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

Amended Reply 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), Bon Secours. The case involves a certified question regarding the application of the presuit requirements of Chapter 766 apply in cases where a complaint contains at least one count that alleges violations of Chapter 400.

In this, Petitioner's Response (hereinafter, "Reply Brief") to Respondent's Reply (hereinafter "Answer Brief of the Respondent"), the Petitioner shall be referred to as "the Home," or simply as "Petitioner." The Respondent shall be referred to as "Mr. Redway," or the "Respondent." All emphasis has been supplied unless noted.

Response to Respondent's "Statement of the Case and Facts"

In her "Statement of the Case and Facts," the Respondent "takes issue" with (what she refers to as) Petitioner's "mischaracterization" of the certified question - by rephrasing it in a way which addresses the critical issue in *this* case – that is, whether the Respondent's Complaint – a good portion of which sounds in *medical negligence* – should be subject to the pre-suit requirements of Chapter 766. However, phrasing her allegations as ones for "inadequate and inappropriate health care" does not change the reality that they sound in medical negligence.

The Respondent concedes that her Complaint actually alleges a "mixture of acts and services" - many of which she has claimed to have been committed by the Petitioner's professional *licensed nursing staff*. It is these alleged acts of medical negligence, directed *quite specifically* at the Petitioner's nurse-employees - and which the Respondent specifically alleges constitute "inadequate and inappropriate health care" under Chapter 400 – which the Petitioner submits constitute acts of "medical negligence" committed by professional licensed "health care providers" and fall squarely within the scope of Chapter 766. Apparently, the Respondent believes that she may file a complaint for medical negligence claims, add a few allegations which do *not* constitute medical negligence - and by styling the complaint as one for "violations" of Chapter 400, she can essentially *circumvent* the express statutory requirements of Chapter 766.

Responsive Argument

If the Respondent here chose only to bring the wrongful death claims (Counts II and V of her Complaint) and the negligent survival claims (Counts III and VI of her Complaint), she would have undoubtedly been required to comply with the presuit provisions of Chapter 766 because the majority of the allegations contained in the above counts constitute "medical negligence." Respondent should not be permitted to avoid a legislative mandate (and effectively recover damages otherwise prohibited by law) by simply adding a Chapter 400 Count against each Defendant and claiming her entire six-count complaint is based on deprivations and infringements of residents' rights pursuant to Chapter 400.

The opinion of the Third District Court of Appeal in *Porter Brown v. Pearson*, 26 Fla. L. Weekly D1638 (Fla. 3d DCA, July 5, 2001) may be instructive here. In *Pearson*, the Court held that the presuit provisions of Chapter 766 applied to a statutory cause of action brought pursuant to Chapter 395 (the "anti-dumping statute") despite that the complaint in that case specifically alleged (much like Respondent has here, under Chapter 400) that the defendants failed to "treat [the plaintiff's] arm appropriately and provide follow-up treatment." The *Pearson* Court was not swayed by this "form over substance" argument, stating:

> By using the word "appropriately" in his allegations, he [the plaintiff] raised the issue of the quality of the health care provided, as distinguished from the refusal to provide any medical treatment at all by "dumping." Consequently, although this case was filed under 395 it

> necessitates proving matters that are, in essence, medical malpractice issues because, in reality, this case is actually a "medical malpractice" case masquerading as an "anti-dumping" case. Accordingly, because of the "medical malpractice"- type issues that are in the complaint, the Plaintiff below would have had to comply with the presuit screening requirements of Chapter 766.[1]

Once the Respondent has alleged medical negligence, she triggered the provisions of Chapter 766, *regardless* of whether the other allegations involve medical negligence. *Paulk v. National Med. Enter., Inc.,* 679 So.2d 1289 (Fla. 4th DCA 1996). The question of whether the provisions of Chapter 766 were invoked should be determined by reviewing the allegations of her complaint, and not by the existence of the presuit requirements found in §400.023(4).

The Respondent relies upon the Second District's reasoning below, pointing out how the Court thought it "seemed" to be a "largely unworkable" task to "extract" the health and medical services aspect of a nursing home's claim. The Petitioner submits that such an "extraction" would *not* be very difficult at all, as one could plead such a complaint with relative ease. The only reason why such an "extraction" could seem "unworkable" to the Second District - is the "mixed-use" Complaint filed by the Respondent herself.

