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Integrated Health Care Services, Inc. v. Pauline Lang-Redway

THERE IS AN AFFIDAVIT REQUIREMENT ARISING OUT OF CHAPTER 400.023 SUBSECTION 4. 766 STILL APPLIES, IF THE MEDICAL NEGLIGENCE IS WHAT THE CLAIM ARISES FROM. THERE ARE 22 ENUMERATED RIGHTS IN SECTION 400.022. THE AFFIDAVIT REQUIREMENT IN 400.023 SUBSECTION 4, RELATES TO ONLY ONE OF THOSE 22 ENUMERATED RIGHTS, AND IT IS QUITE POSSIBLE AND THAT IS SUBSECTION L. IT IS QUITE POSSIBLE FOR YOU TO HAVE A MEDICAL NEGLIGENCE CASE THAT A RISES OUT OF THE -- THAT ARISES OUT OF ONE OF THE OTHER RIGHTS, AND IF WE HAVE A SITUATION HERE WHERE WE ALLEGED THAT THE RIGHT THAT WAS VIOLATED WAS SUBSECTION O, FOR INSTANCE, IF A NURSE IN A LONG-TERM CARE SETTING PROVIDED A DAVAN.

HOW DOES THIS WORK IN A PRACTICAL MATTER? IF AN AID MOVES A PATIENT AND THE PATIENT IS INJURED, AS OPPOSED TO A NURSE MOVING A PERSON AND THE PERSON IS INJURED INJURED?

IF THE ACTIONS COMPLAINED OF, IF THE ACTIONS AROSE OUT OF 766, THE CARE AND TREATMENT PROVIDED BY A CERTIFIED NRSIST THAT WOULD NOT GIVE RISE TO A MEDICAL NEGLIGENCE ACTION, AND WE WOULD E ANYTGO TO CHAPTER 766. IT IS ONLY WHERE, AS HERE, THE CLAIM ARISES OUT OF THE RENDER RENDERING OF OR THE FAIEO RENDER MEDICAL CARE AND TREATMENT, BECAUSE UNDER 766, A NURSE IS A HEALTHCARE PROVIDER. THAT IS A SUBSTANTIVE LEGAL RIGHT THAT NURSES ARE ENTITLED TO, AND UNDER THIS COURT'S OPINION IN WEINSTOCK, THE EMPLOYER OF THAT NURSE, BE IT A NURSING HOME, A HOSPITAL, AN AGENCY, WHOEVER IS BEING HELD AS A POTENTIAL DEFENDANT TO ANSWER VICARIOUSLY FOR THE MEDICAL NEGLIGENCE OF A NURSE, THAT ENTITY, THAT EMPLOYER, IS ENTITLED, UNDER THIS COURT'S OPINION IN WEINSTOCK, TO THE PROTECTION OF 766 AND TO A PRESUIT, AS A PRACTICAL MATTER. WE CAN LOOK-

WOULD YU EXPLAIN HOW IT WOULD HAVE WORKED IN THIS CASE. IN OTHER WORDS, WHO ARE THE POTENTIAL DEFENDANTS? WHAT WOULD THE PLAINTIFF HAVE TO DO? HOW MANY AFFIDAVITS OR NOTICES AND WHO WOULD THEY HAVE GONE TO? HOW, JUST SORT OF TAKE US THROUGH THAT.

WILL -- THERE IS A VERY EASY WAY TO RECONCILE. THAT WAS NOT DONE IN THIS INSTANCE, AND IN FACT THIS CASE PROVIDES AN ILLUSTRATION FOR THAT. IF YOU HAVE A SUIT AND YOU ARE CONDUCTING YOUR PRE-SUIT INVESTIGATION, AS COUNSEL DID IN THIS CASE, AND YOU --

WHAT HAPPENED? HE HAD BED SORES OR WHAT HAPPENED?

