

**IN THE DISTRICT COURT OF APPEAL  
STATE OF FLORIDA SECOND DISTRICT**

**BEVERLY HEALTH AND  
REHABILITATIVE SERVICES, INC. and  
BEVERLY ENTERPRISES-FLORIDA,  
INC. and BEVERLY GULF COAST-  
FLORIDA, INC., authorized to operate  
HERITAGE PARK f/k/a HERITAGE  
PARK SPECIALTY CARE CENTER f/k/a  
DADE CITY GERIATRIC CENTER,**

**CASE NO:**

**LT Case No. 2000-444CA Civ. Div.B**

**Petitioners/Defendants,**

**v.**

**THE ESTATE OF RUBY NELL WILKES,  
by and through MICHAEL A. "MIKE"  
WILKES, Personal Representative,**

**Respondent/Plaintiff.**

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Petition for Writ of Certiorari from the Circuit Court of the Sixth  
Judicial Circuit in and for Pasco County, Florida, the Honorable  
Maynard Swanson presiding, Case No. 2000-444CA

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## PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 9.100 of the Florida Rules of Appellate Procedure, the Petitioners, BEVERLY HEALTH AND REHABILITATIVE SERVICES, INC. and BEVERLY ENTERPRISES-FLORIDA, INC. and BEVERLY GULF COAST-FLORIDA, INC., authorized to operate HERITAGE PARK f/k/a HERITAGE PARK SPECIALTY CARE CENTER f/k/a DADE CITY GERIATRIC CENTER (“Beverly”), respectfully petitions this Court for writ of common law certiorari to review a non-final order denying Appellants’ Motion to Dismiss Plaintiff’s, THE ESTATE OF RUBY NELL WILKES, by and through MICHAEL A. “MIKE” WILKES, Personal Representative’s (“Wilkes”) Second Amended Complaint (Appendix A) and in support thereof would show that:

### BASIS FOR INVOKING JURISDICTION

Beverly requests this Court to exercise its certiorari review, quashing the decision of the trial court which had denied Beverly’s Motion (and Amended) to Dismiss Second Amended Complaint because Wilkes violated the Chapter 766 presuit requirements that serve as a condition precedent to the filing of a medical malpractice claim.

As this Court has previously noted, certiorari is the proper method to review an order denying a motion to dismiss for failure to comply with the presuit notice requirement of §766.106.<sup>1</sup> *NME Properties, Inc. v. McCullough*, 590 So. 2d 439, 440 (Fla. 2<sup>nd</sup> DCA 1991); *NME Hospitals, Inc. v.*

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<sup>1</sup>It would be appropriate to issue an Order to Show Cause in this case, as this Court has already issued Orders to Show Cause in two (2) other cases involving similar issues (relating to Chapter 766), which remain pending before this Court. *See Arbor Health Care Company v. Monroe*, Case No. 2D00-1293, and *Integrated Health Care Services, Inc. v. Redway*, Case No. 2D00-2905.

*Azzariti*, 573 So. 2d 173 (Fla. 2<sup>nd</sup> DCA 1991); *Pearlstein v. Malunney*, 500 So. 2d 585 (Fla. 2<sup>nd</sup> DCA 1986), *rev. denied*, 511 So. 2d 299 (Fla.1987). The court reasoned in *Pearlstein* that where a trial court erred in failing to dismiss a medical malpractice complaint for failure to comply with presuit notice requirements, the error complained of could not be adequately remedied on appeal. *Pearlstein*, 500 So. 2d at 587. Early intervention was necessary, in its view, to comply with the legislature's "perception of urgency" in enacting medical malpractice reform. *Id.* at 588. The Third District also agrees that certiorari lies to review an order denying a motion to dismiss for failure to comply with the presuit requirements of Chapter 766. *Miami Physical Therapy Associates, Inc. v. Savage*, 632 So. 2d 114 (Fla. 3<sup>rd</sup> DCA 1994).<sup>2</sup>

Since the Court has denied the Motion to Dismiss, Beverly would be forced to further defend the medical malpractice action, perhaps go through a trial, and possible appeal of any adverse judgment, which would then be reversed for Respondent's failure to comply with the conditions precedent mandated by Chapter 766, amounting to a pyrrhic victory, a result not intended by the statute's obvious intended purpose:

