

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

INTEGRATED HEALTH CARE
SERVICES, INC., RIKAD PROPERTIES,
INC., authorized To operate INTEGRATED
HEALTH SERVICES OF ST. PETERSBURG;
BON SECOURS HEALTH SYSTEM, INC.,
BON SECOURS MARIA MANOR NURSING
CENTER a/k/a BON SECOURS MARIA
MANOR NURSING CARE CENTER a/k/a
BON SECOURS MARIA MANOR NURSING
CARE FACILITY,

CASE NO. SC01-792
L.T. Case No. 2D00-2905

Petitioners/Defendants,

v.

The Estate of ALBERT W. REDWAY,
by and Through PAULINE LANG-REDWAY,
Personal Representative,

Respondent/Plaintiff.

**RESPONSE TO PETITION TO INVOKE
THE DISCRETIONARY JURISDICTION
OF THE COURT**

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PREFACE

Respondent, The Estate of Albert W. Redway, by and through Pauline Lang-Redway, as Personal Representative of The Estate, is the plaintiff in a civil action pending in the Circuit Court for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, Case No. 2000-444CA. In this action, Plaintiff is seeking damages for deprivations and infringements of the nursing home resident's rights of Albert W. Redway sustained during his residency at Petitioners' nursing homes licensed in the State of Florida as Integrated Health Services of St. Petersburg (the "IHS Defendants") and Bon Secours Maria Manor Nursing Center (the "Bon Secour Defendant"). Respondent also pled alternative claims for wrongful death and negligence survival damages, based on Petitioner's alleged breaches of statutory duties under Chapter 400 of the Florida Statutes (the "Complaint").

It is unclear whether the instant Petition is filed on behalf of both the IHS Defendants and the Bon Secour Defendants. The style of the Petition includes both sets of Defendants as "Petitioners," and Petitioners make reference in their brief to "Respondent's two Chapter 400 claims," (Pet. at p.8), and refer in the Preface to the Petition that Redway's civil action has filed "against the Petitioner (and Defendant below), Integrated Health Care Services, Inc. et al." (Pet. at p. viii).

Because the IHS Defendants did not participate in the Petition for Writ of Certiorari filed in the Second District, Respondent will assume for purposes of her Response Brief, that the instant Petition is filed only on behalf of the Bon Secour Defendant. If such is not the case, Respondent respectfully suggests that it would be appropriate for the Petitioner to clarify same in its/their Reply Brief. For purposes of this Response Brief, Respondent will address its argument to issues which she assumes to be raised by the singular Bon Secour Defendant.

In the interest of clarity and consistency, Respondent will refer to the Bon Secour Maria Manor Nursing Center as "the Nursing Home," since that is the term used in the Petition. Respondent shall be referred to as "Redway," or the "Respondent." References to the instant Petition to Invoke the Discretionary Jurisdiction of the Court shall be cited as "(Pet. at p. ____)." References to the Appendix which accompanies the Petition shall be cited as "(App. at Tab ____)." Because Petitioner failed to include a copy of the Second District's March 9, 2001, *Redway* opinion in its Appendix, Respondent has included the opinion in a Supplementary Appendix which she has filed concomitantly with the Reply Brief. All emphasis has been applied unless otherwise noted.

STATEMENT OF JURISDICTION

This matter is before the Court upon review of a question certified by the Second District Court of Appeal as one of "great public importance." This Court has jurisdiction pursuant to Article V, section 3(b)(4) of the Florida Constitution and Rule 9.030(a)(2)(A)(d) of the Florida Rules of Appellate Procedure.

Respondent respectfully suggests that if the Court accepts this case for consideration, it limit its discretionary review to the questions certified, and that it refrain from using its broad review authority to address other non-certified issues raised in the Petition, which represent Petitioner's disagreement with the Second District's legal conclusions about the allegations in Redway's Complaint, and the Petitioner's disagreement with the reasons asserted by the Second District for determining to deny Petitioner a writ of certiorari.

Respondent respectfully requests that this Court decline to exercise discretionary jurisdiction over this matter, or alternatively to answer the certified question in the negative.

STATEMENT OF THE CASE AND FACTS

Redway's Complaint seeks damages from the IHS Defendants and the Bon Secour Defendant based upon the Defendants' deprivations and infringements of Albert W. Redway's nursing home resident's rights during his period of residency at IHS of St. Petersburg and Bon Secour's Maria Manor Nursing Center from late 1997 through April, 1998¹. In addition to counts brought pursuant to sections 400.023(4) of the Florida Statutes, Redway's Complaint included alternative claims for wrongful death and negligent survival damages. However, it is important to note that both the wrongful death and negligent survival claims were based upon Defendants' alleged breaches of their statutory duties to Albert W. Redway under section 400.022 of the Florida Statutes (1997). Redway's Complaint enumerated the many nursing home resident's rights of which Mr. Redway was deprived, including, most notably, Albert W. Redway's right to receive adequate and appropriate health care, a statutory right which the 1986 Florida Legislature created to ensure that the nursing home residents of licensed Florida nursing homes would receive that level of health care necessary for such residents' to obtain and maintain their highest practicable levels of mental,

¹ Albert W. Redway resided at IHS of St. Petersburg from October 21, 1997 through February 11, 1998. Mr. Redway resided at Bon Secour's Maria Manor Nursing Center from February 27, 1998 through April 17, 1998. Mr. Redway died on April 17, 1998. (App. at Tab 1).

physical and psychosocial well being. By her Complaint, Respondent alleged that both the IHS Defendants and the Bon Secour Defendant failed to provide Albert W. Redway with adequate and appropriate health care, which breaches of statutory duty led to Mr. Redway's wrongful death. (App. at Tab 1).

Respondent takes issue with Petitioner's mischaracterization of the certified question before this Court as one "to determine whether the presuit requirements of Chapter 766 are mandated when allegations of medical negligence (e.g., allegations that professional nurse employees failed to render adequate and appropriate medical care) are alleged...." (Pet. at p. 2). Redway's Complaint does not allege medical negligence, it alleges clearly and unequivocally the utter failure of the Petitioner to provide Albert W. Redway with his statutory right to receive adequate and appropriate health care.

Petitioner's Statement of the Case and Facts focuses on the fact that Respondent did in fact provide presuit notice to the Petitioner, and concludes that Redway's presuit notice is an acknowledgement that Respondent must have believed that the presuit requirements of Chapter 766 apply to her Complaint. Petitioner thereafter argues matters which are far outside the four corners of the Complaint; "facts" which have neither been argued before the trial or before the district court and Petitioner cites to phantom presuit activities which are wholly unsubstantiated by

record documents contained within the Appendix. For example, at page 4 of the Petitioner, Petitioner argues that Respondent failed to respond to presuit discovery requests and refused to provide a presuit settlement demand. These matters are scandalous, impertinent, entirely unsupported in the record, and must be stricken or otherwise disregarded by this Court in the context of the instant Petition for discretionary review.

At page 5 of the Petition, Petitioner improperly discusses its attempt to depose Respondent's nursing expert who prepared the affidavit required by section 400.023(4), and misstates the trial court's express reasoning for granting the protective order. Contrary to Petitioner's assertion that "Judge Walker apparently did not address these arguments, instead issuing the Protective Order because he believed that the medical malpractice presuit requirements were unconstitutional," a close review of the hearing transcript on Respondent's Motion for Protective Order will show that Judge Walker granted the Protective Order because he believed that discovery of Respondent's non-testifying medical expert violated the work product privilege (App. at Tab 7 pp. 12-13).

QUESTION PRESENTED AND ISSUE

The Second District Court of Appeal has certified the following question as being one of great public importance:

IF A PLAINTIFF FILES A LAWSUIT SEEKING TO ENFORCE ONLY THOSE RIGHTS ENUMERATED IN § 400.022, FLORIDA STATUTES, MUST THE PLAINTIFF COMPLY WITH THE PRESUIT CONDITIONS IN § 766.106?

