

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

**MAGGIE KNOWLES, as Personal
Representative of the Estate of
Gladstone Knowles, Deceased,

Petitioner,**

S.Ct. Case No. SC00-1910

**4th DCA CASE NO.: 98-765
L.T. CASE NO: 96-05246 (03)**

v.

**BEVERLY ENTERPRISES-FLORIDA,
INC. d/b/a BEVERLY GULF COAST-
FLORIDA, INC., d/b/a WASHINGTON
MANOR NURSING HOME AND
REHABILITATION CENTER,**

Respondent.

**On Certification of Great Public Importance from the Fourth District Court
of Appeals (*en banc*): Original 4th DCA Opinion, 24 Fla. L. Weekly 1986, *en
banc* Opinion, 766 So. 2d 335, certified 763 So. 2d 1285**

**Arising from the trial court's granting of a new trial after a defense jury
verdict, entered by Broward Circuit Court Judge Patricia Henning**

Answer Brief of Respondents on the Merits

SUBMITTED BY:

**Scott Mager and Gary Gaffney
Mager & Associates, P.A.
P.A.
Co-Counsel for Respondent**

**George Quintairos and Edward Prieto
Quintairos, McCumber, Prieto & Wood,
P.A.
Co-Counsel for Respondent**

**One East Broward Blvd., #601
Fort Lauderdale, Florida 33301
Telephone: (954) 763-2800
Facsimile: (954) 763-2885**

**Dadeland Towers II, Suite 725
Miami, Florida 33156
Telephone: (305) 670-1101
Facsimile: (305) 670-1161**

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

In accordance with Rule 9.210(a)(2) we do hereby certify that the enclosed documents are typed using 14 point Times New Roman font.

Scott A. Mager
Fla. Bar No. 768502

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PREFACE

This proceeding arose out of a lawsuit originally filed in Broward County, Florida. The Petitioner, Maggie Knowles, is the wife of Mr. Gladstone Knowles, who died in 1995 at the age of 72. In this Brief, Respondent, Beverly Enterprises-Florida, Inc. (d/b/a Beverly Gulf Coast-Florida, Inc., d/b/a Washington Manor Nursing Home and Rehabilitation Center), shall be referred to as “Washington Manor” or “Respondent.” Ms. Maggie Knowles, as the Personal Representative of the Estate of Gladstone Knowles, will be referred to as “Knowles” - and the decedent, Mr. Gladstone Knowles, will be referred to as “Gladstone.”

References to the record below will be denoted by a parenthetical containing the letter “R” followed by the page number upon which the cited material appears, and references to the transcript will be similarly identified by the letter “T” followed by the appropriate page number. References to “Volume 8” of the trial transcript are broken into two parts. Part A (“8A”) consists of the transcript from October 16, 1997. Part B (“8B”) consists of the transcript from October 17, 1997. All emphasis has been supplied unless otherwise noted.¹

¹Respondent does believe that the arguments in support of its position are succinct: 1) That the statute is clear and needs no interpretation, 2) if interpretation is needed, then the legislative intent is clear, 3) that comparative fault applies, and 4) that regardless of the answer to the certified question, that Petitioner had its day in court and the Fourth District’s reinstatement of the verdict is correct in any event.

JURISDICTIONAL STATEMENT

This Court entered its Order of October 6, 2000, deferring the acceptance of jurisdiction of a question of “great public importance” certified by the Fourth District Court in *Beverly Enterprises-Florida, Inc. v. Knowles*, 763 So. 2d 1285 (Fla. 4th DCA 2000),² and directing the parties to file briefs on the merits.³ The Court’s Order was issued in response to a request by an *en banc* panel of the Fourth District Court of Appeal and its certification of the following question:

MAY A PERSONAL REPRESENTATIVE BRING A STATUTORY CAUSE OF ACTION UNDER §400.023(1), FLORIDA STATUTES (1997), ON BEHALF OF A DECEASED RESIDENT OF A NURSING HOME FOR ALLEGED INFRINGEMENT OF THE RESIDENT’S STATUTORY RIGHTS PROVIDED BY §400.022, FLORIDA STATUTES (1997), WHERE THE INFRINGEMENT HAS NOT CAUSED THE RESIDENT’S DEATH?

However, in order to allow this Court to independently consider each argument without referring to previous sections, Respondent has reiterated various arguments in each section where applicable, perhaps lending itself to a longer brief than desired.

²The original opinion, at 24 Fla. L. Weekly D1986 (4th DCA, Aug. 25, 1999), rehearing *en banc*, at 766 So. 2d 335, 336 (Fla. 4th DCA 2000) *en banc*, and certification, 763 So. 2d 1285 (Fla. 4th DCA 2000) (*en banc*), are attached as Composite Appendix 7.

³Knowles’ presumably claims jurisdiction under Article V, §3(b)(4), but that provision does not operate in a self-executing fashion to mandatorily invoke this Court’s jurisdiction. *See, e.g., Taggart Corp. v. Benzing*, 434 So. 2d 964 (Fla. 4th DCA 1983).

Respondent Washington Manor believes this Court need not accept jurisdiction over this particular case. While it is undeniable that the rights of nursing home residents in this state represent an issue of critical importance to everyone, with all due respect, the sympathetic, the strained arguments put forth by both Petitioner and her *amici* here do nothing to establish this Court's jurisdiction under Article V, 3(b)(4) of the Florida Constitution. Indeed, even a cursory review of the statute in question reveals that the Fourth District's unanimous "plain meaning" construction was appropriate to the facts and correct as a matter of law. Thus, while it would be difficult for the Respondent to disagree with the notion that all of our State's nursing home residents need to be adequately protected by law, the specific question at issue here – as expressed by the question formally certified by the Fourth District Court of Appeal - concerns nothing more complicated or significant than the construction of a plainly worded statute – and has little, or nothing, to do with what Petitioner and her *amici* might believe to be in the best interests of the nursing home community at large. Moreover, in light of the Fourth District's unanimous *en banc* opinion in this case, the law on this issue is well-settled at this point, and is certainly in no need of "immediate" resolution. *See, e.g., Dept. of Ins. v. Teachers Ins. Co.*, 404 So. 2d 735, 736 (Fla. 1981) England,

J., dissenting.

As such, the Respondent would submit that the threshold “substantive” issue here (i.e., was the Fourth District correct in construing the plain language of the statute as it did) is also “jurisdictional” in a sense - as the ease and unanimity in which that Court ultimately resolved that issue substantially undercuts the “importance” of - what Respondent believes will be - an identical resolution of the issue by this Court. Put simply, while the needs of our state’s nursing home residents are indeed both immediate and important – the “resolution” of this particular legal question – is not.

Alternatively, the Respondent would strongly suggest that this Court not address the issue, leaving the issue of a statutory change in this area of the law to the Legislature, which is itself presently considering substantial revisions to Chapter 400. This Court should not be lured into assuming the legislative function of re-drafting the statutory language simply because there is a certified question before it. The Legislature will, if so disposed, redraft itself. *See Schwarz v. Nourse*, 390 So.2d 389, 392 (Fla. 4th DCA 1980) (“Our theory of government is that of separation of powers. The Legislature and not the court is responsible for legislating. It may well be time to drastically change the law on juveniles.... Judges

of Courts cannot do so because we were not elected to the Florida Legislature”). Respondent would respectfully request this Court to decline to exercise its discretionary jurisdiction over this matter under Article V of the Florida Constitution, and that in conformance with its earlier Order of October 6, 2000, that the Court dispense with oral argument on this matter, and dismiss this proceeding.