Conceivably, if respondents were to prevail in this proceeding, they might prevail at trial and obtain a judgment against petitioners. On appeal, if the judgment was determined to be the product of a fundamentally fair trial, an argument could be made that no useful purpose would be served in remanding the case because the cost-saving pretrial procedures were not followed. Therefore, for petitioners to receive the benefits conferred upon them (and, in the estimation of the legislature, upon the

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<sup>2</sup> The rationale of review now is sound, as the case law explains: Since the Court has denied the Motion to Dismiss, which on its face should have been granted, Petitioners are forced to defend a malpractice suit where the Respondents admittedly have not complied with the conditions precedent mandated by chapter 766. To have to defend a case, go through a trial, and possibly appeal a judgment which would then be reversed for Respondent's failure to comply with the conditions precedent mandated by Chapter 766 would amount to a pyrrhic victory.

citizens of Florida) by the statute, it is necessary and appropriate for [the Court] to intervene at this juncture.

*Citron v. Shell*, 689 So. 2d 1288 (Fla. 4<sup>th</sup> DCA 1997) (quoting *Pearlstein*, 500 So. 2d at 587).

Consistent with the case law, and to avoid the shown irreparable harm, Beverly respectfully requests that this Court exercise its certiorari jurisdiction in this case.

### **RELEVANT FACTS**

This case arises out of medical care rendered to Ruby Nell Wilkes. See Second Amended Complaint, Appendix 5, paragraph 40(a).<sup>3</sup> Wilkes' first Complaint was met with Beverly's Amended Motion to Dismiss, Appendix 1 and 2, respectively. The trial court entered an Order granting the Amended Motion to Dismiss on June 15, 2000. See Appendix 3. Respondents then filed a six (6) count Amended Complaint on June 28, 2000, Appendix 4, followed by a Second Amended Complaint, also alleging six counts. Appendix 5. Petitioners filed a Motion to Dismiss and/or Strike Second Amended Complaint, Appendix 6, a Memorandum of Law in Support of Defendant's Motion to Dismiss and/or Strike Complaint, Appendix 7, and Supplemental Memorandum of Law (regarding Chapter 766 deficiencies), Appendix 8. The Plaintiff filed a Memorandum in Opposition to the Motion to Dismiss, Appendix 9.

The Second Amended Complaint essentially alleges that Ruby Nell Wilkes did not receive adequate health care, resulting in infections, and was not adequately supervised, resulting in injuries from falling down. Appendix 6. It also sought to impose vicarious liability on Beverly through

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<sup>3</sup>. See Second Amended Complaint, paragraphs 40, 54(a) & (e); 71(a) & (e); 78(a) & (h); 92(a); and 109(a) & (e).

allegations that the medical care and treatment rendered to Ruby Nell Wilkes by the nurses was not adequate and appropriate care:

31. DEFENDANTS, were required to have sufficient nursing staff, on a 24 hour basis to provide nursing and related services to residents in order to maintain the highest practicable physical, mental, and psychosocial well-being of each resident as determined by resident assessments and individual plans of care.

32. DEFENDANTS did not perform adequate and sufficient background checks; did not provide adequate and sufficient orientation and in-service training; and did not adequately and sufficiently monitor the performance of its staff, with the result that residents like RUBY NELL WILKES did not receive adequate and appropriate care.

Second Amended Complaint, ¶¶31 and 32, Appendix 6.

Respondents further alleged that the lack of medical care caused medical problems for RUBY NELL WILKES:

40. Ruby Nell Wilkes was deprived of such rights by the acts or omissions of Defendants which are apparent from the chart, and include the following: a) Failing to provide adequate and appropriate health care to Ruby Nell Wilkes by allowing her to develop repeated, numerous infections, which include: 1)Infection with MRSA at the G-Tube site...2)Urinary tract infection...5)Eye infection...11)Yeast infection...15)Upper respiratory infection....”