SUMMARY OF THE ARGUMENT

In concluding that Chapter 766 presuit requirements had no application to Redway's Complaint, the Second District issued an opinion which was narrowly drawn, precisely worded, and entirely consistent with existing statutes, rules of statutory construction and applicable decisional law. The sufficiency of the Complaint is to be determined by reference to the presuit screening requirements in section 400.023(4) of the Florida Statutes (1997), and not by reference to sections 766.106 and 766.203(2), where the basis of respondent's claims is deprivation and infringement of Albert Redway's statutory nursing home residents' rights, and not medical malpractice. The presuit requirements of section 400.023(4) differ in form and substance from the medical malpractice presuit requirements.

The nursing home care provided by Petitioner to Mr. Redway was a **mixture of acts** provided by the licensee as well as its nurses, dieticians, therapists, housekeepers, aides and a myriad of other nursing home personnel. To suggest that the Court disregard this mixed use in favor of construing a statutory rights claim to be a disguised medical malpractice claim is farcical and unsupported in fact or law.

Petitioner obviously asserts that Respondent must comply with all aspects of the Medical Malpractice Reform Act presuit requirements, **and must also comply**

with nursing home resident's rights and corroborating medical opinion and verification requirements, in order to sustain her residents' rights cause of action against this Petitioner. Such an interpretation of the various presuit statutes would render one or other statutory scheme to be redundant and superfluous, and would place an onerous burden on an elderly infirm population who are unable, on their own behalf, to protect and assert their rights.

Presuit screening statutes must be construed in a manner that favors access to the courts. Article I, section 21, Florida Constitution ensures Respondent's access to the courts for resolution of legal and equitable disputes. Remedial statutes must be liberally construed so as to "suppress the evil" identified by the legislature and to advance the remedy intended. Presuit statutes, on the other hand, must be narrowly construed to avoid restricting a litigant's right of access to the courts.

Petitioner's reliance on the 2001 amendments to Chapter 400 to support its argument that Chapter 766 presuit requirements applied to a claim which arose in 1998 is wholly without merit, because the 2001 legislative amendments to Chapter 400 **actually support** the Second District's holding in *Redway* that Chapter 766 presuit requirements **do not apply** to nursing home residents rights claims brought pursuant to section 400.023(4). The "clarification" made by the 2001 Florida Legislature, which

is entirely consistent with the *Redway* opinion, is the legislative pronouncement found at in the last sentence of section 400.023, Chapter 01-45, Laws of Florida (2001) which states,

"The provisions of chapter 766 do not apply to any cause of action brought under sections 400.023-400.0238". (*emphasis added*)

This Court should decline to exercise discretionary review or should alternatively answer the certified question in the negative and approve the Second District's opinion in *Redway*.

ARGUMENT

I. A PLAINTIFF WHO FILES A LAWSUIT SEEKING TO ENFORCE ONLY THOSE RIGHTS ENUMERATED IN § 400.022, FLORIDA STATUTES, NEED NOT COMPLY WITH THE PRESUIT CONDITIONS IN SECTION 766.106.

The question certified by the Second District for review by this Court is a narrow one, which, stated simply, inquires whether the presuit requirements of section 766.106 are incorporated by implication into a cause of action brought pursuant to section 400.023(4). The question is narrow because the *Redway* Court denied the writ of certiorari by holding that

"a plaintiff who chooses to allege only a statutory claim under section 400.022 and does not also allege a common law claim for medical negligence is not required to comply with the presuit requirements of section 766.016, Florida Statutes (1997). Although there may be some overlap between the statutory right to "receive adequate and appropriate health care" and the common law claim for medical negligence, we conclude that the presuit requirements of Chapter 766 must narrowly construed to apply only to common law medical negligence claims and not to the separate statutory rights created by chapter 400. Compare section 400.022(1)(1), Fla. Stat. (1997), with section 766.102(1) Fla. Stat. (1997) if the legislature wishes to establish additional presuit requirements for nursing home claims under section 400.022(1)(1), it must create a procedure that expressly applies to these statutory claims.

Integrated Health Care Services, Inc. et al vs. Pauline Lang-Redway, Second District Case No. 2D00-2905, 25 Fla. L. Weekly D699 (March 9, 2001).

The Second District, in reviewing the trial court's order denying Defendant's motion to dismiss the complaint for failure to comply with presuit requirements, considered the allegations of the Complaint, and acknowledged that in addition to the statutory claims brought under section 400.023(4), Redway's complaint also,

"includes a claim for wrongful death and, in the alternative, a claim for damages if the Defendant's negligence did not cause Mr. Redway's death. However, both claims are based upon a violation of a statutory right instead of a common law right." (supp. at Tab 1, p.3). The Second District noted that the complaint alleged that Mr. Redway failed to receive adequate and appropriate health care in violation of section 400.022(1)(1), but that "the plaintiff does not allege any common law theory attempting to make the Defendants vicariously liable for breach of a professional standard of care by a health care provider."

The Second District was not convinced by Petitioner's argument in the Petition for Writ of Certiorari that Redway's Complaint was really a disguised claim for vicariously liability of the Nursing Home for the medical malpractice acts of its nurses. The Second District acknowledged that "there may be some overlap between the statutory right to "receive adequate and appropriate health care" and the common law claim for medical negligence," and the Second District nevertheless concluded that because the district court was bound to narrowly construe Chapter 766, and because Redway's Complaint was not a complaint framed in terms of vicarious liability for

independent acts of medical negligence, Chapter 766's presuit requirements simply did not apply.

The Redway Court gave four reasons for its denial of the writ. First, the Second District concluded that because of the **mixture of acts and services** which a nursing home provides, any attempt to extract the medical care and services aspect of a nursing home resident's claim for deprivation of his right to receive adequate and appropriate health care would seem largely unworkable. The court further explained that Chapter 766, when read in its entirety, does not suggest that the Florida Legislature intended to intertwine Chapter 766 presuit requirements with the "similar, but separate rights and requirements in Chapter 400."

Second, the *Redway* Court cited to the Florida Legislature's 1993 enactment of section 400.023(4), wherein the legislature "created a separate presuit investigatory requirement for cases under Chapter 400." The court also noted that the 1993 amendment was enacted in the same year that this Court decided *Weinstock v. Groth*, 629 So. 2d 835(Fla. 1993). Third, the Second District noted that the 1993 amendment "now contains significant restrictions upon the claimant's ability to allege vicarious liability for the actions of a health care provider," and since the statute exculpates

nursing homes for liability for medical negligence of any physician other than the nursing home's own medical director.

Finally, the Second District acknowledged that the presuit requirements of Chapter 766 must be strictly and narrowly construed since "presuit conditions restrict a party's access to Florida's courts and limit pre-existing common law rights." The Second District concluded that Redway had complied with "the only presuit conditions expressly mandated by the legislature for this lawsuit," and thus opined that "[t] the trial court did not depart from the essential requirements of the law."

In concluding that Chapter 766 presuit requirements had no application to Redway's complaint, the Second District issued an opinion which was narrowly drawn, precisely worded, and entirely consistent with existing statutes, rules of statutory construction and applicable decisional law.

The Second District has denied two similar petitions for certiorari writs based upon its holding in *Redway*. See, *National Healthcare Corp. v. Lowe*, 2001 Fla. App. LEXIS 6301; (March 30, 2001) and, *Health Care and Retirement Corporation of America v. Peel*, 2001 Fla. App. LEXIS 5577 (April 27, 2001). *Redway* has also been followed by the Fourth District in *Preston v. Health Care and Retirement Corporation of America*, 785 So.2d 570 (4th DCA 2001). This Court, in recognizing

the soundness of the Second District's reasoning and holding, should decline to review the question certified, or alternatively, should answer the question in the affirmative, since to do so would be to act consistent with rules of statutory construction, legislative intent and binding legal precedent.