STANDARD OF REVIEW

The certified question here being specifically directed at the Fourth District’s construction of a state statute (i.e., a pure question of law), the Respondent believes this Court’s review of that construction, and its resolution of the certified question (should it accept jurisdiction and deem such resolution necessary), is most properly conducted under a general *de novo* standard of review. *See, e.g., Racetrac Petroleum, Inc. v. Delco*, 721 So. 2d 376 (Fla. 5th DCA 1998). The Fourth District Court’s decision to reverse the trial court’s decision and direct the reinstatement of the zero verdict, however, is entitled to great deference, and should not be overturned in the absence of clear error. Should this Court’s accept jurisdiction, regardless of its answer to the certified question, the court should give equal deference to the jury verdict, since, as noted

below, the Petitioner was permitted to present its entire statutory case to a full jury, who rendered a zero verdict.

RESPONSE TO PETITIONER’S STATEMENT OF CASE AND FACTS

Quite respectfully, the Statement of Case and Facts submitted by Petitioners – to the extent this Court determines they are applicable to the limited question here of whether the statute is clear on its face - contains statements of facts not supported by the record, and inaccurately portrays the true record facts of this case. Washington Manor will identify the areas of disagreement and then provide complimentary facts supported by record references, which (as Amicus for the Academy of Florida Trial Lawyers on behalf of Petitioner agrees) is consistent with the correct facts as articulated in the en banc opinion of the Fourth District Court.

Washington Manor notes the following inaccuracies in Knowles’ “facts:”

- On page 5 of the Petition, Knowles makes reference to photographs taken by a Detective of the Hollywood Police Department that allegedly graphically depict Knowles “horrific condition.” However, the trial Court specifically excluded these photographs from being admitted into evidence. (T. Volume 13, pgs. 791-793, 894);
- On Page 4 of the Petition, the Petitioner incredulously asserts that Gladstone “never” received pain medication,” when in fact, the evidence demonstrated the opposite---that Gladstone did receive pain medication. (T. Volume 12, pgs. 698-700). In fact, there was ample testimony as to

why Gladstone did not receive pain medication in certain instances, such as during physical therapy, so that his progress could be properly monitored;

- On Page 5 of the Petition, Knowles asserts that Gladstone had developed “huge pressure sores,” when there was no description of the size of the pressure sores as being huge;
- On Page 5 of the Petition, Knowles asserts that Gladstone was “life-threateningly dehydrated,” when his dehydration was not characterized as life threatening;
- On Page 4 of the Petition, the Appellate asserts that Mrs. Knowles testified that drugs “changed her husband drastically.” However, there was no testimony to that effect;

Knowles was seventy-two years of age when he died on July 28, 1995. It is undisputed that Gladstone died as a result of advanced atherosclerotic cardiovascular disease. (R. 850-58). Before he passed away, Gladstone temporarily resided at the Respondent’s “Washington Manor” Nursing Home. His stay at Washington Manor lasted for sixty-seven days - from April 26, 1995, until July 1, 1995. He came to the Manor just after suffering a serious fall at his home which required him to have surgery and then endure a somewhat lengthy hospital stay. (R.918).

Prior to being admitted to Washington Manor, Gladstone had not only been diagnosed with atherosclerotic cardiovascular disease, but he was also afflicted with organic brain syndrome (OBS), dementia, and anemia of chronic disease. In

addition, he was also suffering from Alzheimer's, severe rheumatoid arthritis, cachexia (a general weight loss and wasting occurring in the course of a chronic disease), and chronic obstructive pulmonary disease (COPD). (T. Volume 12, T46, 602). The autopsy report confirmed that Gladstone died a natural death (R. 850).

Despite the fact that Gladstone's death was confirmed to be "natural," and that it was shown to be "not caused" in any way by any act or omission committed by Washington Manor, and despite the fact that his death did not result from any care or treatment he may have received while he was at Washington Manor, Knowles, as Personal Representative of Gladstone's Estate, brought an action against Washington Manor, in which she sought money damages (and attorney's fees) for, among other things, alleged "violations" of Gladstone "resident's rights." (R. 917-32).

More specifically, in her Second Amended Complaint, Knowles alleged several causes of action against Washington Manor including 1) a claim under §400.022 and §400.023(1),⁴ Florida Statutes (1997) for deprivation of Gladstone's rights by "non-medical personnel" (Count I); 2) a death claim under Fla. Stat.

⁴Florida Statute §400.023 provides residents with a "civil remedy" for violations of §400.022.

§400.023 (Count II); 3) a wrongful death claim under Chapter 768, Florida Statutes (1997) (Count III); and 4) a survival claim (Count IV). (R: 917-32).

Washington Manor filed a Motion for Summary Judgment, asserting, among other things, that it was entitled to judgment as a matter of law because Knowles failed to provide genuine issues of material fact that Gladstone's death was caused by a violation of infringement of his resident's rights or that Gladstone's death was caused by a wrongful act of Washington Manor (R. 842-869).

At the hearing on Washington Manor's Motion for Summary Judgment, Knowles conceded that Gladstone's death had not resulted from any violation or deprivation or infringement of his resident's rights and accordingly, she voluntarily withdrew the two "death" counts from her Second Amended Complaint (i.e., Counts II and III).

Rather than ruling on the remaining counts of Knowles' Second Amended Complaint, (i.e., Counts I and IV), the trial court permitted Washington Manor to respond to Knowles' Memorandum of Law (in Opposition to the Manor's requested Summary Judgment on this issue) and reserved its ruling for a later time.

Before trial, and after reviewing Washington Manor's Response to Knowles' Memorandum - as well as the language and legislative history of

§400.023(1),§415.1111(3),⁵ a trial court order in *Olsen v. Jacaranda Manor, Inc.*,⁶ and the Second District’s “PCA” opinion on that order (all of which Washington Manor appended to its Motion For Summary Judgment), the trial court granted Washington Manor’s Motion for Summary Judgment as to Count I.

In granting the summary judgment, Judge Henning noted:

I have gone through the statute. I have looked carefully at it . . . I think the language is clear. I think that the Defendant is correct, that the action cannot come under that statute that it specifically holds otherwise in the language that’s in there . . .

(T. Volume 8A, p. 18). In an unsuccessful attempt to avoid the trial court’s ruling on the statute, Knowles’ trial counsel pleaded with the court that if it dismissed her statutory claim, Knowles would be “out of court,” and that her case would effectively be “over” if Knowles had “no cause of action under the statute.”

(T. Volume 8A, p. 19). Knowles’ counsel contended that his experts were prepared only to testify to the issue of standard of care and they’ve expressed

⁵This section was amended in 2000, renumbering the statute as section 415.1111. The amendment made significant changes, including the change from the terminology “disabled adult” to “vulnerable adult,” and elimination of the requirement that the “perpetrator” had to “be named in a confirmed report.” Notably significant to the instant case, the legislature made no change to the language “without regard to whether the cause of death resulted from the abuse, neglect or exploitation.”

⁶ A copy of the Order, and *per curiam* affirmance are attached hereto as Composite Appendix 1.

those opinions under the nursing home statute,” (T. Volume 8A, at 25-26) to which Judge Henning responded:

I don't see how you get around the language when the cause of death resulted from the deprivation or infringement of the decedent's rights.

(T. Volume 8A, p.26).