Second Amended Complaint,¶40. The claims of lack of medical care that caused numerous infections are alleged in every count of the Second Amended Complaint, found in part at Appendix 6, at paragraphs 54(a) & (e); 71(a) & (e); 78(a) & (h); 92(a); and 109(a) & (e).

Ultimately, Wilkes alleges that RUBY NELL WILKES died because nursing personnel failed to properly provide adequate and appropriate health care (¶40(a)); failed to appropriately monitor and recognize significant signs and symptoms of changes in health (¶40(f)); failed to protect RUBY NELL WILKES from foreseeable harm, including infections, falls and unexplained injuries (¶40(l)). As a result, Respondents allege that RUBY NELL WILKES suffered “bodily injury” ...and

“ultimately died.” ¶41. There was no allegation contained in the complaint(s) of compliance with Chapter 766, nor any evidence in the record that compliance with any requirements of Chapter 766 has been fulfilled as to Beverly.

There was a hearing and extensive argument on Beverly’s Motion to Dismiss the Second Amended Complaint. The trial judge entered an Order on September 29, 2000, denying the Motion to Dismiss. Appendix 10.

### **RELIEF SOUGHT**

Petitioners appeal the denial of their Motion to Dismiss the Second Amended Complaint because the Respondents did not comply with the presuit requirements of Chapter 766, the Medical Malpractice Act (“the Act”). Petitioners request that the Court quash the trial court’s decision, with instructions that the trial court enter an order dismissing the case for want of compliance with the Chapter 766 required presuit requirements.

### **ARGUMENT**

Courts of this state have uniformly found the primary purpose of chapter 766 is to "promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding." *Cohen v. Dauphinee*, 739 So. 2d 68, 71 (Fla.1999). As cases such as *Pavolini v. Bird*, 25 Fla. L. Weekly D2085 (Fla. 5<sup>th</sup> DCA Aug. 30, 2000) provide,

the presuit requirements in Chapter 766 have at least two purposes. The first is to force the claimant to conduct an investigation of the suspected malpractice and the defenses which may be asserted. The burden is on the medical malpractice claimant to make a "reasonable investigation" to determine that there are grounds for a good faith belief that there has been negligence. The second purpose is evaluation and settlement. Once the claimant's investigation is complete, §766.106(2) requires that the claimant serve all potential defendants with a notice of intent to initiate litigation. It is then incumbent upon the potential defendants to evaluate the claim.

*Id.* at D2086.

As the Court notes, when the defendants' evaluation is completed, the defendants have four options, each of which carry grave risks: 1) the claim may be rejected, 2) a settlement offer can be made, 3) liability may be admitted with arbitration as to damages, or 4) one may simply make no response. *See* Chapter 766 and *Pavolini*.

The notice requirement under the Act is inextricably intertwined into the fabric of an overall statutory scheme designed to weed out meritless medical malpractice claims and promote the prompt resolution of valid claims. *Id.* The Legislature expressed its intent to “provide a plan for prompt resolution of medical negligence claims,” which plan consists “of two separate components, presuit investigation and arbitration.” § 766.201(2), Fla. Stat. (1999). Pre-suit investigation is mandatory while arbitration is voluntary. Thus the notice provision cannot be considered in isolation because appended to the pre-suit notice requirement are the pre-suit investigation requirements contained in section 766.203, Florida Statutes. The requirements of pre-suit investigation apply to “all medical negligence” claims and defenses. § 766.203(1), Fla. Stat. (1999).

The pre-suit investigation statute provides that “[p]rior to issuing notification of intent to initiate medical malpractice litigation pursuant to §766.106, the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that: (a) [a]ny named defendant in the litigation was negligent in the care and treatment of the claimant; and (b), [s]uch negligence resulted in injury to the claimant.” § 766.203(2)(a),(b), Fla. Stat. (1999). A claimant under the Act is defined as “any person who has a cause of action arising from medical negligence.” § 766.202(1), Fla. Stat. (1999). The Act further provides in section 766.104(1), Florida Statutes, that “[n]o action

shall be filed for personal injury or wrongful death arising out of medical negligence, whether in tort or contract, unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for good faith belief that there has been negligence in the care or treatment of the claimant. The complaint or initial pleading shall contain a certificate of counsel that such reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant.”