A. THE SUFFICIENCY OF THE COMPLAINT IS TO BE DETERMINED BY REFERENCE TO THE PRESUIT SCREENING REQUIREMENTS IN § 400.023(4), FLORIDA STATUTES, AND NOT BY REFERENCE TO §§ 766.106 AND 766.203(2), FLORIDA STATUTES, WHERE THE BASIS OF RESPONDENT'S CLAIMS IS DEPRIVATION AND INFRINGEMENT OF ALBERT REDWAY'S STATUTORY NURSING HOME RESIDENTS' RIGHTS AND NOT MEDICAL MALPRACTICE.

It is without dispute that by the Complaint, Respondent claims damages occasioned by Petitioners' deprivation of Albert Redway's rights as a nursing home resident. It is likewise without dispute that Respondent's claims arise from the private cause of action for deprivation or infringement of a nursing home resident's rights contained in § 400.023, Florida Statutes.

Due to strong public policy concerns for protecting elderly state residents who are no longer capable of protecting or caring for themselves, the Florida Legislature, in enacting Chapter 400, deemed it necessary to incorporate its intent and findings with regard to long-term care facilities and their residents within the statute:

The Legislature finds that conditions in long-term care facilities in this state are such that the rights, health, safety, and welfare of residents are not ensured by rules of the Department of Elderly Affairs or the Agency for Healthcare Administration, or by the good faith of owners or operators of long-term care facilities. Furthermore, there is a need for a formal mechanism whereby a long-term care facility resident or his or her representative may make a complaint against the facility or its employees, or against other persons who are in a position to restrict, interfere with, or threaten the rights, health, safety, or welfare of the resident. It is the further intent of the Legislature that the environment in long-term care facilities shall be conducive to the dignity and independence of residents and that investigations by ombudsman councils shall further the enforcement of laws, rules, and regulations that safeguard the health, safety and welfare of residents.

The Legislature furthered its intent by establishing an Office of State Long-term Care Ombudsman, and authorizing said office to act as the legal advocate of nursing home residents throughout the state. In addition, in 1986, the Legislature created an independent private cause of action for civil enforcement of nursing home resident rights, which is codified in section 400.023 of the Florida Statutes. This statute affords any resident whose resident rights have been deprived or infringed upon the

right to bring a private cause of action against any licensee responsible for the infringement or deprivation. Because the nursing home residents' rights in section 400.022 includes "[t]he right to receive adequate and appropriate health care and protective and support services" (*emphasis added*), the 1993 Florida Legislature, included a provision to protect health care providers from having to defend frivolous residents' rights health care claims. The legislature amended section 400.023 to add subparagraph (4), which requires that any claimant "alleging a deprivation or infringement of adequate and appropriate health care pursuant to section 400.022(1)(k)"² which resulted in personal injury to or the death of a resident "shall conduct an investigation which shall include a review by a licensed physician or registered nurse familiar with the standard of nursing care for nursing home residents pursuant to this part."

² See footnote 2 to section 400.023, which clarifies that "[t]he cite to section 400.022(1)(k) may be intended to reference section 400.022(1)(l)." The right to adequate and appropriate health care is provided in section 400.022(1)(l). Paragraph (1)(k) covers the right to refuse medications or treatment. The right to adequate and appropriate health care was provided in section 400.022(1)(g) prior to the 1993 regular session of the Legislature. In the 1993 session, C.S. for C.S. for H.B. 2203 amended both section 400.022 and 400.023. The bill moved the language in section 400.022(1)(g) to paragraph (1)(k). House Amendment 8 to C.S. for C.S. for H.B. 2303 amended section 400.023, adding subsection (4) referencing "[c]laimants alleging a deprivation or infringement of adequate and appropriate health care pursuant to section 400.022(1)(g)" and Amendment 1 to Amendment 8 corrected the reference to "400.022(1)(k)." See, Journal of the House of Representatives 1993, pp. 849-850. Later in the process, Senate Amendment 1 added a new paragraph (1)(k) to section 400.022 (*see* Journal of the Senate 1993, p. 1017); the reference to section 400.022(1)(k) in section 400.023(4) was not updated to conform.

The intent of the presuit requirements in section 400.023(4) is to require a claimant to conduct discovery in order to support her claims of deprivations or infringements of adequate and appropriate health care. Section 400.023(4) further requires the claimant to obtain a verified medical expert opinion that there exists reason to believe that a deprivation or infringement of the resident's rights to adequate health care occurred during the period of residency. The obvious purpose of such a presuit screening requirement in section 400.023(4), like that of section 766.203(2), is to obtain corroborating medical opinions as to the legitimacy of the personal injury claim, so as to avoid subjecting nursing home Defendants to frivolous lawsuits. *See, Ft. Walton Beach Medical Center, Inc. v. Dingler*, 697 So. 2d 575 (Fla. 1st DCA 1997) (presuit procedures designed to prevent filing of baseless litigation). See also, *Davis v. Orlando Regional Medical Center*, 654 So. 2d 664 (Fla. 5th DCA 1995) (where court held that the purpose of a section 766.106 corroborating medical opinion is to verify the legitimacy of the medical negligence claim, and not to put Defendants on notice of each and every specific incident of negligence).

1. The Presuit Requirements Of Section 400.023(4) Differ In Form And Substance From The Medical Malpractice Presuit Requirements.

While Respondent certainly recognizes the similarities of the presuit corroborating medical opinion under section 766.203(2) and the presuit opinion

required by section 400.023(4), she is also mindful of their distinct differences. Respondent asserts that the statutes are by no means interchangeable, as they contain some substantial and significant variations in both procedure and application. First, and most importantly, the Chapter 766 presuit procedures apply to medical negligence claims brought against a health care provider pursuant to section 766.102 for death or injury resulting from the negligence of a health care provider.

Unlike the nursing home resident's rights corroboration of injury requirements, the medical malpractice statute requires the claimant to provide **written notice** to all potential malpractice Defendants of its intent to file suit upon the completion of claimant's presuit investigation pursuant to section 766.203, which notice must be sent at least ninety (90) days prior to the filing of a lawsuit. See, section 766.106 of the Florida Statutes. Third, unlike nursing home resident's rights litigants, medical malpractice act litigants must submit to voluntary binding arbitration pursuant to section 766.207.³

³ In the 1999 regular legislative session, the Florida Legislature again amended section 400.023, this time adding subparagraph (6), which states that in order to recover attorney's fees under this section, nursing home resident's rights litigants must participate in a mediation session which must be concluded within one hundred twenty (120) days after the filing of a responsive pleading or defensive motion. Although this mediation provision applies prospectively to all causes of actions that accrue on or after October 1, 1999, and is therefore not applicable to the instant case, it is nevertheless demonstrative of the Legislature's intent for the presuit requirements, and mediation provisions in section 400.023 (as opposed to the presuit requirements and arbitration provisions found in sections 766.107 and 207) to apply to nursing home rights deprivation cases.

The requirement of presuit notice as a condition precedent to commencement of a medical malpractice case, and the types of health care practitioners and personnel who are entitled to presuit notice under section 766.106, are matters which have frequently been litigated. The Florida appellate decisions on this issue are legion and stand for the proposition that statutory notice and investigation requirements ensure that medical negligence claims will be professionally evaluated before the parties engage in expensive and time-consuming litigation. The purpose of the Chapter 766 presuit procedures is to ferret out and eliminate, to the extent possible, "frivolous claims and defenses." *Kukral v. Mekras*, 679 So. 2d 278 (Fla. 1996).