Thereafter, with Washington Manor's consent, Knowles was permitted to orally amend Count IV of her Second Amended Complaint to assert (for the first time in this proceeding) a cause of action for negligence. (T. Volume 8A, p. 30; T. Volume 813, p. 3). The Order on Summary Judgment was granted as to Knowles' Count I for relief under §400.022 and §400.023(1) (i.e., alleging deprivation of resident rights by non-medical personnel). Since Knowles had voluntarily withdrawn the death counts she had originally brought under §400.023(1) and Chapter 768, the trial court's order on summary judgment provided that the determination of those issues was rendered "moot." The trial court denied Washington Manor's Motion as to Count IV, inasmuch as it was a "common law" survival claim controlled by § 46.021, Florida Statutes (1999) and not a statutory claim made under §400.023(1). (R. 1160-61), and also simultaneously entered a separate written order which granted Knowles' *Ore Tenus* Motion to Amend her Second Amended Complaint to add the "survival" count for negligence and

permitting the matter to proceed to trial on Knowles' claims of "negligence."

As is referenced later in this Brief, and in the attached appendix (containing Washington Manor's Initial Brief and Reply Brief before the Fourth District Court detailing the numerous record references), Knowles' trial counsel equated the Respondent's alleged violation of Section 400.022 with "negligence" on its part, and even succeeded in getting a jury instruction which specifically instructed the jury that if it found that the Respondent had in any way violated the statute - it would constitute negligence. Irrespective of Knowles experts testifying as to numerous violations of §400.022 and the trial Court providing a Negligence Per Se instruction, the jury returned a defense verdict.

On November 24, 1997, just prior to the hearing on Knowles' Motion for New Trial, the Fourth District issued its opinion in an unrelated case, *Greenfield v. Manor Care, Inc.*, 705 So. 2d 926 (Fla. 4th DCA 1997). In *Greenfield*, involving a class action breach of contract case and not one involving medical negligence, the Court (in a 2-1 decision) had held that a cause of action under §400.023(1) could be brought by the personal representative of a deceased resident, regardless of whether the violation actually caused the resident's death.

Judge Warner dissented in *Greenfield*, explaining that she believed that this

portion of the statute was intended to apply only when the alleged violation of the nursing home residents' rights causes the resident's death. Judge Warner agreed with the trial court which had, of course, applied the "plain meaning" of the statute to reject the statutory claim brought by a personal representative. The Fourth District in *Greenfield*, however, decided to abandon that plain meaning of the language of the statute, and to instead attempt to "construe" the Legislature's intent by resorting to rules of statutory construction. Dissenting from the Court's 2 to 1 opinion, Judge Warner stated:

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

Moreover, §400.023(1) was enacted long after § 46.021 and I do not see how the two can be harmonized, nor does the majority opinion give any rationale to do so. As a general rule of statutory construction, a special statute controls over a general statute. See *McKendry v. State*, 641 So.2d 45 (Fla. 1994). Therefore, I would hold that §400.023(1) controls. I would affirm the dismissal of the statutory cause of action.

Id. at 934 (italics in original). Confronted with this decision out of its own Fourth District (which was then, of course, the controlling law in that District), the

trial court granted Knowles' Motion for New Trial. The trial court granted Knowles the new trial despite that plaintiff's theory of the case was entirely predicated on alleged violations of §400.022.

Washington Manor appealed the order granting Knowles' Motion For New Trial and Knowles cross appealed on various issues. The Fourth District Court issued its original opinion in this matter, in which a three judge panel affirmed the trial court's decision granting the new trial based on *Greenfield*. See *Beverly Enterprises-Florida v. Knowles*, 24 Fla. L. Weekly D1986 (Fla. 4th DCA Aug. 25, 1999). However, the Court granted rehearing *en banc*, and requested additional briefing to the entire panel of the Fourth District to determine whether it should recede from its previous decision in *Greenfield*. Both parties filed supplemental briefs, and the Court, in an 11-0 *en banc* decision, receded from *Greenfield* on the Chapter 400 issue, adopted Judge Warner's dissent, and found that "the language of section 400.023(1) is clear and, thus, leaves no room to resort to consideration of legislative history to determine its meaning" and that "because the legislative language of section 400.023(1) is unequivocal on the specific subject to which it speaks, it need not be 'harmonized' with section 46.021, an inconsistent, general, and earlier-enacted statute." *Beverly Enterprises-*

Florida v. Knowles, 766 So. 2d 335, 337 (Fla. 4th DCA 2000) (en banc).

Upon motion filed by Respondents, the Fourth District Court certified the following question as one of “great public importance:”

May a Personal Representative Bring a Statutory Cause of Action under §400.023(1), Florida Statutes (1997), on Behalf of a Deceased Resident of a Nursing Home for Alleged Infringement of the Resident’s Statutory Rights Provided by §400.022, Florida Statutes (1997), Where the Infringement Has Not Caused the Resident’s Death?

Beverly Enterprises-Florida, Inc. v. Knowles, 763 So. 2d 1285 (Fla. 4th DCA 2000) (en banc).

This Court did not accept jurisdiction in this matter, but rather, in its Order of October 6, 2000, directed the parties file briefs on the merits. This Brief is filed in compliance with that order.

SUMMARY OF ARGUMENT

Assuming this Court accepts jurisdiction, the question certified to this Court by the Fourth District Court of Appeal should be answered in the negative. The case essentially presents one simple issue: Whether §400.023(1) means what it says. More specifically, the certified question asks this court whether §400.023(1) - which provides a cause of action only when death results from a violation of resident’s rights - still somehow “clearly” and “unequivocally” gives a cause of

action where the death does not result from the deprivation.

As a threshold matter, as discussed in the preface, the Respondent believes that this Court need not even accept jurisdiction over this case because there is really no “important” question that needs to be resolved here. The question is whether the statute says what the statute says: Characterizing this appeal as one that is “important” because it involves nursing home resident’s rights does not change the nature or substance of the question before the court. While all parties concede the importance of a nursing home resident’s rights, the subject matter does not automatically serve as the basis to accepting jurisdiction on a particular certified question particularly one which requires the court to rewrite an otherwise clearly drafted statute, and one that 11 learned judges have already said is “clear” and “unequivocal” in its meaning.

If this Court does accept jurisdiction to consider the certified question, it should answer it in the negative, following the lead of the unanimous en banc panel of the Fourth District which quite properly found the statute to be “clear,” and “unequivocal on the specific subject to which it speaks,” and held that a personal representative in such cases can bring suit only when the death results from the infringement/deprivation of the resident’s rights. The statute being clear on its face,

there is no need to resort to any rules of construction to so hold.

And, even if this Court found it necessary to resort to rules of construction, the result would nevertheless be the same, as the legislative history of this statute quite clearly indicates the Legislature's intent to provide a cause of action only when the death results from the infringement.

This Court should not be asked to redraft the statute by adding words and meaning that were never intended by the Legislature. Petitioners, under the guise of a claim of interpretation, wish this Court to re-write the statute to add words and meaning never contemplated by the Legislature. The Legislature should be left to make these sorts of changes, particularly in light of the well-known fact that the Florida Legislature intends to address these issues in its next session, and plans to consider significant amendments to various sections of Chapter 400, including issues relating to this very matter.

Regardless of how the Court answers the certified question, it should hold that Knowles, in the case at bar, already had her day in court, and should thus not have been granted a second trial on these issues she has already fully argued and had determined by a jury of her peers. Knowles was permitted to present all evidence relevant to the Respondent's alleged "statutory" violations, and even

succeeded in securing a negligence *per se* jury instruction which directed the jury to find for Petitioner if they found any such violation of resident's rights - and this all resulted in a verdict for Respondent.