Wilkes maintains that they are not required to comply with Chapter 766, and alleged that nursing homes are not “health care providers” as provided for by the act. See Plaintiff’s Memo of Law, Appendix 9 at 2. This sort of argument has been considered and rejected by courts. *See, e.g., NME Properties, Inc. v. McCullough*, 590 So.2d 439 (Fla. 2<sup>nd</sup> DCA 1991); *Pinellas Emergency Mental Health Services, Inc. v. Richardson*, 532 So. 2d 60 (Fla. 2<sup>nd</sup> DCA 1988); *Linkemar v. Health Care & Retirement Corp. of America*, 1999 WL 984428 (S.D. Fla. 1999).

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

Although a nursing home is not itself a health care provider for purposes of section 766.102, it may be vicariously liable under that higher standard of care for the acts of some of its agents or employees. For example, East Manor probably employs nurses who are licensed under chapter 464. Under respondeat superior, East Manor may be liable under the higher professional standard of care when its agent, who is actively involved in the incident, is a health care provider rendering medical care or service. On the other hand, East Manor may be liable under an ordinary negligence standard of care when other nonprofessional employees commit alleged negligence, or when an incident does not involve medical care.

*Id.* at 440.

In approving *NME*, the supreme court in *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993), explained the broad sweep of the presuit protections of Chapter 766 afforded to potential defendants such as Beverly:

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

*Id.* at 838.

The presuit requirements as a condition precedent to filing an action apply to any defendant alleged to be vicariously or directly liable under the medical negligence standard of care set forth in §766.106(2), not limited to a "health care provider." *See, e.g., Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993). Wilkes' Complaint is replete with assertions of Beverly's vicarious liability for medical malpractice and other negligence. *See, e.g., Appendix 5 paragraphs 34, 54, 68, 71.* A number of other cases equally support Petitioner's protected status and mandate that plaintiffs first engage in the pre-suit investigation in compliance with Chapter 766.

For example, in *Pinellas Emergency Mental Health Services, Inc. v. Richardson*, 532 So. 2d 60 (Fla. 2d DCA 1988), this court addressed whether a provider of mental health emergency services was entitled to the protections afforded by the medical malpractice pre-suit requirements. Although the mental health provider was not defined in the statutes as a "health care provider," the Second District Court held that it was entitled to pre-suit notice under the medical malpractice statute because

the mental health emergency services were regularly provided in a hospital and a hospital is defined as a "health care provider." 532 So. 2d at 62.

Similarly, in *Barfuss v. Diversicare Corp. of America*, 656 So. 2d 486, 487 n. 2 (Fla. 2<sup>nd</sup> DCA 1995), *disapproved on other grounds*, *H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997), the Second District Court was called on to address various issues in a case against a nursing home in which the plaintiff asserted claims of negligence and violations of the nursing home statute. In *Barfuss*, the Court noted Chapter 766's requirements might be applicable to some of the actions complained of by the plaintiff in that case, namely, "allegations of failure to treat pressure ulcers properly and to keep [the plaintiffs] catheter bag free from leakage indicate the necessity of the services of a health care professional." *Id.* at 487 (citing *NME*).

The Court in *NME* (mentioned above) recognized that by attempting to disguise a medical negligence claim as a simple negligence claim, a plaintiff might hope to submit the case to a jury without expert testimony and to prove only the ordinary negligence standard of care. *McCullough*, 590 So. 2d at 441. It stated that such a tactic "would seem to involve great risk" and said the defendant would have the option in such a case to move to strike the complaint as a sham pleading, and reiterated this warning in *Feifer v. Galen of Florida, Inc.*, 685 So. 2d 882 (Fla. 2<sup>nd</sup> DCA 1996), stating:

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

*Id.* at 885 (holding that plaintiff did not have to comply with pre-suit notice requirements in ordinary slip and fall claim against a hospital). Wilkes would like to hold Beverly liable for medical malpractice

without having to meet the more stringent standards of proof for medical malpractice by essentially disguising the claims as a violation of the nursing home statute.