The courts have consistently taken a substance over form approach in determining the sufficiency of section 766.106 notice and the persons entitled to receive same. *See, e.g., Community Blood Centers of South Florida, Inc. v. Damiano*, 697 So. 2d 948 (Fla. 4th DCA 1997) (blood bank was not a health care provider for purpose of Chapter 766); *Sova Drugs, Inc. v. Traiy Patrick Barnes*, 661 So. 2d 393 (Fla. 5th DCA 1995) (pharmacist was not a health care provider for purposes of presuit investigation and notice requirements under section 766.106); *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993) (psychologists are not health care providers); *NME Properties, Inc. v. McCullough*, 590 So. 2d 439 (Fla. 2d DCA

1991) (nursing home is not a health care provider); *Auto v. Rodriguez*, 710 So. 2d 1 (Fla. 4th DCA 1998) (corroborating medical opinion need not accompany notice of intent); *Patry v. Capps, M.D.*, 633 So. 2d 9 (Fla. 1994) (since the purpose of the statute is to facilitate the amicable resolution of medical malpractice claims early in the controversy, strict compliance with the mode of service of notice under the statute is in no way essential to this legislative goal).

Recently, the Second District in deciding *Redway*, acknowledged that the legislature has “clearly attempted to restrict the circumstance in which a resident of a nursing home can file an action against a nursing home” by creating a separate presuit review for formerly governed by Chapter 400.” The *Redway* Court saw no reason to require a nursing home plaintiff to comply with both presuit requirement statutes. In April 2001, the Fourth District agreed and in issuing its opinion in *Preston v. Health Care & Retirement Corp. of America*, 785 So.2d 570 (Fla. 4th DCA 2001), where the court opined that,

"[w]e agree ... that the Malpractice Act's presuit requirements do not apply where the plaintiff alleges only that a nursing home violated a resident's rights under Chapter 400. The Legislature is presumed to know the state of the law in passing statutes, and consequently, the legislation is to be construed on the premise that the particular statute in questions is to be applied relative to other statutes affecting the same subject matter. ... we conclude that the legislature, by enacting the 1993 amendments, clearly intended that the less comprehensive presuit

requirements of section 400.023(4) should apply where the plaintiff alleges only that a nursing home violated a resident's rights to adequate health care.

In this respect, we note that section 400.023(4) was enacted long after section 766.106 and we do not see how the two can be harmonized. 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). Here while section 766.106 applies to general medical negligence cases, section 400.023(4) specifically applies to suits involving a nursing home's failure to provide a resident with adequate health care. Because the legislative language of section 400.023(4) is unequivocal on the specific subject to which it speaks, it need not be "harmonized" with section 766.106, an inconsistent, general, and earlier enacted statute. *See McKendry*, 641 So.2d at 46. Accordingly, we hold that appellant was not required to comply with section 766.106 where his only claim was under Chapter 400.

Preston, 785 So.2d at 572, 573.

Petitioners cite *Linkemar v. Health Care & Retirement Corp. of America*, 1999 WL 984428 (S.D. Fla.) for their assertion that it is now clear that a nursing home is entitled to the presuit notice requirements of the medical malpractice statute. However, it is apparent that *Linkemar* did *not* put this issue to rest. First, an opinion by a federal district court interpreting Florida law is not binding precedent on this Court. In addition, the *Linkemar* opinion does not address the question of whether nursing homes can be health care providers, but rather simply distinguishes the allegations made by the plaintiffs in *First Healthcare Corp. v. Hamilton*, 740 So.2d 1189 (Fla.

4th DCA 1999) from those made by the plaintiffs in *Linkemar*. Further, the *Linkemar* plaintiffs failed to even respond to the Defendant's motion to dismiss; the court's ruling was, in part, predicated on their failure to file a timely response.

2. The Complaint Does Not Include Claims For Vicarious Liability.

Petitioner asserts that Respondent's Complaint substantively includes claims for vicarious liability for medical negligence, and that both trial court and the Second District misapprehended the scope of the Complaint. To support this argument, Petitioners cite to various Complaint paragraphs in which Respondent has alleged specific statutory nursing home resident's rights of which Petitioners' deprived Albert Redway. It is the Petitioner, and not the trial court, who has misconstrued the Complaint. The Complaint asserts **direct** breaches by Petitioner of its statutory duty to ensure the provision of Mr. Redway's rights. It **does not** allege medical malpractice of a health care provider for whom Petitioners are vicariously liable. Indeed, Respondent's Complaint names no health care provider as a party Defendant, and does not sue the nursing home under the doctrine of *respondeat superior*.

The Complaint alleged that the Petitioner's duties as outlined in section 400.022 are **non-delegable**, such that Petitioner has direct responsibility under section 400.023

and is directly liable for deprivations and infringements of Mr. Redway's nursing home resident's rights.

The allegations that Petitioner identifies in support of its assertion that the statutory resident's rights counts are disguised claims for medical malpractice, do indeed, address Petitioner's failure to provide adequate and appropriate health care, and also allege that Petitioners deprived Mr. Redway of his statutory nursing home resident's rights by its failure to properly staff the facility (operational), failure to protect her from falls (safety), failure to protect her dignity and privacy (non-medical), failure to properly train and supervise staff (operational), by and its improper retention of staff (operational). These are all appropriate allegations of breach by Petitioner of Mr. Redway's statutory nursing home resident's rights. The inclusion by the legislature of a statutory right to receive adequate and appropriate health care does not convert Chapter 400 claims into medical malpractice claims.

Moreover, the nursing home care provided by Petitioner to Mr. Redway was a **mixture of acts** provided by the licensee as well as its nurses, dieticians, therapists, housekeepers, aides and a myriad of other nursing home personnel. To suggest that the Court disregard this mixed use in favor of construing a statutory rights claim to be a disguised medical malpractice claim is farcical and unsupported in fact or law. See,

IHS v. Redway, 25 Fla. L. Weekly D699; *Arthur v. Unicare Health Facilities, Inc.*, 602 So. 2d 602 (Fla. 2d DCA 1992); and Fla. Admin. Code section 59A-4.108 (which permits a nursing home to meet its minimum staffing requirement by a ratio of three certified nursing assistants to one licensed nurse). Respondent's Complaint names no health care providers as medical malpractice Defendants, nor does it sue a nursing home under the doctrine of *respondeat superior* for the medical malpractice of a health care provider. Accordingly, Chapter 766 simply does not apply to Respondent's statutory claims for deprivations and infringements of Mr. Redway's nursing home resident's rights.

B. The Plain Language and Legislative History Of Chapter 766 And Rules Of Statutory Construction Support The Conclusion That Nursing Homes Are Not Protected By Chapter 766.

A final point which bodes in favor of concluding that the nursing staff employees of a nursing home are not covered by the presuit protections of Chapter 766 can be gleaned from a review of legislative history. In response to a dramatic rise in medical malpractice premiums, "resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance **for some physicians**," (*emphasis added*) the Florida Legislature enacted the Medical Malpractice Reform Act. The Florida Legislature codified its intent, "to provide a plan for prompt

resolution of medical negligence claims, and thus created presuit investigation and notice requirements, voluntary arbitration and a conditional limitation on economic damages.” *See* section 766.201(1)(a) and (2), Florida Statutes (1997). By the legislature’s express reference to **physician malpractice**, it expressed its clear and unambiguous intent to protect **physicians** from frivolous lawsuits. Nursing homes and nurses are nowhere mentioned in the legislative intent statute.

Moreover, a review of the legislative history of the definition of health care providers also supports this view. The definition of "health care provider" in the medical malpractice statutes was enacted in 1976 pursuant to Session Law 76-260. The original definition expressly included nursing homes licensed under Chapter 400. However, the following year, Art Harris, Director of the Florida Nursing Home Association, testified before the Florida Senate Committee on Commerce on April 26, 1977, and expressly asked the Senate Committee to amend nursing homes out of the medical malpractice package. Senator Gallen offered an amendment, which amendment was adopted pursuant to Session Law 76-64.

Respondent in no way attempted to circumvent the medical malpractice act by bringing a Chapter 400 claim against Petitioner in her Complaint. Rather, the nursing home industry successfully lobbied the Florida Senate to be removed from the medical

negligence burden of proof set forth in section 766.102(1). Accordingly, it is disingenuous for the instant Petitioner to now argue that they are somehow entitled to the benefits of presuit protection and tort limitations under the medical malpractice act, while at the same time avoiding any responsibilities under that act.