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[1]The Respondent's complaint alleges that the nursing home failed to properly supervise staff, failed to properly train staff, and improperly retained staff, none of which are statutory residents rights. *See* Appendix 4, Paragraphs 44(s) (t) & (u); 58 (s), (t) & (u); 74 (s), (t) & (u); 81, (v), (w) & (x); 95 (v), (w) & (x); and 111 (v), (w) & (x). *See O'Shea v. Phillips,* 746 So.2d 1105 (Fla. 4th DCA 1999) (Plaintiffs are required to comply with the presuit provisions of Chapter 766 when they allege negligent supervision and/or retention of an employee who sexually assaulted a patient at a clinic).

The Petitioner does not believe that the Second District's concern over (what "seemed"[2] to the Court to be) an "unworkable" task is at all well founded, and if, in this particular case, such a task is unworkable, it is something that could quite easily be cured by requiring submission of a complaint not *designed* to *create* that situation.

The contention that Chapter 766 contains "nothing to suggest" that the legislature intended that it be "intertwined" with Chapter 400 - is not dispositive of the issue before this Court. *See Redway*, 783 So. 2d at 1111. *Many* state and federal statues "intertwine" despite the absence of any *specific* statutory commentary *dictating* that they do so.

The Respondent also relies on the Second District's suggestion that the 1993 amendment to Chapter 400 (establishing Chapter 400's *own* presuit requirements) "implies" that a complaint filed "exclusively"[3] under Chapter 400 is "not intended" to invoke the pre-suit conditions of Chapter 766. The Court appears to be suggesting,

[2] In making this pronouncement (i.e., that the "extraction" of the medical care and services aspect of a purported Chapter 400 claim "*seems*" largely unworkable), the Second District did not offer any support for that conclusion. *Redway*, 783 So.2d at 1111. Moreover, the Court's use of the word "*seems*" (i.e., rather than stating that such an extraction "*would be*" unworkable), indicates that the Court itself may have had reservations over this conclusion, and that perhaps believed a more thorough reevaluation is warranted.

[3] The Second District's use of the phrase "filed exclusively under Chapter 400" (in references to the Respondent's Complaint) here - is somewhat perplexing, as it appears to place the cart before the horse, so to speak. It appears as if the Court determined that the Respondent's Complaint *was* filed "exclusively" under Chapter 400 – a determination of fact – simply because the Respondent *claims* that it was - *not* based upon the actual *substance* of its ultimate allegations of fact. That determination itself is reversible error, as the specific allegations of fact contained in the Complaint itself indicate otherwise. As such, the Court's reference to "a complaint filed *exclusively* under Chapter 400" (while it was trying to discern the "implied" legislative intent behind the 1993 amendment of §400.023) begs the critical question which is now before this Court – to wit: *is* the *Respondent's* Complaint "filed exclusively under chapter 400?"

without relying upon (or citing) any specific authority, that the pre-suit requirements of Chapter 766 were somehow "impliedly revoked" by the legislature's 1993 amendment to §400.023 – at least with respect to those actions filed "exclusively" under Chapter 400. *Redway*, 783 So.2d at 1111. To support this conclusion, the Court appears to rely solely upon the *existence* of §400.023(3) and §400.023(4) *Id*. Neither of these amendments are sufficient enough to "imply" a legislative intent to repeal or revoke the requirements of Chapter 766. *See e.g., Tamiami Trail Tours v. City of Tampa*, 31 So. 2d 468, 471-72 (Fla. 1947) ("[t]he legal presumption is that the legislature *did not intend*...to effect so important a measure as the repeal of a law without expressing an intent to do so").

Petitioner submits that such an interpretation here is certainly not "inevitable" - as the two statutes in question can quite easily be reconciled and construed *in para materia* - as they should. The absence of any express "intent" by the legislature to repeal *should* have prompted the Second District to invoke the legal presumption discussed above, and the *existence* of the two amendments relied upon by the Court in its opinion[4] do not work to make it "inevitable" that the legislature intended the express requirements of Chapter 766 be repealed as to nursing home plaintiffs.

[4] The Second District actually concludes, "Chapter 400 now contains significant restrictions upon the claimant's ability to allege vicarious liability for the actions of a health care provider." 783 So. 2d at 1111. Petitioner submits that this one lone amendment does *not* establish "*significant* restrictions," – just a "restriction," and this *restriction* – however "significant" it might be, has no application *here*, where the "medical negligence of a physician" is not even at issue. In any event, this one amendment to §400.023(4) certainly cannot be said to have made it "inevitable" that the requirements of Chapter 766 were impliedly repealed.