THIS CASE INVOLVES A MAN BY THE NAME OF ALBERT RED WAY, IN TWO NURSING HOME FACILITIES, ONE THE INTEGRATED HEALTH SERVICES FACILITY, A PRIOR FACILITY TO MY CLIENT'S, BOND, SYKORA, AND THAT ENTITY IS NOT PARTICIPATING IN THIS IN ANY MANNER. THIS APPEAL IS BROUGHT ON BEHALF OF THE SECOND NURSING HOME FACILITY. THIS GENTLEMAN CAME INTO OUR FACILITY ON HOSPICE CARE, AND ACCORDING TO THE ALLEGATIONS IN THE COMPLAINT, WE ARE CHARGD WITH FAILING TO PROVIDE MEDICAL TREATMENT TO WOUNDS AND INFECTION CARE, AND OUR CARE PLANS, THE NURSING DIAGNOSIS, WHICH LEADS TO A PLAN OF TREATMENT FOR THE RESIDENT. ALL THOSE MEDICAL ISSUES, WHICH ARE DONE BY NURSES, ARE CHALLENGED IN THIS CASE. SO AS FAR AS RECONCILING THE TWO CASES AND THE PRE-SUIT, AS JUSTICE SHAW HAD INDICATED, WHAT WAS DONE IN THIS CASE WAS THAT COUNSEL WENT OUT AND GOT A NURSING AFFIDAVIT, WHO RENDERED AN OPINION TO THEM THAT THE NURSES DEVIATED FROM THE PREVAIL PREVAILING PROFESSIONAL STANDARD OF CARE. THAT AFFIDAVIT,

THEN, UNDER CHAPTER 400, AND UNDER CHAPTER 766, SDONE IN THIS CASE, THAT VERY SAME AFFIDAVIT RED A 766 PRESUIT. WE HAD A 90-DAY PRE-SUIT INVESTYRIOD. OUR ALLEGATION IS IT WASN'T CONDUCTED FULLY AND IN GOOD FAITHD THAT IS WHY WE GOT TO THE COURT.

WHY ISN'T THIS A MATTER OF SIMPLE STATUTORY INTERPRETATION? YOU HAVE A GENERAL STATUTE AND YOU HAVE A SPECIFIC STATUTE, AND WHY, UNDER OUR RULES OF CONSTRUCTION, WHY DOESN'T THE IC TRUMPE GENERAL? TK WHAT THE COURT IS CHARGED WITH DOI, YORNOR, IS TO RECONCILE THE TWO PROVISIONS, AND THEY CAN BE HARMONIZED AND THEY CAN BE READ TOGETHER. AS I WAS INDICATING TO JUSTICE PARIENTE, THE SAME AFFIDAVIT THAT TRIGGERED THE 766 PRE-SUIT, WAS SIMPLY STAPLED TO THE COMPLAINT. THE IDENTICAL AFFIDAVIT IN THIS CASE, WAS SIMPLY STAPLED TO THE COMPLAINT. THAT STAPLE SATISFIES THE REQUIREMENTS OF 400.023 SUBSECTION 4. THE TWO PROVISIONS CAN BE HARMONIZEED, AND THEY CAN APPLY, AS I HAD INDICATED WITH MY EXAMPLE WITH SUBSECTION O. THEY MAY ARISE OUT OF DIFFERENT SETTINGS.

BUT THAT IS MY QUESTION. WHY DO THEY HAVE TO BE RECONCILED, WHEN YOU HAVE A SPECIFIC STATUTE THAT DEALS WITH A SPECIFIC SITUATION?

CHAPTER 400 PROVIDES REMS WHICH ARE IN ADDITION TO AND KUM TAFTIVE WITH -- AND TIMETIVE WITH ALL OTHER REMEDIES T -- AND CUMULATIVE WITH ALL OTHER REMEDIES. IT WAS NOT INTENDED TO APPLY WITH 766. WHEN YOU ARE TALKING ABOUT NURSES AND THE MEDICAL CARE AND TREATMENT THAT NURSES PROVIDE IN A NURSING HOME SETTING, THE PROVISIONS OF 766, THE MORE GENERAL STATUTE, STILL APPLY, AND IT IS ONLY IF THEY ARE INCONSISTENT AND HOPELESSLY INCONSISTENT, THAT THIS COURT, THEN, CAN IGNORE 766.

AND IT IS YOUR POSITION THAT THERE IS NO INCONSISTENCY INEPREQUIREMENTS ET OSITION, S THERINCYETWESIONS THAT CANNOT BE EASILY HARMONIZED.