1. Florida Courts Have Wrestled With The Interpretation Of “Health Care Provider” Under Chapter 766.

In expressing frustration with the lack of definitions in Chapter 766, the Second District noted that,

"[i]t is our to give effect to legislative intent and, if a literal interpretation of a statute leads to unreasonable results, then we should exercise our power to interpret the statute in such a way as to impart reason and logic to it.

Catron, 580 So.2d at 818.

The *Catron* Court interpreted the phrase "similar health care provider" found in section 766.102(2), by reference to Chapter 766 and the definition of the practice of chiropractic under Chapter 460, so as to justify the qualifications of a chiropractic physician to testify as an expert. Later on that year, in *N.M.E. Properties, Inc. v. McCullough*, 590 So. 2d 439 (Fla. 2d DCA 1991), the Second District acknowledged that a nursing home was not a health care provider, and cited *Catron* in stating that,

[w]e have recently lamented the difficulty of interpreting Chapter 766 because the chapter lacks comprehensive definitions. *[citation omitted]* This case presents similar difficulties.

McCullough, 590 So.2d at 441, n.1.

The *McCullough* Court, in concluding that a nursing home was not a health care provider as defined in section 768.50(2)(b), also noted that this definitional section was repealed in 1985, but cited to its opinion in *Silva v. Southwest Florida Blood Bank, Inc.*, 578 So.2d 502 (Fla. 2d DCA 1991) ("*Silva I*") that section 768.50(2)(b) "was not repealed to the extent that it is incorporated within section 766.102(1), Florida Statutes (1989)." At the time the *McCullough* Court cited to *Silva I* in support of its conclusion that the repealed definitional section 768.50(2)(b) was resurrected by its incorporation by reference into section 766.102(1), *Silva I* was good law. However, by May, 1992, the Florida Supreme Court had quashed *Silva I* and rejected the Second District's reliance upon the repealed definition of "health care provider."

In *Silva v. Southwest Florida Blood Bank, Inc.*, 601 So.2d 1184 (Fla. 1992) ("*Silva II*"), this Court reviewed a conflict between the Second and Third Districts on the issue of whether blood banks are subject to the two-year statute of limitations for medical malpractice suits under section 95.11(4)(b), Florida Statutes (1991), or the four-year negligence statute of limitations under section 95.11(3)(a). The *Silva II*

Court held that the Second District erred in concluding that a blood bank was a "provider of health care" that rendered "diagnosis, treatment, or care" to the plaintiffs who received its blood product, quashed *Silva I* and approved *Durden v. American Hospital Supply Corp.*, 375 So. 2d 1096 (Fla. 3d DCA 1979). The *Silva II* Court reviewed the Second and Third District Courts' analyses of the definitions of health care provider and the provision of health care services, and expressly rejected *Silva I's* reliance upon definitions found in repealed section 768.50(2)(b) of the Florida Statutes:

The Second District concluded that blood banks are health care providers, relying on a statutory definition formerly found in section 768.50(2)(b), Florida Statutes (1985)(repealed 1986). As the Second District noted, section 766.102, Florida Statutes (1989), defines the standards in recovery in medical malpractice actions. Subsection (1) incorporates by reference the definition of health care provider found in section 768.50(2)(b), which included blood banks. The Second District thus reasoned that the legislation specifically identified the entities that would be classified as health care providers for purposes of medical malpractice actions. *Silva*, 578 So. 2d at 505.

We find this reasoning flawed in several respects. In addition to the fact that section 768.50(2)(b) addressed collateral sources of indemnity, and not medical malpractice, that statute was repealed in 1986. See ch. 86-168, section 68, Laws of Fla. The current collateral source statute does not contain the definition on which Southwest now relies. See section 768.77, Fla. Stat. (1989). (emphasis supplied)

Silva II, 601 So.2d at 1189.

Then in December, 1993, this Court issued its opinion in *Weinstock, Ph.D. v. Groth*, 629 So. 2d 835 (Fla. 1993), wherein the Court resolved a conflict between the Second District in *Pinellas Emergency Mental Health Services, Inc. v. Richardson*, 532 So.2d 60 (Fla. 2d DCA 1988) and the Fifth District in *Groth v. Weinstock*, 610 So.2d 477 (Fla. 5th DCA 1992) on the issue of whether a plaintiff in a negligence suit against a licensed clinical psychologist must comply with Chapter 766 presuit notice requirements.⁴ In *Weinstock*, this court concluded that the notice requirements of the act only applied in direct or vicarious actions against "health care providers," and ruled that psychologists **do not fit within any of the various definitions** of health care provider contained within Chapter 766. The *Weinstock* Court considered and compared three definitions of health care provider found within Chapter 766 including the definitions in sections 766.101(1)(b), 768.50(2)(b), and 766.105(1)(b). In footnote one to the opinion, the Court noted that "[s]ection 768.50(2)(b) was repealed except to the extent that it is incorporated by reference into section 766.102(1), Florida

⁴ At Petition page 16, Petitioner cites *Pinellas EMHS v. Richardson*, and *Barfuss v. Diversicare Corp. of America*, 656 So.2d 486 (Fla 2d DCA 1995) as support for its statement that "[a] good number of appellate cases" support application of Chapter 766 to claims against **any** Defendant against whom a medical negligence claim is asserted. Yet, Petitioner has failed to note that in 1993, *Richardson* was disapproved by this Court's opinion in *Weinstock*, and that *Barfuss* was disapproved by this Court in *Schwartz* on other grounds.

Statutes (1991). *N.M.E. Properties, Inc. v. McCullough*, 590 So. 2d 439, 440 (Fla. 2d DCA 1991)." Curiously, the Court, while citing to *McCullough* almost verbatim on the issue of the repeal of section 768.50(2)(b), failed to note that *McCullough* relied upon *Silva I*, which this Court quashed in *Silva II*. Indeed, the *Weinstock* opinion makes no mention whatsoever to the *Silva II* Court's analysis and rejection of application of the repealed definitions in section 768.50(2)(b). Obviously, the *Weinstock* Court did not limit its consideration solely to the definition in section 768.50(2)(b), and instead looked to the overall statutory scheme and narrowly construed the term so as not to restrict the plaintiff's right of access to the court.

Silva II's rejection of application of the definitions from the repealed statute did not go unnoticed by the Fourth District, which followed *Silva II* in *Community Blood Centers of South Florida, Inc. v. Damiano*, 697 So.2d 948 (Fla. 4th DCA 1997). The *Damiano* Court considered whether a blood bank was a health care provider for purposes of a medical malpractice claim. The Fourth District considered *Weinstock*, and also relied upon *Silva II's* rejection of the repealed definitions, which the *Silva II* Court noted were contained within the collateral source of indemnity statute which does not pertain to medical malpractice claims at all. The *Silva II* Court also noted that the current version of the collateral source of indemnity statute, codified at section

768.77, contained no such definition of health care provider. In reliance upon *Silva II*, and in the absence of clear expression of legislative intent to the contrary, the *Damiano* Court interpreted "the applicable statutes as excluding blood banks."

In view of the fact that the Florida Supreme Court and other district courts of this state have compared, analyzed and construed **the various definitions** of health care provider found within Chapter 766, in concluding that the malpractice presuit requirements should be narrowly construed and strictly applies, it was entirely proper for the trial court in this case and the Second District to conclude that the Complaint did not involve medical negligence claims against health care providers.

Moreover, *Silva II* and *Weinstock* are consistent insofar as in both cases, this Court narrowly construed the definitions and resolved the conflicts in favor of the plaintiffs' free access to the courts. In *Silva II*, this Court determined to **exclude** blood banks from malpractice presuit, notwithstanding that they were included in section 768.50(2)(b). In *Weinstock*, this Court **excluded** psychologists from 766.108(1) because they were not included **in any of the Chapter 766** definitions. No matter how it got there, this Court in both cases construed "health care provider" to exclude non-physician providers.