The inclusive breadth of Chapter 766 was also illustrated in *NME Hospitals, Inc. v. Azzariti*, 573 So. 2d 173 (Fla. 2<sup>nd</sup> DCA 1991), the Court held the presuit requirements of Chapter 766 applied in a suit against a hospital being sued under theories of strict liability and product liability. Rejecting plaintiff's contention "that compliance is not required as the suit alleges causes of action based on strict or product liability theories," the Court reasoned that if a defective product was necessarily used in providing medical services, the suit was for medical malpractice regardless of what name the plaintiffs/respondents wanted to give their claims because it was asserted against a hospital, which is a "health care provider" under the medical malpractice statute. *Id.* at 173. Thus, this Court granted the petition for writ of certiorari for failure to comply with the condition precedent of the pre-suit requirements. *Id.*

Comparatively, the issue was recently addressed in *First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189, 1191-92 (Fla. 4<sup>th</sup> DCA 1999). The violations of Section 400.022 alleged in that case included allowing the resident to wander from the facility, failing to employ adequate alarms to prevent such occurrences, and failing to have adequate staff to provide supervision. *Id.* at 1191-92. The Fourth District Court applied the test as set forth in *McCullough*, as adopted in *Weinstock*, but determined that the "gist of plaintiff's complaint, and the substance of his proof in that case did not involve any issue regarding medical diagnosis or treatment." *Id.*

Even more recently, the United States District Court for the Southern District of Florida distinguished the *Hamilton* case and held that the pre-suit requirements of Sections 766.106 and

766.203 were applicable to claims asserting violations of a nursing home resident's rights under Section 400.022. *Linkemar v. Health Care & Retirement Corporation of America*, 1999 WL 984428 (S.D. Fla. 1999). In that case, the plaintiff, as personal representative of the estate of the nursing home resident, filed an action under Chapter 400, alleging that the defendant:

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

The United States District Court for the Southern District of Florida stated that *Hamilton* was inapposite because the allegations in *Hamilton* did not involve issues regarding medical diagnosis or treatment. In contrast, the plaintiff in *Linkemar* alleged inadequacies in the medical treatment received by the deceased nursing home resident. Accordingly, the Court in *Linkemar* held that the pre-suit requirements of sections 766.106 and 766.203 were applicable to the claims brought under §400.022, and dismissed the action without prejudice for failure to satisfy said pre-suit requirements. *See also Kelley v. Rice*, 670 So. 2d 1094 (Fla. 2<sup>nd</sup> DCA 1996) (simple negligence claim could be maintained against sheriff for breach of his custodial obligations to the plaintiff, although medical negligence claim was barred by shorter limitations period); *Paulk v. National Medical Enterprises, Inc.*, 679 So. 2d 1289 (Fla. 4<sup>th</sup> DCA 1996) (holding that claim against hospitals alleging that they defrauded their patients by extending their hospitalization to exhaust their insurance without medical negligence was governed by medical malpractice statute of limitations because the plaintiffs could not prove their claims without adducing evidence of the medical necessity of their hospitalization); *Tunner v. Foss*, 655 So. 2d 1151 (Fla. 5<sup>th</sup> DCA 1995) (quashing trial court's order denying dismissal of claim for

failure to comply with pre-suit notice and screening requirements of section 766.106; ruling that claim alleging doctor refused to refer patient to specialist or admit patient to hospital due to economic self-interest was a claim for medical malpractice); *O'Shea v. Phillips*, 746 So. 2d 1105 (Fla. 4<sup>th</sup> DCA 1999) (holding that Chapter 766 pre-suit requirements apply to a claim that a health care facility negligently supervised an employee who sexually assaulted a patient because the claim was for medical malpractice as opposed to a theory of negligence apart from medical malpractice).

In sum, it is now clear that any person or entity, including a nursing home, is entitled to the protections of the pre-suit notice requirements of the medical malpractice statute when an individual seeks to hold them vicariously liable for medical malpractice. *NME Properties, Inc. v. McCullough*, 590 So. 2d 439 (Fla. 2<sup>nd</sup> DCA 1991); *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993), *Barfuss v. Diversicare Corp. of America*, 656 So. 2d 486, 487 n. 2 (Fla. 2<sup>nd</sup> DCA 1995), *disapproved on other grounds H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997); *Linkemar v. Health Care & Retirement Corporation of America*, 1999 WL 984428 (S.D. Fla. 1999).