As noted in Petitioner's Initial Brief, §400.023(4) (1997) required only that an affidavit be attached to the Complaint. Other than this affidavit, §400.023(4) had *nothing* in common with the presuit provisions of Chapter 766. As such, one cannot reasonably conclude that §400.023(4) was intended to replace Chapter 766.

The Respondent suggests that the 2001 amendment to the Nursing Home Act which created an entirely new section in §400.0233 titled *"Presuit notice; investigation; notification of violations for resident rights or alleged negligence; claims evaluations procedure; informal discovery; review"* - was merely a "clarification of §400.023(4)." To "clarify" is to make something clear or easier to understand. Nothing in §400.0233 makes it easier to understand §400.023(4).

The Respondent claims that the amendments to Chapter 400 support her construction of Chapter 766 because the last sentence in newly-enacted §400.023(1) expressly indicates that the provisions of Chapter 766 do not apply to actions brought under §400.023-§400.0238. The Respondent stresses the fact that the newly enacted §400.023(7) provides that an action brought under this is <u>not</u> a claim for medical malpractice and §768.21(8) does not apply to a claim alleging death of a resident. However, Respondent fails to recognize why the above language is found in the new provisions of Chapter 400. Indeed, as discussed in the Initial Brief, §400.0233 contains pre-suit requirements which are virtually *identical* to those found in Chapter 766. Obviously, with the implementation of Chapter 400's own comprehensive

presuit provisions, there should be no need to comply with Chapter 766 as well.

Respondent also stresses the final "reason" the Second District gave for construing Chapter 766 as it did - is its recognition that "pre-suit conditions" (i.e., as restrictions on a party's "access to the courts") should be *strictly construed* when applied to "common law rights." *Redway*, 783 So.2d at 1111. There is weakness in this position. First, as the *Court* itself acknowledges, the "rights" the Respondent claims to be invoking here are not derived from "common law" - they arise "exclusively" under *statute*. *Id*. Second, the Court offers virtually *no authority* to support its position (i.e., as to why this principle should be applied to the *statutory* rights in question *here*), nor does it discuss why the principle should be applied in this particular case. Instead, it simply reiterates the same "reasoning" it expressed with respect to the 1993 amendments, and concludes that the Respondent "complied with the only pre-suit conditions expressly mandated by the Legislature for this lawsuit."

The Respondent also claims that requiring Chapter 400 plaintiffs to comply with Chapter 766 would place an "onerous burden" on an "elderly infirm population who are unable, on their own behalf, to protect or assert their rights" - and in the same sentence, calls these requirements "redundant." It is true, all of our nation's elderly are in need of substantial protection; they represent a truly vulnerable class of citizens for which governments have made (and continue to make) substantial accommodation and special protections available. The elderly who reside in nursing homes - as the

legislature itself acknowledges by its *enactment* of Chapter 400 - are in need of a particular *kind* of protection. But this reality alone should not justify a complete disregard of the express statutory scheme put in place by the legislature - to address the very sort of *medical negligence* claims the Respondent raises in her Complaint. Requiring medical negligence plaintiffs – like the Respondent here – to comply with the very statute the Florida Legislature has set up *specifically* to deal with *just* this sort of claim would in no way constitute an "onerous burden."

Moreover, the requirements of Chapter 766 *do not* - as the Respondent argues - "restrict" or "deny" nursing home plaintiffs access to the courts any more than they do to plaintiffs who do *not* live in nursing homes. These requirements are simply the *balance* struck by the legislature to protect the rights of <u>both</u> the victims of alleged medical negligence - *and* the medical health professionals who provided them care. The fact that a potential medical negligence plaintiff may be "elderly" - or live in a nursing home - however sympathetic the Respondent may wish to paint the picture – should not detract from the fact that the pre-suit requirements must be complied with by *all* who seek to hold the medical health community liable for acts which constitute "medical negligence." The Court should not apply any "stricter" construction than it would to plaintiffs who do <u>not</u> live in nursing homes, nor should it treat two similarly situated "elders" differently - thus allowing one to circumvent the detailed pre-suit requirements of Chapter 766 just because he or she happened to be living in a nursing

home when the alleged medical negligence occurred.