Obviously, the decisional law on this topic is anything but clear. Respondent suggests that the more reasoned approach is contained in this Court's opinion in *Silva II*, which concluded that since section 768.50(2)(b) has been repealed, and since the current collateral source of indemnity statute contains no such definition of "health care provider," and does not speak to medical malpractice claims in any event, this Court is not bound to apply this definition and may look to the other definitions in Chapter 766 for guidance.

This Court in *Weinstock* held that presuit statutes must be narrowly interpreted "in accord with the rule that restrictions on access to the courts must be construed in a manner that favors access," 629 So. 2d at 838. The Second District followed *Weinstock* and construed the two statutes in a manner to not restrict *Redway's* free access to the Florida courts. *Redway* is entirely consistent with applicable law on the definition of "health care provider."

Finally, basic rules of statutory construction provide that a specific statute covering a particular subject area controls over a statute covering the same and other subjects in more general terms. *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994). The applicable medical malpractice provisions were first enacted in 1976, and applied generally to "health care providers" the definition of which was expressly amended in

1977 to exclude nursing homes. The nursing home presuit provisions of section 400.023(4) were enacted in 1993, and apply specifically and uniquely to nursing homes. Accordingly, the later enacted statute, the nursing home presuit statute, regulates the presuit process and actions against nursing homes.

C. Since The Legislature Is Presumed To Have Known About The Existence Of Chapter 766 Presuit Requirements When It Enacted Chapter 400's Presuit Requirements, It Is Illogical To Assume That The Legislature Intended Both Statutes' Presuit Procedures To Apply To Nursing Home Resident's Rights Claims.

Clearly, in light of the *McCullough* and *Weinstock* decisions, the 1993 Florida Legislature could easily have addressed the matter by adding a provision in Section 400.023, requiring that claimants comply with both the presuit investigation and notice requirements of Chapter 766, as well as Section 400.023(4) prior to bringing an action based upon inadequate or inappropriate health care by a nursing home. However, the legislature obviously did not do so, and the absence of any language in the 1993 amendment to Section 400.023(4) incorporating the presuit requirements of Chapter 766, the plain language of Section 400.023(4) must be construed to mean that the legislature considered and rejected application of Sections 766.101 and 766.203(2).

Petitioner obviously asserts that Respondent must comply with all aspects of the Medical Malpractice Reform Act presuit requirements, **and must also comply**

with nursing home resident's rights and corroborating medical opinion and verification requirements, in order to sustain her residents' rights cause of action against this Petitioner. Such an interpretation of the various presuit statutes would render one or other statutory scheme to be redundant and superfluous, and would place an onerous burden on an elderly infirm population who are unable, on their own behalf, to protect and assert their rights.

Indeed, if the Court were to accept Petitioner's argument, aggrieved nursing home residents and their families and estate would be held to higher claims verification standards than any other category of litigants within the State of Florida, and their access to the courts and their ability to seek redress for their injuries would be hampered and delayed by having to work through not one, but two presuit processes. Clearly, in creating a statutory civil remedy for resident's rights infringement of those elder and infirm nursing home residents who are in the last stages of life and who cannot protect themselves, the Florida Legislature could not have intended to further delay and encumber the legal process to the effect that the very persons the state sought to protect would die as a result of injuries occasioned by those infringements. Respondent respectfully suggests that such an argument is without merit. Not only

does that position envision an incredible redundancy, it would result in a colossal waste of time, money and effort, and ignores basic rules of statutory construction.

Presuit screening statutes must be construed in a manner that favors access to the courts. Article I, Section 21, Florida Constitution ensures Respondent's access to the courts for resolution of legal and equitable disputes. The Florida appellate courts interpreting presuit notice under Chapter 766 have been careful to narrowly restrict application of the presuit notice requirements, so as not to deny access to the courts to medical negligence plaintiffs. *See, Ragoonanan v. Associates in Obstetrics and Gynecology*, 619 So. 2d 482 (Fla. 2d DCA 1993); *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993); and *Patry v. Capps*, 633 So. 2d 9 (Fla. 1994). Since Florida courts are bound to construe Chapter 766 notice requirements narrowly even in medical malpractice cases, Respondent fails to see how Petitioner can ask this Court to grossly expand its application beyond medical negligence actions to a statutory nursing home resident's rights claims, especially under circumstances where Chapter 400 provides similar protection to prevent nursing home owners and operations, including Petitioners, from being forced to defend frivolous deprivation of resident's rights claims.

1. The Position Espoused by Petitioners With Regard to Application of Chapter 766 to Respondent's Chapter 400 Claim, is Wholly Inconsistent

With Binding Florida Legal Precedent Interpreting and Applying Rules of Statutory Construction.

In accordance with the statutory construction rule *expressio unius est exclusio alterius*, which means the mention of one thing implies the exclusion of the other, this Court must conclude that the legislature's failure to include any reference whatsoever to application of Chapter 766's presuit requirements, or for that matter, any requirement that claimant provide Defendants with notice and a copy of his corroborating expert opinion prior to filing a lawsuit, implies that the legislature considered these provisions and omitted them intentionally. *Diversified Services, Inc. v. Avila*, 606 So. 2d 364 (Fla. 1992); *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992); *Sova Drugs, Inc. v. Barns*, 661 So. 2d 393 (Fla. 5th DCA 1995).

Moreover, where the legislature is silent with respect to the simultaneous operation of two statutes, the Court must be guided by the plain and obvious meaning of both statutes, giving full effect, to the extent possible, to the two provisions and reading them in harmony. *Holmes County School Board v. Duffell*, 651 So. 2d 1176 (Fla. 1995). *See also, Palm Harbor Special Fire Control District v. Kelly*, 516 So. 2d 249 (Fla. 1987), "The court's obligation is to adopt an interpretation that harmonizes two related, if conflicting, statutes while given effect to both, since the legislation is presumed to pass subsequent enactments with full awareness of all prior

enactments and an intent that they remain enforce.” Accordingly, this Court must interpret Section 766.106 and Section 400.023(4) in a manner which will give effect to both statutes to the extent possible.

2. Where Two Conflicting Statutes Potentially Apply, the Later Enacted, More Specific Provisions Apply and Control.

Basic rules of statutory construction provide that a specific statute covering a particular subject matter always controls over a statute covering the same and other subjects in more general terms. *McKendry v. State*, 641 So. 2d. 45 (Fla. 1994). Furthermore, it is axiomatic that a later enacted statute controls over an older statute because the courts presume that statutes are passed with knowledge of prior existing statutes. 641 So. 2d at 46; Fla. Jur. 2d, Statutes, §§180-182. The latter promulgated statute prevails because it is the latest expression of legislative intent in that area of law.

The medical malpractice presuit provisions were first enacted in 1985, and apply generally to certain “health care providers” identified in Section 768.50. The nursing home presuit provisions were enacted in 1993, and apply specifically and uniquely to nursing homes. Accordingly, the latter enacted statute, the nursing home presuit statute, regulates the presuit process in actions against nursing homes.

As stated, *supra*, the presuit investigation requirements under Chapter 766 and the nursing home presuit statutes under Chapter 400, although they share a common

goal, contain very different procedures, were enacted at different times, and are applicable to different situations. The medical malpractice presuit investigation statutes and the nursing home presuit investigation statutes conflict with one another in a number of ways, including, but not limited to the following:

1. A medical expert qualified under Chapter 766 to provide a Section 766.203(2) corroborating opinion, may nevertheless **fail to qualify** as a Section 400.023(4) corroborating expert, because the resident's rights presuit statute requires that the medical professional be qualified to give an opinion specifically on the standard of care applicable in a nursing home setting.⁵

2. Chapter 766 contains a provision for extensions of the statute of limitations, whereas Chapter 400 does not.

3. Chapter 766 provides that the verified statement must be mailed to the Defendant, via certified mail, whereas Chapter 400 provides that a verified statement corroborating the claim must be attached to plaintiffs Complaint.