Furthermore, reviewing the allegations of the Complaint, one can easily see how they fall within the definition of a “claim for medical malpractice,” as defined in §766.106(1)(a) as meaning “a claim arising out of the rendering of, or the failure to render, medical care or services.” §766.106(1)(a), Fla. Stat. (1997).

The Second Amended Complaint sought to impose vicarious liability on Beverly on the basis that the medical care and treatment rendered to Ruby Nell Wilkes by the nurses of Beverly was not adequate and appropriate care:

31. DEFENDANTS, were required to have sufficient nursing staff, on a 24 hour basis to provide nursing and related services to residents in order to maintain the highest

practicable physical, mental, and psychosocial well-being of each resident as determined by resident assessments and individual plans of care.

32. DEFENDANTS did not perform adequate and sufficient background checks; did not provide adequate and sufficient orientation and in-service training; and did not adequately and sufficiently monitor the performance of its staff, with the result that residents like RUBY NELL WILKES did not receive adequate and appropriate care.

Second Amended Complaint, ¶¶31 and 32, Appendix 6.

Respondents further alleged that the lack of medical care caused medical problems for RUBY NELL WILKES:

40. Ruby Nell Wilkes was deprived of such rights by the acts or omissions of Defendants which are apparent from the chart, and include the following: a) **Failing to provide adequate and appropriate health care to Ruby Nell Wilkes** by allowing her to develop repeated, numerous infections, which include: 1)Infection with MRSA at the G-Tube site...2)Urinary tract infection...5)Eye infection...11)Yeast infection...15)Upper respiratory infection....”

*Id.* at ¶40 [emphasis supplied].

Additionally significant, the claims of lack of medical care that caused numerous infections are alleged in every count of the Second Amended Complaint, found in part at Appendix 6, at paragraphs 54(a) & (e); 71(a) & (e); 78(a) & (h); 92(a); and 109(a) & (e).

Ultimately, Wilkes alleges that for RUBY NELL WILKES died because nursing personnel failed to properly provide adequate and appropriate health care (¶40(a)); failed to appropriately monitor and recognize significant signs and symptoms of changes in health (¶40(f)); failed to protect RUBY NELL WILKES from foreseeable harm, including infections, falls and unexplained injuries (¶40(1)). As a result, Respondents allege that RUBY NELL WILKES suffered “bodily injury” ...and “ultimately died.” ¶41. Therefore, this suit, though masked as a claim for common law and statutory negligence, is in actuality a medical malpractice case.

It is clear that the gist of Wilkes' complaint, and the substance of his proof, was the failure of Beverly or Beverly's employees to "provide adequate and appropriate health care to RUBY NELL WILKES." Appendix 6, ¶¶40(a)(1-27); 54(a) & (e); 71(a) & (e); 78(a) & (h); 92(a); and 109(a) & (e). As such, the notice requirements of the Act are applicable because the gravamen of Respondent's Second Amended Complaint is the failure to provide adequate health care.

There has been no compliance with the presuit requirements of Chapter 766 as it relates to claims against Beverly, and therefore, certiorari should be granted, quashing the trial court's decision to deny the Motion to Dismiss on that ground.<sup>4</sup>

WHEREFORE, Petitioner Beverly respectfully requests this Court exercise jurisdiction and issue an Order to Show Cause and ultimate grant of a Writ of Certiorari, quashing the trial court decision which denied the motion to dismiss.

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<sup>4</sup>Wilke's claims in its Memorandum in Opposition to the Motion to Dismiss - that it does not have to comply with Chapter 766 because it complied with Chapter 400 - is not supported by the law or the specific legislative intent and purpose of Chapter 766.

**CERTIFICATE OF SERVICE**

We hereby certify that a true and correct copy of the foregoing was delivered, faxed or mailed this 27<sup>th</sup> day of October, 2000 to Timothy McHugh, Esq., Wilkes & McHugh, P.A., Tampa Commons, Suite 601, One North Dale Mabry Highway, Tampa, FL 33609.

Respectfully submitted,

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