Finally, Ms. Knowles' request in her Brief that (i.e., if the case is remanded) the trial court should be directed to grant her "Motion to Strike the Comparative Fault of Nonparties' Defense," is unjustified and without any merit whatsoever, and should of course be denied, as her argument here is contrary to Florida's comparative fault law, which provides for the allocation of responsibility between all parties.

Argument

I. THE LANGUAGE OF §400.023(1) IS CLEAR AND UNAMBIGUOUS AND THE FOURTH DISTRICT COURT WAS CORRECT IN CONSTRUING THE STATUTE AS IT DID.

A. The *En Banc* Panel of the Fourth District Properly Held that the Language of §400.023(1) Clearly And Unambiguously Provides That a Personal Representative of a Deceased Nursing Home Resident May Only Bring a Cause of Action Against The Nursing Home Pursuant to §400.023(1) When the Resident's Death was Caused by the Alleged Deprivation or Infringement of the Decedent's Resident's Rights.

Florida Statute §400.023(1) expressly provides that certain actions may be maintained by or on behalf of the resident of a nursing home, and in limited

circumstances, by the personal representative of the estate of a “deceased” nursing home resident. In this regard, §400.023(1) provides, in pertinent part:

Any resident whose rights as specified in this part are deprived or infringed upon shall have a cause of action against any licensee responsible for the violation.

This section also specifically identifies just who may bring the action, and more particularly, who may bring the action on behalf of a deceased resident - and when.

It states:

The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, *or by the personal representative of the estate of a deceased resident when the cause of death resulted from the deprivation or infringement of the decedent’s rights.*

The entire panel⁷ of the Fourth District Court of Appeal, sitting *en banc*, correctly found the language of §400.023(1) to be clear and unambiguous, and unequivocal” on the subject to which it speaks. 766 So. 2d at 337. Respectfully, any other conclusion would have to ignore - or directly controvert - the clear and express language used by the Legislature, and would effectively invalidate the express statutory requirement that in any posthumous action brought under this section, the cause of death must have resulted from the alleged deprivation or

⁷Judge Klein recused himself, and did not participate in the opinion.

infringement of the decedent's rights. *See, e.g., Meyer v. Caruso*, 731 So.3d 118 (Fla. 4th DCA 1999) (“judges do not have the power to edit statutes so as to add requirements that the Legislature did not include”). When statutory language - as that which the Legislature utilized here - is clear and unambiguous on its face, the statute must be given its plain and ordinary meaning, and there can be no occasion for judicial interpretation. *Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 609 So.2d 1315 (Fla. 1992).⁸ This principle acknowledges that legislative intent is to be determined primarily from the language used in the statute, and it bears in mind the presumption that the Legislature knows the meaning of the words it uses, and has expressed its intent by the use of the words found in the statute. *See Aetna*, 609 So. 2d at 131, and *S.R.G. v. Department of Revenue*, 365 So. 2d 687 (Fla. 1978). While in this case, rules of statutory construction and the legislative history of the statute actually support the Respondent's position, there is no need to resort to those rules or history, as the wording of the statute is clear on its face. As this Court has stated:

The Legislature must be understood to mean what it has plainly expressed and this excludes construction. The Legislative intent being

⁸ *Streeter v. Sullivan*, 509 So. 2d 268 (Fla. 1987); *Holly v. Auld*, 450 So. 2d 217 (Fla.1984); *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So. 2d 452 (Fla. 1992).

plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. Cases cannot be included or excluded merely because there is intrinsically no reason against it. *Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.* If a Legislative enactment violates no constitutional provision or principle it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage. Courts have then no power to set it aside or evade its operation by forced and unreasonable construction. If it has been passed improvidently the responsibility is with the Legislature and not the courts. Whether the law be expressed in general or limited terms, the Legislature should be held to mean what they have plainly expressed, and consequently no room is left for construction, but if from a view of the whole law, or from other laws in pari materia the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature. [numerous citations omitted]. *The sum of these cases is that this Court is without power to construe an unambiguous statute.*

Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452, 454-55 (Fla. 1992) (quoting *Van Pelt v. Hilliard*, 78 So. 693 (Fla. 1918)). *See also Donato v. American Tel. & Tel. Co.*, 24 Fla. L. Weekly S44 (Jan. 20, 2000) (“ . . . the primary source for determining legislative intent is the language chosen by the Legislature to express its intent”).

As Knowles and her *amici* argue, it is clear from its use of language that the Legislature intended to expand the scope of remedies available under §400.023(1) (i.e., by now expressly permitting a personal representative of a deceased resident to bring an action under “certain circumstances”). But it is also clear that the Legislature limited the extent of that expansion - clarifying it with specific language - adding that the personal representative of a deceased resident would only be authorized to bring an action in cases where the resident in fact had died as a direct result of the alleged violation of the Act. This Court, just as the Fourth District before it, can only give effect to the statute’s clear and unambiguous language - and this clear and unambiguous language strongly militates against resort to other means of statutory interpretation.

Indeed, if the Legislature had intended for a resident’s personal representative to have this power - even if the alleged statutory violation did not cause the resident’s death - it could quite easily have provided that the cause of action could be brought by the resident’s personal representative *without regard to whether the cause of death resulted from the deprivation*. Cf. §415.1111. See *Holly v. Auld*, 450 So.2d 217 (Fla. 1984) (where the words of a statute convey a clear and definite meaning, courts are without power to construe the statute in such

a way as to extend or modify the statute's express terms, even if it is "to uphold a policy favored by the court.")⁹

In sum, the Respondent believes that the Fourth District correctly decided that the language of §400.023(1) clearly and unequivocally provides that a personal representative may bring suit on behalf of a deceased resident of a nursing home for an alleged infringement of the resident's rights - only when the infringement has caused the resident's death, and, as such, would respectfully request this Honorable Court to answer the certified question in the negative on these same grounds.

B. The Legislature's Intent Becomes Abundantly Clear When One Compares the Language Used by the Legislature in §415.1111 and §400.429, Which are Sister Statutes to §400.023(1).

As discussed, the Legislature's obvious intention in amending §400.023(1) to permit personal representatives to bring the statutory action - but limiting the

⁹ The legislative history of a statute is irrelevant where the wording of the statute is clear; *Dept. of Health and Rehab. Serv. v. MB.*, 22 Fla. L. Weekly 5564 (Fla. 1997); *St. Mary's Hospital, Inc. v. Phillipe*, 699 So. 2d 1017, 1025 (Fla. 4th DCA 1997) ("[i]t is a fundamental rule of statutory construction that if the text is clear, the court may not resort to construction. We must also read a statutory text to give effect to the plain meaning of its words"). *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976) (the Legislature is presumed to know the meaning of the words and to have expressed its intent by the use of the words found in the statute). *See also Carcaise v. Durden*, 382 So. 2d 1236 (Fla. 5th DCA 1980); *State v. Billie*, 497 So. 2d 889 (Fla. 2d DCA 1986); *Floyd v. Bentley*, 496 So. 2d 862 (Fla. 2d DCA 1986).

circumstances in which a personal representative could bring a cause of action on behalf of a deceased nursing home resident is clear on the face of the statute - and becomes even more so if one considers similar sister statutes - such as §415.1111, formally §415.1111(3). For example, if the Court was to adopt the interpretation espoused by Knowles, it would effectively render meaningless § 415.1111 (Fla. Stat. 2000) which provides that an action “may be brought by the personal representative of the estate of a deceased victim *without regard to whether the cause of death resulted from the abuse, neglect or exploitation.*”

Indeed, in 1995, long after it had enacted the 1986 amendment to §400.023(1), the Florida Legislature enacted §415.1111, and amended this section just last year. Chapter 415 is entitled, “*Protection from Abuse, Neglect and Exploitation,*” and is generally considered to be a “sister” statute to Chapter 400. More specifically, § 415.1111 provides a private cause of action, which is in some circumstances very similar to 400.023(1), and in other circumstances, is vastly different. Section 415.1111 (2000) states, in pertinent part:

A vulnerable adult who has been abused, neglected or exploited as specified in this Chapter, has a cause of action against any perpetrator and may recover actual and punitive damages for such abuse, neglect or exploitation. The action may be brought by the vulnerable adult, or that person’s guardian, by an organization acting on behalf of the vulnerable adult with the consent of that person, or that person’s

guardian, or by the personal representative of the estate of a deceased victim without regard to whether the cause of death resulted from the abuse, neglect or exploitation.