In essence, the Respondent here actually seeks to establish a special "class" of medical negligence plaintiffs (i.e., the "elderly who reside in nursing homes"). Respondent then wishes to declare this class as "*exempt*" from the pre-suit requirements of Chapter 766 - just because they happen to *reside* in nursing homes. Under the Respondent's view, if two plaintiffs – one living in a nursing home, the other living right next door in a private home or apartment - are injured as a result of the same sort of medical negligence (i.e., an identical act of "inadequate or inappropriate health care") - these two plaintiffs should be treated *differently*. The elderly person who lives at *home* (or in a hospital) *must* comply with the requirements of Chapter 766 - while the elderly person living in the nursing home is somehow "excluded" from having to satisfy those requirements. This new "class" of plaintiffs the Respondent seeks to "protect" does not consist of <u>all</u> of the state's "elderly" - only those who happen to r*eside* in nursing homes. As such, it is clear that the Respondent here cares not so much for the "elderly" – but <u>only</u> for <u>those</u> elderly *who happen to reside in nursing homes*. Under the Respondent's interpretation of the law, *only nursing home residents* should be exempt from the requirements of Chapter 766.

The Second District's ruling below was in *error*, and if left undisturbed, it could encourage others to "mix" together allegations of "statutory violations" and "medical negligence" and circumvent the requirements of the Medical Malpractice Act – by

simply "mislabeling" the action as one for "statutory violations" under Chapter 400" rather than for common law medical negligence.[5]

A better approach, one which does not offend traditional notions of equal protection or promote "form over substance," would impose upon trial courts a simple task: to discern, based on the *substance* of any given "mixed use" complaint – whether its allegations raise a cause of action grounded in medical negligence. If so, then the plaintiff in such a case *would* be required to comply with the requirements of both non-medical statutory violation *and* the medical malpractice statute. If a complaint alleges violations of Chapter 400 which do *not* involve medical negligence, then compliance with the requirements of Chapter 766 would *not* be necessary. To rule otherwise would defeat - without any sound rationale - the express legislative intent behind the requirements of Chapter 766; and would invite nursing home plaintiffs to purposely draft complaints so as to avoid those requirements. To rule as the Respondent requested here – the Court must first agree to *disregard* the language in Chapter 766; it must then agree to elevate "form" over "substance" in pleading

[5]The Second District did not actually hold that the pre-suit requirements of §766.106 could *never* apply to a suit filed under Chapter 400. Judge Altenbrend made it perfectly clear that the Court was "merely" ruling that Chapter 766 was not applicable to *the Complaint the Respondent filed in this* case. *Redway*, 783 So. 2d at 1110. The Second District actually grounded its ultimate determination in several questions of fact. First, the Court appears to have concluded that the Respondent's Complaint in this case was filed "exclusively" under Chapter 400. Then, after expressly acknowledging that there might be factual situations where the pre-suit requirements of Chapter 766 would apply to an action brought under Chapter 400 - the Court determined - again, apparently as a question of fact - that these provisions did not apply to the allegations contained in this Complaint.

practice - a position which is unjustifiably antithetical to traditional principles of law and procedure. And why? So that a relative handful of nursing home residents – who, claim essentially, that they have been injured as a result of the negligence of a licensed nurse – can *avoid* the few requirements set out in our state's medical malpractice statutes, while every other person in this state making the same *factual* allegations– whether elderly or otherwise - would have to comply.

In this regard, the Second District erred when it found that the Respondent's complaint was filed "exclusively under Chapter 400." The Court concedes that "there may be some overlap" between the statutory right to "receive adequate and appropriate health care," and the "common law" claim for medical negligence, but appears to have focused too deeply on how the Respondent chose to "*label*" her claim – not on what she alleged as the *ultimate facts* underlying the claim itself. The Court then inappropriately construed Chapter 766 as only applying to "common law" claim, not "statutory" claims. This construction is in error, and does not take into consideration the "ultimate facts" - the *true substance* of the Respondent's Complaint.

Take, for example, a plaintiff who alleges that 1) she resides in a state- licensed nursing home; 2) while a resident, she was treated for a medical condition; 3) she did not receive "adequate and appropriate medical treatment;" and 4) was injured as a result. This is essentially a claim for medical negligence, and would have to comply with the requirements of Chapter 766. However, if this plaintiff merely adds "and this

constitutes a violation of Chapter 400," she would be *exempt* from the requirements of Chapter 766, and would *only* have to comply with Chapter 400.[6]

In her Answer Brief, the Respondent fails to adequately distinguish *Linkemar v. Health Care Ret. Corp. of America*, 1999 WL 984428 (S.D. Fla. 1999). The allegations in *Linkemar* are similar to those in the instant case, and persuasive here.