COULD YOU GIVE US, FROM YOUR PERSPECTIVE, ON HOW THIS FITS IN WITH THE EVOLUTFE MEDICAL MALPRACTICE STATUTORY SCHEMET WE HAVE HERE, IN FLORIDA. WHAT MY CONCERN IS THAT THIS WAS DRAWN UP AS, REALLY, A VERY NARROW STATUTORY SCHEME,D IN FACT, THERE WERE NUMEROUS CONSTITUTIONAL ATTACKS, BECAUSE OF THE RESTRICTIVE ANDMITIG ASPECTS OF IT. MY CONCERN IS THAT, IF WE NOW BROADEN, IN EFFECT, THE MEANING OF THE MEDICAL MALPRACTICE SCHEME, TO EXTEND TO NURSING HOME SETTINGS LIKE THIS, THAT T WE ARE DOING, IN EFFECT, IS ON A BASIS AFTER THE FACT, OF ACTUALLY ADDING CONSIDERATIONS THAT MAY WELL HAVE CAUSED A SCHEME LIKE THAT TO GO OVE RE LINE ON A CONSTITUTIONAL BASIS. THAT IS TO BE, IF ALL THESE OTHER ADDITIONAL REQUIREMENTS, WHICH WERE UPHELDLY, FO MEPRBUTW ARE EXTENDED TO THESE BROAD NURSINGHOMGS,TH, DE SCHEME MIGHT NOT MEET DUE PSONSTITL ANALYSIS. CAN YOU HELP ME WITH THAT?

YES, SIR. I DON'T BELIEVE THE APN OF MEDICAL NEE PRINCIPLES O THE SAME NURSE WHO WORKS HER RST SHIFT IN A HOSPITALD THEN WALKS ACROSS THE STREET AND WORKS THE SECOND SHIFT IN A NURSING HOME, AND WE AREG ABOUT THE SAME ADMINISTRATION OF MEDICATION. WE ARE TALKING ABOUT THE SAME WOUND CARE TREATMENT. WE ARE TALKING ABOUT ALL THE SAME ACTIVITIES THAT A NURSE DOES IN ONE SETTING OR ANOTHER. IN FACT, I THINK WE HAVE CONSTITUTIONAL EQUAL PROTECTION CONCERNS, IF WE ELECT TO TREAT THAT SITUATION DIFFERENTLY, SIMPLY BECAUSE THAT NURSE HAPPENS TO BE PRACTICING HER TRADE, HAPPENS TO BE PRACTICING AND PROVIDING, RENDERING MEDICAL CARE UNDER A BUILDING THAT IS A NURSING HOME, AS OPPOSED TO A HOSPITAL OR OTHER FACILITY.

WELL, ARE THE DAMAGES THAT ARE BEING SOUGHT IN THIS CASE DIFFERENT, AS AGAINST THE NURSE FOR THE NURSING CARE, BECAUSE IT IS BEING SOUGHT UNDER SECTION 400,VERSSREDICAL MALPSTAT? THE SEAGESENT?

S NOT NAMEDAS AN IN DEFENDAN.> SHE IS NOT,SO SITA SHE ? ? N'T . IT AOUS AN, BASEDNRD F

NEGLIGENCE. OS THESING HE SUBJECT TO THEESATWOULD BE, TH BET N RYDIC ICE CASE?

N COUNT.

NO. BUT THERE IS A DIFFERENCE.

THE FIRST THREE COUNTS OF THE COMPLAINT RELATE TO THE OTHER DEFENDANT THAT IS NOT HERE. IN THE FOURTH COUNT OF THE COMPLAINT, IT IS THE STATUTORY ACTION, UNDER CHAPTER 400. IN THAT STATUTORY ACTION, THE LEGISLATURE VENTURES TO ENTITLE ATTORNEYS FEES, IN ADDITION TO THE DAMAGES, BUT THERE ARE COUNTS, THEN, PROCEEDING FROM THAT POINT, FORWARD, COUNTS IN ADDITION TO AND CUMULATIVE WITH THE CHAPTER 400 REMEDY. THERE IS A COUNT, A L-DEATH, AND COUNT VI, AS SURVIVAL. IN THOSE COUNTS, THE MEASURE OF DAMAGES IS IDENTICAL. THESE ARE GARDEN VARIETY NEGLIGENCE COUNTS FOR EITHER WRONGFUL-DEATH DAMAGES OR SURVIVAL.