If the argument is that Respondent should be required to go through two presuit investigations to prove that the claim is not frivolous, Respondent respectfully

⁵ Section 766.203(2)(b) requires a verified written medical expert opinion from a medical expert as defined in Section 766.202(5), which defines a "medical expert" as a person "duly and regularly engaged in the practice of his profession" . . . In contrast, Section 400.023(4) requires that a verified statement must be from a licensed physician or registered nurse who is also "familiar with the standard of nursing care for nursing home residents pursuant to this part". A specific familiarity with nursing home resident rights is not required under Chapter 766.

suggests that not only would this envision a waste of time, money and effort, it would also render the application of the statutes unconstitutional. The Florida Supreme Court has already held that the medical malpractice presuit procedures are strictly construed because they come dangerously close to an unlawful impediment to the constitutional right to access to courts. Those statutes, however, serve an important legislative purpose – to prevent frivolous lawsuits. This corresponding benefit, when balanced against the degree of impediment to courts, tilts the scale in favor of constitutionality.

There is no purpose, or benefit, however, to proving **not once, but twice** that a claim is not frivolous prior to instituting suit. Such an interpretation of these statutes would double the impediment to access to courts – the expense, time, etc., and provide no additional benefit. It would simply restrict access to courts **for no purpose except to make it more difficult and expensive to access the courts.** Respondent respectfully suggests that such an interpretation would constitute an unconstitutional violation of the constitutional right to access to courts. *Psychiatric Associates v. Siegel*, 610 So. 2d 419 (Fla. 1992) (bond requirement unconstitutionally infringes upon the Plaintiff’s fundamental right to access to courts without providing any commensurate benefit – the only “benefit” of the statute is to infringe upon right

to access to courts).

Respondent's compliance with the presuit investigation requirements of the nursing home statutes established his right to maintain this action. The applicability of the medical malpractice presuit statutes would serve no purpose, would result in a monumental waste of resources and would likely constitute an unconstitutional impediment to access to courts.

3. Section 400.023 is a Remedial Statute Which Must Be Liberally Construed.

The plain and express language of Section 400.023 clearly states that “[t]he remedies provided in this section are **in addition to and cumulative with** other legal and administrative remedies available to a resident and to the Agency.” (*emphasis added*). Thus, the statutory remedies set out in Section 400.023 are in addition to remedies provided under common law and under other statutory schemes. Remedial statutes must be liberally construed so as to “suppress the evil” identified by the legislature and to advance the remedy intended. *Connor v. Division of Elections*, 643 So. 2d 75 (1st DCA 1994), *citing*, *Amos v. Conkling*, 126 So. 2d 283 (Fla. 1930). As stated *supra*, the legislature, in enacting Chapter 400, found conditions in nursing homes to be such that the rights, health, safety and welfare of nursing home residents

are not adequately ensured by rules of the Agency for Healthcare Administration or Department of Elderly Affairs. The courts of this state have traditionally interpreted and applied Chapter 400 broadly and liberally, to afford redress and protection to those who, due to age or infirmity, are unable to care for or protect themselves. The Florida Supreme Court has consistently held that a statute, such as Chapter 400, that is enacted for the public benefit should be liberally interpreted in favor of protecting the public. *See, State v. Hamilton*, 388 So. 2d 561 (Fla. 1980), *quoting, City of Miami_Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); and *Dept. of Environmental Regulation v. Goldring*, 477 So. 2d 532 (Fla. 1985). The Fourth District, in the recent case of *Beverly Enterprises-Florida, Inc. v. Knowles*, 763 So.2d 1285 (Fla. 4th DCA 2000), *on rehearing*, 766 So.2d 335 (Fla. 4th DCA 2001), held that the statutory negligence cause of action under Section 400.023 is a “per se” statute,

of the “strict liability” type designed to protect a particular class of persons from their inability to protect themselves and to establish a duty to take precautions to protect a particular class of persons from a particular injury or type of injury.... The nursing home’s Patient’s Bill of Rights, which is designed to protect elderly Floridians is in need of nursing home care, fits squarely within the definition of negligence *per se* statutes.

In *Mang v. Country Comfort Inn, Inc.*, 559 So. 2d 672 (Fla. 3d DCA 1990), the Third District held that the “Florida legislature deemed it necessary to make certain

designated individuals responsible for the day-to-day operations of facilities caring for the elderly and the infirm.” One of the issues in *Mang* was whether the administrator of an assisted living facility governed by Section 400.041, FLA. STAT., could be sued in his individual capacity. The appellate court answered this question in the affirmative, and held that public policy mandates that these “individuals” be responsible for their actions and “**not become faceless entities.**” (*emphasis added*). 559 So. 2d at 674.

II. REFERENCE TO SUBSEQUENTLY ENACTED LEGISLATION IS ONLY APPROPRIATE TO CLARIFY THE LEGISLATURE'S INTENTION REGARDING APPLICATION OF A PRIOR STATUTE.

Petitioner's reliance on the 2001 amendments to Chapter 400 to support its argument that Chapter 766 presuit requirements applied to a claim which arose in 1998 is wholly without merit, because the 2001 legislative amendments to Chapter 400 **actually support** the Second District's holding in *Redway* that Chapter 766 presuit requirements **do not apply** to nursing home residents rights claims brought pursuant to section 400.023(4).

Although Respondent readily acknowledges the ability of the Florida Supreme Court to refer to subsequent statutory enactments, Respondent respectfully suggests that such an analysis is only appropriate where the subsequent amendment is enacted

merely to **clarify** (as opposed to modify or amend) existing law. *State vs. Lanier*, 464 So. 2d 1192 (Fla. 1985) (Supreme Court will show great deference to subsequent statutory amendments where "the enactment of an amendment to a statute is passed merely to **clarify existing law**"; *Williams v. Hartford Accident & Indemnity Co.*, 382 So. 2d 1216, 1220(Fla. 1980) (An amendment to a statute clarifying the scope of underinsured motorist insurance coverage did not substantially amend the statute as it existed prior to the enactment to the amendment, because the amendment merely served to **clarify** the extent of coverage as it previously existed); and, *Savona v. Prudential Insurance Co. of America*, 648 So.2d 705 (Fla. 1995) (It is appropriate to look to later enactments for **clarification** (as opposed to modification) of legislative intent).

The legislature clearly has the authority to explain its original intent in a subsequent enactment, and this Court has consistently held that courts may consider subsequent legislation **to clarify the intended** result of the previously enacted statute. *Palma Bel Mar Condominium Assoc. No. 5 of St. Petersburg, Inc. v. Commercial Laundries of Florida, Inc.*, 586 So.2d 315 (Fla. 1991) and *Ivey v. Chicago Insurance Co.*, 410 So.2d 494 (Fla 1982). This is particularly so, where there has been a judicial interpretation of the statute after the original enactment. *Palma* at 317.

A. The 2001 Legislative Amendments to Chapter 400 Support the Second District's Holding in *Redway* That Chapter 766 Presuit Requirements Do Not Apply to Nursing Home Resident's Rights Claims Brought Pursuant to Section 400.023(4).