Obviously, the difference between these two sections is as clear and unambiguous as the language used by the Legislature in the sections themselves. § 415.1111 expressly allows a personal representative to sue *without regard to the decedent's cause of death*, while § 400.023(1) limits a personal representative's cause of action by requiring the decedent's death result from the care and treatment provided by the nursing home.

Petitioners essentially contend that §400.023(1) does not mean what it says, but rather it means what §415.1111 says. Notably, Petitioners avoid referencing or admitting the existence of §415.1111 in their Petition, nor have they ever effectively addressed the language in that statute either at the trial or intermediate appellate levels. Similarly, the existence of other Florida statutes helps to illustrate the fact that a personal representative has cause of action under § 400.023(1) only when the cause of death resulted from a deprivation or infringement of decedent's rights. For example, § 400.429, entitled "*Civil Actions to Enforce Rights*" (a statute which deals with "Assisted Living Facilities), provides in pertinent part:

Any person or resident whose rights as specified in this part are violated shall have a cause of action against any facility owner, administrator, or staff responsible for the violation. The action may be brought by the resident or his or her guardian or by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident *when the cause of death resulted from a violation of the decedent's rights to enforce such rights.* (emphasis added).

As the Legislature's use of language in these various other statutes helps to illustrate, the Legislature often provides for *different* remedies for injuries which result in death than those which do not, and in reviewing the language of these other statutes (e.g., § 415.1111 and § 400.429), the Legislature's intent is abundantly clear.

Knowles apparently takes the position § 46.021 somehow mandates that no cause of action in Florida can ever be legislatively restricted in any way - and that the rule in §46.021 somehow controls over another, more specific - or even later enacted - statute, and that the express language used by the Legislature in §400.023(1), was thus instantaneously rendered "invalid" upon its enactment - by the previous dictates of § 46.021 - insofar as §400.023(1) required "the cause of death to be [casually linked to] the deprivation or infringement of the descendent's rights." This is simply not the case. The two sections can be quite easily

“harmonized” if one simply realizes that §46.021 does not “create” or “modify” anything - it merely provides that if an action exists prior to the death of the real party in interest - it does not die with that party’s death.¹⁰

Respectfully, for this, and all of the foregoing reasons, this Court should affirm the decision of the Fourth District and answer the certified question in the negative.

¹⁰All causes of action do not survive the death of the victim. *See, e.g., Gates v. Foley*, 247 So. 2d 40, 45 (Fla. 1971) (“[a wife's] right of action [for loss of consortium] is a derivative right and she may recover only if her husband has a cause of action against same defendant.”) *See, e.g., Taylor v. Orlando Clinic*, 555 So. 2d 876, 879 (Fla. 5th DCA 1989) (“negligence action did not survive death because § 768.20 specifically provides [that] “when a personal injury to the decedent results in his death, no action for the personal injury shall survive and any such action pending at the time of his death shall abate.”); *Lohr v. Byrd*, 522 So. 2d 845 (Fla. 1988)(claims for punitive damages die with tortfeasor, and thus, action for these damages may not be recovered against estate, notwithstanding § 46.021). Divorce ends in death of party; medical malpractice ends with the death of a surviving spouse if there are no minor children. § 768.21. *Accord Arthur v. Unicare Facilities, Inc.*, 602 So. 2d 596, 600, n. 1 (Fla. 2d DCA 1992) (Wrongful Death Act, § 768.16-768.27 eliminates claims for pain and suffering when death results from injuries, notwithstanding Fla. Stat. § 46.021); *Gates v. Foley*, 247 So. 2d 40, 45 (Fla. 1971) (“[a wife's] right of action [for loss of consortium] is a derivative right and she may recover only if her husband has a cause of action against same defendant”). *See also Carpenter v. Sylvester*, 267 So. 2d 370 (Fla. 3d DCA 1972), where the court held that § 46.021 did not have the effect of preventing abatement of a statutory cause of action for paternity, absent a provision for survival in the statute which created the cause of action. The court held that where an enabling statute (synonymous with a remedial statute) provides that a statutorily-created cause of action survives the death of a party, it may be so maintained. Where there is no such provision in the enabling statute, however, it may not. *Id.*

C. Established Principles of Statutory Construction Confirm the Fourth District’s Construction of the Statute and Establish that the Legislature’s Intent is Expressed in its Clear and Unambiguous Language of the Statute.

In her Brief, Knowles virtually ignores the plain meaning of the language of the statute, and instead insists on having this Court resort to rules of “statutory construction” to determine the “legislative intent” here. However, even if the court were to do as she asked and abandon the “plain meaning” of the language used in §400.023(1), and instead apply principles of statutory construction, the result would be the same.

It is true, as Knowles points out in her Brief, that this Court has often held legislative intent to be the “polestar” guiding the interpretation of statutes. *See e.g., Donato v. American Tel. and Tel. Co.*, 767 So. 2d 1146, 1150 (Fla. 2000); *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998); *Miele v. Prudential-Bache Sec.*, 656 So. 2d 470, 472 (Fla. 1995). And it is also true that “this intent must be given effect even though it may contradict the strict letter of the statute.” *State v. Webb*, 398 So. 2d 820, 824 (Fla. 1981); *Arthur Young & Co. v. Mariner Corp.*, 630 So. 2d 1199, 1202 (Fla. 4th DCA 1994).

However, as Knowles herself admits, the Legislature’s intent in enacting a statute is normally to be determined primarily from the language it has utilized; and

therefore, Florida's courts are generally not able to resort to canons of construction or extrinsic aids to interpretation where the statutory language used is clear and unambiguous.¹¹ See e.g., *Rollins v. Pizzarelli*, 761 So. 2d 294, 297 (Fla. 2000); *McLaughlin*, 721 So. 2d at 1772; *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984); *Golf Channel*, 752 So. 2d at 564. Nevertheless, even if the Court were to resort to such methods - it would not alter the result here.

As discussed, the Fourth District Court of Appeals quite easily concluded here that §400.023(1) unambiguously restricts posthumous actions which can be brought under the statute, and the Court had no problem construing the effect of §400.023(1) in conjunction with other statutes. This analysis simply gives the greatest weight to the plain meaning of the statutory language of the statute in question, and did not, as Knowles seems to suggest, read this clear and unequivocal language of §400.023(1) in "isolation," ignor[ing] the intent of the Legislature as expressed in "other" related statutes.

