that not every "malpractice action" (which requires notice) will be filed against a "health care provider" licensed under the referenced authorities. The Legislature obviously utilized the words "and, if," because it knew that there would be instances where an act of "medical malpractice" – as it is specifically defined by this section – could be committed by someone who was not a "health care provider licensed under (the referenced statutes).[7]

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[6] *Preston* is distinguishable on its facts, since that case involved a claim made only under Chapter 400. Here, the claims sound in statutory and common law negligence (e.g., Wrongful Death, Negligent Survival claims). Second, as shown herein, §766.106(2) is clear on its face and applies to any defendant being sued for medical negligence. §400.023(4) was certainly not intended to be a vehicle by which a party could plead a medical negligence case and yet avoid the statutory requirements of Chapter 766 merely because the defendant was a nursing home. As noted above, the "notice" requirements in Chapter 400 are not "presuit requirements" as required by Chapter 766. There is no presuit notice - the only notice that is required to be received is with the service of the Complaint.

[7] As an example (and there could be others), consider the following. A renowned New York heart surgeon – not licensed in Florida – comes to the state

In light of the Legislature's use of the words "and, if," the first portion of §766.106(2) of the statute specifically contemplates situations in which a defendant in a "medical malpractice" action would not be a licensed "health care provider." The express language the Legislature used in the statute provides for two different factual situations. The first, is identified in the clause before the critical words, "as, if," and occurs where the medical malpractice defendant is not a "health care provider licensed under [the referenced authorities]." In such a case, only the medical malpractice "defendant" needs to be notified under the Statute. In the second type of situation (i.e., "and, if" the defendant is a licensed health care provider), the claimant must also notify the Department of Health. While it may have been caused by the failure of the appealing parties to raise the issue at the time of that case, the construction in *Weinstock* nonetheless does not appear to comport with the specific language of §766.106(2). A cleaner construction of §766.106(2) than the one found in *Weinstock* would recognize that the notice provisions of §766.106 apply to any "claim for

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for a visit, and commits an act of medical negligence while she is here. Is this not "medical malpractice," simply because she is not licensed under one of the referenced authorities as a "health care provider" in Florida? Would a court apply a "reasonable" standard of care to her case – rather than one at the professional level?

medical malpractice" an action which the *statute itself* specifically defines as "a claim arising out of the rendering of, or the failure to render, medical

care or services. Fla. Stat. §766.106(1)(a)(1997). Under this express definition, specifically tailored by the Legislature for this particular section of the statute - if the allegations of fact which comprise a particular claim – no matter how it may be styled - are grounded in the defendant's failure to render adequate medical care, then it is a claim for "medical malpractice," and under §766.106(2), all potential defendants – "health care providers" or otherwise – should be entitled to the required notice and other pre-suit protections.

If the Court determines that the notice requirements of §766.106(2) are in fact applicable to *all* "medical malpractice" claims filed – including those that are not filed against defendants who are also "health care providers," then the question of whether the Petitioner in this case is a "health care provider" – would not even be significant - nor barely relevant[8] - to the determination of whether it was, or was not entitled to statutory notice of the Respondent's claim.

CONCLUSION

[8] Of course it would be relevant to the determination of whether the Department of Health would also have to be notified here. If, in fact the Nursing Home *did* fall within the statutory definition of a "health care provider" then the Department of Health would also have to be notified – and if not, the Respondent's Complaint would have been subject to dismissal on those grounds as well.

In light of the foregoing, and on the strength of the cited authorities, Petitioner would respectfully request this Court to accept jurisdiction over this matter, answer the certified question in the affirmative, and remand the case back to the trial court with instructions to require the plaintiff here to comply with the requirements of Chapter 766.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition was delivered, faxed or mailed this __ day of June, 2001 to SUSAN MORRISON, Esq., Wilkes & McHugh, P.A., Tampa Commons, Suite 601, One North Dale Mabry Highway, Tampa, FL 33609.

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Scott A. Mager

Fla. Bar No. 768502

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

In accordance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, the undersigned hereby certifies that the enclosed documents have been printed using a 14 Point Times New Roman font.

_____

Scott A. Mager
Fla. Bar No. 768502