The Respondent claims that the Petitioner has somehow "misconstrued" the allegations of her Complaint, and that her Complaint is <u>not</u> one for "vicarious liability." As was discussed in the Initial Brief, however, the allegations contained within the Respondent's Complaint show that they were allegedly committed, if at all, by an *employee* of the Petitioner. In essence, the Respondent is claiming that the Home's nurse-employees committed acts which "failed to provide Mr. Redway with adequate and appropriate health care", but that as its *employee*, the state licensed Home – the only real "deep pocket" here – can be held liable under doctrine of *respondent superior.* This "form over substance" argument cannot stand.

It is also crucial to recognize the fact that the alleged *actors* here, the actual *people* the Respondent alleges to have deprived Mr. Redway of "adequate and appropriate health care," are the *licensed professional nurses* employed by the Home. §768.50(2)(b) expressly includes nurses licensed under Chapter 464 within its

[6] With due respect, Respondent's discussion of "differences" on pages 16-20 of her Answer Brief serves to *underscore the* fact that the statutes are meant to deal with the different factual situations and they (i.e., Chapter 400) are not intended to "revoke" or "modify" the others.

definition of "health care providers." There is no question that the Complaint in this case alleges that the Petitioner's *nursing staff* was somehow negligent (or that their actions deviated or fell below the appropriate medical standards of care). Moreover, in her Complaint, the Respondent makes it quite clear that she is seeking to hold Petitioner liable under Chapter 400 for the actions of these *nurses*. Thus, as in *Linkemar*, the Respondent should be required to comply with Chapter 766.

The Respondent's Complaint is replete with allegations of "negligence" committed by the Center's medical staff - a staff which includes nurses and other medical personnel who are clearly defined as health care providers under(former) §768.50(2)(b), the application of which was corroborated by *Weinstock* and *Redway*. *See also* §400.021(11) (which defines a "nursing home facility" to be a facility which provides "nursing services" as defined in Chapter 464 Florida Statutes), and §400.021(15) (which defines a "Resident Care Plan" to be a "written plan developed, maintained and reviewed not less than quarterly by a *registered nurse*).

In making her "direct liability argument, the Respondent appears to rely primarily on an *allegation* she placed in her Complaint - suggesting that the "duties" outlined in §400.022 are "non-delegable" and such that the Petitioner has "direct responsibility" (and is "directly liable") under §400.023. This argument is flawed in a number of respects. First, it must be remembered that the only allegations the Petitioner believes to be relevant *here* are those that support the Respondent's claim

that Mr. Redway did not receive "adequate and appropriate health care" (and other similar claims of "medical negligence"). These allegations *must* be grounded upon the acts of the Home's *nurse employees*, not the "Petitioner" itself. Chapter 400 is *not* a strict liability statute. Thus, principles of vicarious liability must be applied to make the Petitioner liable for these alleged acts of the Petitioner's employees.

The Respondent claims that the "plain language" and "legislative history" of Chapter 766 indicate that "nursing homes" are not entitled to the "protections" of Chapter 766. The Respondent, however, does not actually discuss the "plain meaning" of Chapter 766, and instead claims that Chapter 766 is "ambiguous" with respect to the critical term "health care providers."[7] Selectively quoting alleged snippets of "legislative intent," the Respondent discusses a number of cases to that end - but neatly avoids the fact that the term "health care providers" - however ambiguous it may be - <u>*does*</u> <u>*include*</u> the Petitioner's nurse-employees - who would be the true "actors" *in any allegation* concerning Mr. Redway's medical condition.

There can be no dispute that the state-licensed *nursing* professionals employed by the Home (and other licensed facilities similarly situated) are in fact "health care providers" within the ambit of the Medical Malpractice Act. As such, a medical negligence suit – filed against the Petitioner, but grounded in the medical negligence

[7]Respondent does not appear to raise any serious challenge to the Court's first inquiry in a case such as this (i.e., whether the action arose out of medical negligence in diagnosis, treatment or care). *See Silva v. Southwest Florida Blood Bank, Inc.*, 601 So. 2d 1184, 1186 (Fla. 1992). The allegation satisfies the first "prong" of the *Silva* analysis. *Id.* at 1187.

of its nurse-employees, places the Petitioner within scope of (what the Respondent refers to as) the "protections" of Chapter 766.

CONCLUSION

In light of the foregoing, and on the strength of the cited authorities, Petitioner respectfully requests 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 Respondent to comply with Chapter 766.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Amended Reply Brief was mailed this 17th day of October, 2001 to SUSAN MORRISON, Esq., Wilkes & McHugh, P.A., Tampa Commons, Suite 601, One North Dale Mabry Highway, Tampa, FL 33609.

_____
Scott A. Mager

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
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