Knowles claims that under the Fourth District's "plain meaning" construction of the statute, a nursing home may be able to violate a provision of §400.022 and

¹¹Only where reasonable persons could find two different meanings in the statutory language, a statute is considered ambiguous. See *Rollins*, 761 So. 2d at 297; *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)

get away with it in the event that the resident later dies. To support this claim, she cites, for example, § 400.162(6), Florida Statutes (1995) - which is not an enumerated “resident’s right” - that provides that “in the event of the death of a resident, the nursing home is to return all funds held in trust to the resident’s personal representative. See Brief of Petitioner at 19. Knowles claims that because the right provided by §400.022(1)(h)4 can only arise after a resident dies (and a violation of that section can never cause the resident’s death), that under the Fourth District’s construction this particular right will never be enforceable - thus rendering the provision meaningless.

This argument is flawed in several respects, not the least of which is that a personal representative can certainly secure these funds (thus ensuring that the resident’s “right” to have §400.022(1)(h)(4) complied with) using other avenues of Florida law. Furthermore, a nursing home cannot “violate the right of a resident” that is no longer alive, nor was it the intent of the legislature to provide a cause of action for the Personal Representative solely for such an alleged violation.

In her Brief, Knowles claims that the Fourth District “misapprehended” the general rule of survival in three different ways. She claims that the unanimous *en banc* panel at the Fourth District erroneously applied the rule of statutory

construction which provides that “specific” statutory language should control over more “general” language, and claims that the panel should have instead “harmonized” §400.023(1) with (what she apparently believes to be) some sort of competing interests inherent in the relationship between the Nursing Home Act, the survival statute, and the Wrongful Death Act. Knowles also claims that the Fourth District “erroneously concluded” that the rule of survival set forth in §46.021 does not apply to actions involving “personal” rights, and that in doing so, it ignored the “plain language of §400.023(1).” *See* Petitioner’s Brief at 23. Not one of these claims is supported in fact or law.

For example, Knowles argues that the Fourth District committed its first error when it applied the canon of construction that “specific” statutory language controls over general language. *Id.* at 24. Obviously, §400.023(1) - a statute which the Legislature enacted to deal with the specific subject matter at issue here - should in fact control over the more “general” § 46.021. However, this argument need not even be addressed - as the Fourth District did not actually apply any principle of “construction,” it merely noted that §46.021 was in fact “inconsistent, general and earlier-enacted.” 766 So. 2d at 337. Instead, as discussed, the Court specifically held that the language of §400.023(1) is “unequivocal on the specific subject to

which it speaks,” and simply added (prefacing its commentary with the word, “furthermore”) that a “special” statute should control over a more “general” one. Indeed, as an additional general rule of statutory construction, a “special statute” - such as §400.023(1) here - controls over a general statute. *McKendry v. State*, 641 So. 2d 45 (Fla. 1994). *See also* Judge Warner’s dissenting opinion in *Greenfield*, 705 So. 2d at 934. Accordingly, inasmuch as §400.023(1) - and not §46.021 - was intended to specifically address the rights of the nursing home resident, §400.023(1) should control in the instant case. *See CS. v. S.H.*, 671 So. 3d 260, 268 (4th DCA 1996). Moreover, §400.023(1) cannot be “nullified” by §46.021. *McKendry*, 641 So.2d 45 (Fla. 1994) and cases cited herein.

Knowles claims that the second “mistake” the Fourth District made occurred when it adopted some of the reasoning Judge Warner used in her dissent in *Greenfield* - wherein she opined that the statutory rights provided by §400.022 “are largely personal to the resident of the facility” and, thus, should not survive the resident’s death pursuant to § 46.021. *Knowles*, 766 So. 2d at 336 (adopting Judge Warner’s dissent in *Greenfield*, 705 So. 2d at 934). Knowles claims that the Fourth District’s reference to Judge Warner’s rationale is contrary to the general rule of survival set forth in § 46.021.

Of course, the Fourth District's off-handed reliance on this particular rationale is whether it was justified or not - is not fatal to its plain-meaning construction of the statute. But even so, Judge Warner's reasoning is not at all flawed, and certainly could provide grounds to support the Court's construction.

Knowles claims that case law refutes the Fourth District's reasoning that "personal" rights do not survive pursuant to §46.021, ironically grounding its support in *Baumstein v. Sunrise Community, Inc.*, 738 So. 2d 420, 421 (Fla. 3rd DCA 1999), a case fatally dispositive to its claims. The Court in *Baumstein* did not hold that "personal" rights survive pursuant to section 46.021. Quite the contrary, the Court held that courts "are bound by the legislature's clear and unambiguous expression of its own intent" *Id.* at 421. Applying *Baumstein* to these facts, §400.023 provides who can sue and when they can sue - it clearly and unequivocally states that the cause of death must result from the deprivation of resident's rights. Thus, *Baumstein* only further destroys Petitioner's claims. Further dispositive and distinguishable, the statute in question, §393.13, contains no limiting language like that clearly found in §400.023(1). As the Court noted in *Baumstein*, "[d]espite the appellee's imaginative attempts to make it mean something other than what it says, the statute could hardly be clearer." *Id.*

Knowles also claims that the Fourth District Court unjustifiably “inserted” the word “only” into the statute. *See* Petitioner’s Brief at 18. She argues that Courts are not free to “rewrite” statutes by adding the words the Legislature chose not to include. *See e.g., Holly*, 450 So. 2d at 220; *Webb v. Hill*, 75 So. 2d 596, 605 (Fla. 1954); *Meyer v. Caruso*, 731 So. 2d 118, 126 (Fla. 4th DCA 1999). Quite obviously, the Fourth District did not “insert” the word “only” into §400.023(1), it simply read the statute as it is worded, and those words do not expressly authorize a personal representative to bring an action under §400.022 under any other circumstances - then when the decedent resident has died as a result of the alleged violations of that §400.022. In essence, the court simply refused to read the statute in any other way than the way it is worded - and that is what the court meant when it used the word “only.” Moreover, Petitioner misapplies *Beverly Enterprises-Florida, Inc. v. Maggiocomo*, 651 So. 2d 816 (Fla. 2nd DCA 1995) when it claims that this case stands for the proposition that nursing home resident’s have a cause of action under 400.023(1) even when the death is not caused by the deprivation of the resident’s rights. *Maggiocomo* only dealt with the limited issue of the sufficiency for pleading punitive damages, and the opinion nowhere discussed or even contemplates the sole issue before this Court.

In sum, even if a Court were to abandon the plain meaning of the unequivocal language used in the subject statute - and resort instead to the rules of statutory construction suggested by Knowles - the result would be the same, and the answer to the certified question would still have to be “no.”

D. The Legislative History of §400.023(1) and Prior Case Law Helps to Confirm the Correctness of the Fourth District’s Construction of the Statute.

As discussed, there is no need for the Court to review the legislative history of this statute, as the language used is clear and unambiguous. However, even if this Court were to look behind the clear and unambiguous language found in §400.023(1) and go on to review the legislative history of this particular section, the result would nevertheless be the same, as the history of the statute without question supports the plain meaning of the statute. Indeed, a review of the history of §400.023(1) only serves to confirm the fact that the 1986 amendment was only intended to permit the personal representative of a deceased nursing home resident to bring an action against a nursing home when the resident’s cause of death resulted from the deprivation or infringement of the decedent’s statutory rights.

Section 400.023(1), which was initially enacted in 1980, originally did not expressly allow for actions to be brought after a resident’s death. More

specifically, when first enacted, the statute did not contain the critical language “or by the personal representative of the estate of a deceased resident when the cause of death resulted from the deprivation or infringement of the decedent’s rights.”

Section originally provided as follows:

The action may be brought by the patient or his or her guardian or by a person or organization acting on behalf of a patient with the consent of the patient or his or her guardian.