The Second District's opinion in *Redway* can be readily considered to be a "judicial interpretation after the original enactment" of section 400.023(4) of the Florida Statutes. *Palma* at 317. Unfortunately for Petitioner, this Court's resort to the 2001 Florida Legislature's amendment of Chapter 400 in order to "clarify" the 1993 Florida Legislature's intended result in the context of *Redway*'s presuit requirements supports the Second District's conclusion that Chapter 766 presuit requirements do not apply to Chapter 400 claims. The "clarification" made by the 2001 Florida Legislature, which is entirely consistent with the *Redway* opinion, is the legislative pronouncement found at in the last sentence of section 400.023, Chapter 01-45, Laws of Florida (2001) which states,

"The provisions of chapter 766 do not apply to any cause of action brought under sections 400.023-400.0238". (*emphasis added*)

Further legislative "clarification" is found in the newly added subparagraph 7 to section 400.023, which reads,

"An action under this part for a violation of rights or negligence recognized herein is **not a claim for medical malpractice**, and the

provision of section 768.21(8) do not apply to a claim alleging death of the resident." (*emphasis added*)

It is indeed appropriate for this Court to consider the 2001 amendments to Chapter 400 to clarify the result intended by the 1993 Florida Legislature of the Chapter 400 presuit requirements contained within section 400.023(4). The 2001 Florida Legislature could not have clarified legislative intent more concisely than in declaring that resident's rights claims brought pursuant section 400.023 **do not constitute medical malpractice, and that the presuit requirements of Chapter 766 simply do not apply to such claims.**

Petitioner, in asserting that the 2001 amendments support its assertion that Chapter 766 presuit requirements apply, based its assumption on a misunderstanding of the difference between statutory enactments, which are **intended to clarify** prior laws, and those enactments which are intended **to modify or amend** prior laws. Clearly, the 2001 Florida Legislature's pronouncement that nursing home residents rights claims do not constitute medical malpractice and therefore, Chapter 766 does not apply to such claims, is a "clarification" and not "an amendment or modification." Thus, it is appropriate for this Court to consider the subsequent enactment as a

clarification of the inapplicability of Chapter 766 presuit requirements to a statutory nursing home residents rights claims brought pursuant to section 400.023(4)(1997).

In addition to the "clarifying" enactment contained within the 2001 amendments, the new Chapter 400 also contains substantial modifications to the former statutory schemes. To the extent that Chapter 01-45, Laws of Florida (2001) **creates new presuit requirements** applicable to nursing home resident's rights claims which arise or accrue after May 15, 2001, the 2001 amendments **should not be considered** by this Court for illustrative purposes or otherwise, because the new presuit requirements, codified at section 400.0233 of the Florida Statutes (2001) are contained within a **new section** of the act and constitute a **substantial** modification of existing law. The new "presuit requirements" apply only to statutory nursing home resident's rights claims which arose or accrued after May 15, 2001, and are **substantially different** from the presuit requirements applicable to Redway's Chapter 400 claims. Most importantly, the 2001 amendments were intended **neither to clarify nor to amend Chapter 766**; thus it is entirely improper for Petitioner to suggest that this Court look to subsequent enactments of Chapter 400, to determine the scope of application of section 766.106 to Redway's claims.

Had the 2001 Florida Legislature intended to impose Chapter 766 presuit requirements upon nursing home claimants' causes of action under section 400.023(4), the legislature could have easily done so by incorporating sections 766.106 and 766.103 by reference in to section 400.023(4) and arguably, such an enactment might well have been considered a "clarification" of prior legislative intent. The fact that the legislature chose instead to enact a **different presuit investigatory scheme**, which is markedly different from the presuit notice and discovery requirements contained in Chapter 766, clearly and unambiguously evidences the legislature's enactment of an amendment or modification to existing law. Under such circumstances, it would be inappropriate to look to the new statute to interpret the prior enactment.

B. Petitioner's Reliance on the 2001 Amendments to Chapter 400 to Support its Argument That Chapter 766 Presuit Requirements Applied to Claims which arose in 1998 is Wholly Without Merit.

Rather than comparing prior versions of section 400.023 to the 2001 amendment in order to glean legislative intent, Petitioner would have this Court turn rules of statutory construction on their heads, and instead asks this Court to compare the **current version** of sections 776.106 and 766.203 to the **newly enacted** section 400.0233. There is no rule of statutory construction, to the knowledge of Respondent after diligent search, which would permit such a tortured interpretation of current and

subsequently enacted statutes contained in entirely different chapters of the Florida Statutes.

Finally, perhaps in a last ditch effort to convince this Court to apply the medical malpractice statute to nursing home resident's statutory rights claims, Petitioner resorts to pure speculation and fantasy, in suggesting that the term "adequate and appropriate health care" is an extremely vague phrase, and that the legislature requires claimants to secure affidavits from registered nurses or physicians so as to alleviate the vagueness and shed some light on the phrase's meaning. Petitioner's "theory" is based on pure speculation and should be disregarded by this Court.

III. PETITIONER'S ARGUMENT THAT THE SECOND DISTRICT'S OPINION IN *REDWAY* DEPARTS FROM THE ESSENTIAL REQUIREMENTS OF LAW IS INCORRECT AND NOT SUPPORTED BY EXISTING LAW.

A. Petitioner Fail to Cite Any Binding Legal Authority From Which the Order Departs.

Petitioner was unable to establish sufficient potential for material injury that could be recompensed through final appeal before the Second District sufficient for the court to invoke its certiorari jurisdiction to issue a writ quashing the trial court's order denying its motion to dismiss. Neither the trial court's order nor the Second

District's order can be shown to depart from the essential requirements of law under circumstances where Petitioner has failed to provide this Court with any binding legal precedent in support of its claim to entitlement to section 766.106 presuit notice. In the absence of any express binding precedent on the issue of application of section 766.106 medical malpractice presuit notice to resident's rights claims brought pursuant to section 400.023(4), the Second District's order cannot, under any reading of the Petition, be deemed to depart from the essential requirements of law. The only authority to support the position espoused by Petitioner is **dicta** contained within *McCullough* at 590 So. 2d at 441, and, *Barfus v. Diversicare Corp. of America*, 656 So.2d 486, 488 (Fla. 2d DCA 1995). Although the *McCullough* court did suggest that a nursing home Defendant might be vicariously liable for the medical malpractice of its employees and agents, nowhere in the *McCullough* opinion does the Second District suggest that such a claim would be appropriately brought as a section 400.023 claim, as opposed to a claim for medical malpractice under section 766.102, and in any event *Redway's* Complaint does not include claims based upon *respondeat superior*.

Moreover, in *Weinstock*, this Court clarified that medical malpractice presuit requirements apply in only the most limited of circumstances. Accordingly, since

Petitioner relies solely upon non-binding *dicta* which fails to directly address the issue raised in the Petition, Petitioner cannot meet its burden of showing that the *Redway* opinion departed from the essential requirements of law.

CONCLUSION

In denying the writ, the Second District correctly concluded that Chapter 766 presuit requirements have no application to Redway's Complaint. The Second District issued an opinion narrowly drawn, precisely worded, and entirely consistent with existing law.

The question certified to this Court is likewise narrowly drawn, and questions whether a plaintiff seeking to enforce his nursing home resident's rights pursuant to section 400.022, must comply with the presuit conditions of section 766.106. Because section 400.023(4) of the Florida Statutes (1997) contains its own presuit requirements, Redway should not be required to comply **both** with the presuit requirements of section 400.023(4) and with section 766.106.

This Court should decline to grant discretionary review or should, in the alternative, answer the certified question in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by via fax to all parties the 6th day of August, 2001; and, in addition, by hand delivery the 7th day of August, 2001, to **Andrew R. McCumber**, Quintairos,

McCumber, Prieto & Wood, P. A., 3502 Henderson Boulevard, Second Floor, Tampa, Florida 33609; and by overnight delivery the 7th day of August, 2001, to **Edward C. Prieto**, Quintairos, McCumber, Prieto & Wood, P. A., 9200 South Dadeland Boulevard, Suite PH-825, Miami, Florida 33156, and **Scott A. Mager**, Mager & Associates, P.A., One East Broward Boulevard, Fort Lauderdale, Florida 33301.

SUSAN B. MORRISON, ESQUIRE

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

In accordance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, the undersigned certifies that this Response Brief has been printed using a 14 point Times New Roman Font.

Susan B. Morrison, Esq.
Florida Bar No. 394424