See §400.023(1), Fla. Stat. (1980). **Appendix “2.”**

In 1986, §400.023(1) was amended by the Legislature. When the initial Bill of this particular amendment was first introduced, it did not contain the limiting language at question (i.e., specifying that the personal representative of a deceased nursing home resident could bring an action under §400.023(1) only when the death resulted from a deprivation or infringement of the decedent’s right). Instead, the Bill in its original form contained only the following language:

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

(See Appendix “3”).

Prior to the Bill becoming law, however, in the House, Representative

Patchett suggested they add additional limiting language to the Amendment - “when the cause of death resulted from the deprivation or infringement of the decedent’s rights” - a suggestion which was then adopted. (See Journal of House of Representatives, attached as **Appendix “4”**).

Similarly, when the Bill was first proposed in the Senate (under Senate Bill 128), Senator Fox moved to add the same limiting language “when the cause of death resulted from the deprivation or infringement of the decedent’s rights,” and this amended version was also adopted by the Senate (*See Journal of Senate*, attached as **Appendix “5”**). Senate Bill No. 128, which added the additional language to §400.023(1), specifically notes that the amendment was intended to provide a cause of action by a personal representative of the estate of a deceased nursing home but only “*under certain circumstances . . .*” (See *Appendix “E”*) This critical language - “under certain circumstances” - quite significantly appears throughout the legislative history of this statute.

This clear and unequivocal intention is not only evident from the language the Legislature chose to use, but is actually confirmed by Appendixes 5-11 attached to Petitioner’s Brief.

On page 32 of its Brief, Petitioner has conglomerated a group of selected

sections of various sentences and phrases (separated by ellipses) that it claims supports that 400.023(1) provides for a cause of action without regard to whether the death is caused from the deprivation of the resident's rights. They have not attached nor submitted the tape recordings or transcription of the entire proceedings of amendment to senate bill 128 which contain the entire context of statements and allegedly discussing rationale of the bill, nor have they secured approval to use such information in this Court. In any event, the out-of-context references do not mean what Petitioner claims they do, and do not in any way alter the clearly articulated legislative intent.

If one examines the legislative history of this statute carefully, it becomes clear that the Legislature's real intention here was to allow personal representatives to secure *attorneys' fees* awards and costs in addition to any judgment amount. If the Florida Legislature had intended to authorize a personal representative to bring a cause of action under §400.023(1) - even if the decedent's death was not related to any wrongdoing by the nursing home, it would not have altered the language in the initial Bill. Furthermore, as the title of the Bill itself indicates, the amendment was specifically intended to allow the personal representative to bring a cause of action only "under certain circumstances." *See* Chapter 86-79, Laws of Florida.

Similarly, contrary to the arguments put forth by Knowles and her *amici*, the intent of the Florida Legislature to limit the circumstances under which the personal representative can maintain an action under §400.023(1) is supported by case law interpreting §400.023(1), including the recent decision of the Fourth District, *First Healthcare Corporation v. Hamilton*, 740 So. 2d 1189 (Fla. 4th DCA 1999), *rev. dismissed*, 743 So. 2d 12 (1999), where the court said

First, the 1986 amendment to §400.023, which the *Spilman* court construed, *simply created in the personal representative of a deceased nursing facility resident, whose death resulted from deprivation or infringement of the decedent's rights, a cause of action* against the nursing facility to enforce such rights and recover actual and punitive damages for any deprivation of or infringement on the rights of a resident. *There is nothing unclear or ambiguous in the legislative language, and thus the legislative intent must be determined primarily from the language of the statute. See Aetna Cas. & Sur. v. Huntington Nat'l Bank*, 609 So.2d 1315, 1317 (Fla. 1992).

Id. at 6.

In addition to *Hamilton*, the Court in *Beverly Enterprises-Florida, Inc. v. Spilman*, 661 So.2d 867 (Fla. 5th DCA 1995) (with which the *Hamilton* Court disagreed on the damage issue) also acknowledged the clear intent of the Legislature to limit posthumous causes of action brought under §400.023(1):

Both the plain language of the statute and the transcripts of the committee hearings indicate that the legislature did not intend damages

under section 400.023 to be limited by the Wrongful Death Act where the nursing home's infringement or deprivation of the patient's rights resulted in the patient's death.

Id. at 869. Although the Respondent earnestly believes that this Court need not look beyond the plain language of the statute to its legislative “history,” that history and the case law which has analyzed this statute - clearly indicates that §400.023(1) does not authorize the personal representative of a deceased nursing home resident to bring an action under §400.023(1) unless the resident has died as a result of the alleged violation of §400.022.

E. Policy Considerations Confirm the Correctness of the Fourth District Court's Construction of the Statute

Contrary to Knowles' contentions, she was not left without a remedy here. Specifically, under §46.021 Florida Statutes (1999), if a nursing home resident (like Gladstone) suffers some sort of personal injury at the hands of the home, but then subsequently dies of unrelated causes, the personal representative of that resident will still have a cause of action (under a common law negligence theory) for any loss or injury the nursing home may have caused the resident (i.e., through its negligence or other wrongful conduct). Moreover, it is undisputed that a violation of § 400.022 can provide *per se* evidence of such negligence - even if the resident's injuries did not result in death. In fact, this is the precise theory that the instant

case was tried on - a common law negligence survival claim. Indeed, just because §400.023(1) does not provide a personal representative in a case such as this with an additional “statutory” action (i.e., one by which a plaintiff’s counsel might be able to recover attorney’s fees), in no way means that deceased nursing home residents are left without a legal remedy for wrongs committed against them, or that nursing homes are somehow left immune from suits brought for non-fatal losses or injuries sustained by their residents.

Knowles’ construction of §400.023(1) effectively redrafts both §400.023(1) and §415.1111, rendering the phrase in §415.1111 - “*without regard to whether the cause of death resulted from the abuse, neglect or exploitation*” - meaningless.

II. Whichever way this Court was to Decide on the Statutory Issue, the Issue of “Comparative Fault” Is Moot, Since the Jury Found That Respondent Was Not at Fault.

No matter how the court decides the statutory issue, the issue of “comparative fault” (just now raised by Knowles in her Brief on the merits) is moot, as the jury here specifically found Respondent not to be at fault here. Indeed, although the verdict form contains six possible questions, the jury in this case answered only question number 1. (R. 1214-1216). That one question, the jury answered in the negative:

Was there negligence on the part of the Defendant, Beverly Enterprises - Florida, Inc. d/b/a Washington Manor Nursing Home and Rehabilitation Center which was the legal cause of loss, injury or damage to the decedent, Gladstone Knowles?

Yes ___ No X

If your answer to Question 1 is not, your verdict is for the Defendant and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If you answer to question one is yes, please answer question two.

Was there negligence on the part of David A. Krant, M.D. which was a legal cause of loss, injury or damage to the decedent Gladstone Knowles?

Yes ___ No ___

If you answer to question 2 is Yes, please answer question 3. If your answer to question 2 is No, skip question 3 and answer all remaining questions.

As such, it is clear that the jury found that the Respondent was without any “fault” in this matter whatsoever - comparative or otherwise. Knowles has not challenged the verdict form, nor the propriety of the jury in making this determination. Thus, unless Knowles can persuade this Court that the alleged violations of Gladstone’ rights imposed some sort of “absolute liability” upon the Respondent - which has nothing to do with her claim of “negligence” - despite seeking precisely the exact same damages - Knowles should not even be heard

(much less, prevail) on this point. Florida's Comparative Fault Statute, §768.81, specifically applies to civil actions based upon or related to negligence claims and even strict liability claims. This section provides, in pertinent part:

(1) Definition.—As used in this section, “economic damages” means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action.

(2) Effect of contributory fault.—In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and non-economic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

(3) Apportionment of damages.—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

(4) Applicability.

(a) This section applies to negligence cases. For purposes of this section, “negligence cases” includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories.

In determining whether a case falls within the term “negligence cases,” the court shall look to the substance of the action and not the conclusory terms used by the parties.

(b) This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by Chapter 403, Chapter 498, Chapter 517, Chapter 542, or Chapter 895.

(5) Applicability of joint and several liability.—Notwithstanding the provisions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of damages does not exceed \$25,000 . . . (emphasis added).

As noted, the statute provides (in part) that when determining whether an action falls within the scope of “negligence cases,” the court shall look to the substance of the action and not the conclusory terms used by the parties. There is no question that the principle of “comparative fault” applies to medical malpractice cases. Similarly, there is no question in the instant case that Knowles was alleging “medical negligence” - as evidenced by her compliance with the presuit provisions of Chapter 766. In addition, Knowles criticized the drugs which were provided to Gladstone while he resided at the Respondent’s facility. It is undisputed that these drugs were ordered and prescribed by physicians. In this regard, it is also quite significant that under §400.023(3), a nursing home is not liable for the medical

negligence of any physician rendering care or treatment to the resident except for the services of a medical director as provided in this part. In other words, the nursing home is only responsible for the administrative duties of its medical director and not for the “medical negligence” of its medical director. As a result, one can imply that it was the Legislature’s intent for physicians rendering care to nursing home residents to be responsible for their own actions or inactions. Otherwise, the nursing home facility would (unfairly) become the insurer of the negligence of all health care providers. Logically speaking, if the plaintiff fails or decides not to sue a health care provider who may be responsible for the plaintiff’s injuries, the nursing home may certainly place the health care provider on the verdict form.

Furthermore, inasmuch as §768.81 applies to *strict liability* cases, it certainly applies in Chapter 400 cases, since Chapter 400 does not even provide for strict liability. Perhaps the absurdity of Knowles’ position can be gleaned from the following example: If a nursing home resident develops an ulcer in his or her leg, and as a result is sent to a hospital where a surgeon mistakenly amputates the wrong leg, under Knowles’ argument, she could unilaterally block the placement of the surgeon on the verdict form by purposely not naming him/her (even if they know the surgeon was the sole negligent party). The jury would be precluded from

properly assessing the respective fault of that unnamed party. This scenario is completely at odds with common sense, and with Florida's Comparative Fault statute as well.

The weakness in Knowles' claim - that Respondent did not present sufficient evidence to allow Dr. Krant (who left a staple inside of Gladstone's hip which may have caused the infection) to be included as a *Fabre* non-party on the verdict form - is also rather evident.

Florida Statute §766.102(4) in pertinent part states:

. . . the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider. (emphasis added)

Since it is uncontroverted that Dr. Krant left the staple in Gladstone' hip (and a staple constitutes paraphernalia commonly used in surgical procedures), the sufficient showing may be proven from those facts. Also highly significant, in this regard is the corroborating testimony provided by Knowles' own nurse - expert, Maria De Los Santos, who testified, among other things, that "the standard of care would require that all staples be removed at that time." (T. Vol. 12, Oct. 22, 1997, at 709). Thus, it is apparent that Dr. Krant's violation of §766.102(4) constituted

prima facie evidence of professional negligence - which allowed the Respondent to submit the *Fabre* non-party for the jury to determine proximate cause and damages.

In sum, in the event this matter is remanded in any way, Knowles' request that the issue of comparative fault should be rejected.

III. Knowles Incurred No Detriment and Was in No Way Prejudiced by the Adverse Summary Judgment on Her Statutory Claim Because the Question of Whether Washington Manor Violated Any of the Provisions of §400.022 Was Fully Considered and Answered by the Jury

Put simply, regardless how this Court were to answer the certified questions here, it is clear that Knowles' case was in no way harmed by the pretrial grant of summary judgment on Count I of her Complaint. In her remaining Count IV, Knowles sought damages for a violation of the "Resident's Bill of Rights" set forth in Fla. Stat. 400.022. Notwithstanding the Court's adverse ruling on the summary judgment, that issue was in fact submitted to (and resolved by) the jury, a reality which is quite easily borne out by the jury instructions and verdict form submitted to the jury in this case.

The fact that it was referred to as a common law negligence claim, as opposed to a statutory claim under §400.023(1), is hyper-technical. Florida Statute

§400.023(1) does nothing more than establish a statutory remedy for a violation of §400.022. A person who is actually injured by such a violation may always rely on their common law rights and remedies. The trial court, in effect, provided Knowles with a greater remedy than she was entitled when it allowed Knowles' counsel, throughout the proceeding, to repeatedly refer to the Florida's Resident's Bill of Rights and §400.022, and by instructing the jury that a violation of §400.022 constituted negligence *per se*. Further, Knowles experts provided a plethora of testimony supporting their claims of violations of section 400.022. Thus, Knowles already had her day in court. *See Appendix "6"*, containing the Initial and Reply briefs filed in the Fourth District Court of Appeal, at pages 11-23 (of the Initial Brief) and pages 4-8 (of the Reply Brief), which itemize a recitation of the litany of supporting record evidence that demonstrated Knowles' full opportunity to have her "violation of resident's rights" case heard and determined by a jury.

Since Knowles had her day in the trial court, regardless of whether this Court answers the certified question, it should follow the Fourth District Court's decision and affirm the reinstatement of the verdict.

CONCLUSION

In light of the foregoing, and on the strength of the authorities cited,

Respondent, BEVERLY ENTERPRISES-FLORIDA, INC. d/b/a BEVERLY GULF COAST-FLORIDA, INC., d/b/a WASHINGTON MANOR NURSING HOME AND REHABILITATION CENTER, would respectfully request this Court to affirm the *en banc* decision of the Fourth District Court, to answer the certified question in the negative, and, in any event, to affirm the reversal of the trial court's grant of a new trial, directing that the jury verdict be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was furnished by U.S. Mail this 22nd day of January, 2001 to: **Jane Kreuzler-Walsh, Esquire**, Jane Kreuzler-Walsh, P.A., 501 So. Flagler Drive, Suite 503, Flagler Center, West Palm Beach, Florida 33401, **Jeffrey M. Fenster, Esquire**, Fenster and Faerber, P.A., 8751 West Broward Boulevard, Plantation, Florida 33324, **Laura B. Zebersky, Esquire**, Zebersky & Associates, P.A., 1776 N. Pine Island Road, Suite 308, Plantation, FL 33322; **Joel S. Perwin, Esquire**, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130; **M. Stephen Turner, Esq.**, Broad and Cassel, 215 S. Monroe Street, Suite 400, P.O. Drawer 11300, Tallahassee, FL 32302; **Edward J. Lyons, Esq.**, Milcowitz & Lyons, P.A., 29605 U.S. Highway

19 North,

Suite 110, Clearwater, FL 33761.

Scott A. Mager
Fla. Bar No. 768502
Mager & Associates, P.A.
Counsel for Respondent
500 East Broward Blvd.
Eighteenth Floor
Fort Lauderdale, Florida 33394
Tel: (954) 763-2800 Fax: (954) 763-
2885

And

George F. Quintairos and Edward C.
Prieto
Quintairos, McCumber, Prieto &
Wood, P.A.
Dadeland Towers II, Suite 825
Miami, Florida 33156
Telephone: (305) 670-1101