REALLY, YOUR POSITION IS THAT THE ANALYSIS IN THE COURT, IN YOUR OPINION, DOES NOT SEE THE COMMON LAW MEDICAL MALPRACTICE ACTIONS FROM THE SECTION 400 ACTIONS. IS THAT, I MEAN, THAT IS BASICALLY THE BOTTOM LINE OF WHAT YOU ARE SAYING.

THAT IS A PART OF OUR BOTTOM LINE. YES, SIR. THERE ARE THREE COUNTS. WHERE THE SECOND DISTRICT MISSED THE MARK IN ONE OF THE WAYS WAS THAT THEY SAID YOUR COMMON LAW COUNTS ARE BASED EXCLUSIVELY ON A STATUTORY DUTY. IF THE COURT WILL REVIEW PARAGRAPH 92 OF THE COMPLAINT IN THE WRONGFUL-DEATH ACT, WHAT IS PLED IN THIS COMPLAINT, IT SAYS IN ADDITION TO THE STATUTORY REMEDIES, THE EMPLOYER, BOND, SYKORAS, IS LIABLE FOR THE ACTION OF ITS NURSES, SO THERE IS A VICARIOUS ACTION THAT IS NOT BASED ON THE --

WOULD YOU AGREE THAT, IF THE CAUSE OF ACTION IS LIMITED TO A STATUTORY CAUSE OF ACTION, UNDER 400, THAT YOU DO NOT PROCEED ON THE BASIS OF THE VARIOUS ASPECTS OF 766?

NO, SIR.

YOU WOULD NOT AGREE WITH THAT?

NO, SIR. IF THE ACTION THAT GIVES RISE TO THE CASE IS THE, IF IT ARISES OUT OF THE MEDICAL CARE AND TREATMENT, THE RENDERING OF BY A NURSE, IT MATTERS NOT THAT IT IS IN THE STATUTORY ACTION OR UNDER 766. 766 WOULD STILL APPLY TO COUNT IV AS WELL, WHICH IS THE STATUTORY COUNT, EVEN IN THE ABSENCE OF IT CLEARLY APPLYING IN THOSE OTHER TWO COUNTS THAT ARE NOT BASED SOLELY AND EXCLUSIVELY ON THE STATUTE, AND THEREFORE THE PROCEDURAL ASPECTS OF THE STATUTE WOULD NEVER APPLY TO THE COMMON LAW CAUSE OF ACTIONS.

THAT WOULD ESSENTIALLY RENDER 400, IN SOME PARTS, SURPLUSAGE, CORRECT?

I DON'T BELIEVE SO, BECAUSE ADEQUATE AND APPROPRIATE HEALTHCARE IS A BROAD ENCOMPASSED CONCEPT. MEDICAL CARE AND TREATMENT IS PROVIDED BY A HEALTHCARE PROVIDER, BY A NURSE. ADEQUATE AND APPROPRIATE HEALTHCARE CAN AND IS PROVIDED IN A NURSING HOME SETTING, BY CERTIFIED NURSING ASSISTANTS, BY -- BY CERTIFIED NURSING ASSISTANTS, BY OTHERS, AND YOU CAN REQUIRE AN AFFIDAVIT DEMONSTRATING THAT THERE WAS A FAILURE TO PROVIDE ADEQUATE AND APPROPRIATE HEALTHCARE, IN CASES THAT ARE NOT MEDICAL NEGLIGENCE CASES, AND YOU CAN HAVE MEDICAL NEGLIGENCE CASES AND RIGHTS OTHER THAN "L", IN ACTIONS THAT WOULDN'T GIVE WAY TO THE AFFIDAVIT REQUIREMENT.

SO IT IS YOUR POSITION THAT, A NURSING HOME, UNDER SECTION 400, IF WE WERE DEALING WITH

A DOCTOR THAT WAS IN-HOUSE, THERE, AT THE NURSING HOME, THAT THE STANDARDS OF RECOVERY AND THE PLEADING REQUIREMENTS OF 766 WOULD HAVE TO BE MET, IN ADDITION TO THE PRE-SUIT REQUIREMENTS.

IF YOU WERE, IF THERE WAS AN ACTION, A VICARIOUS ACTION, BASED ON THE ACTIONS OF A PHYSICIAN, THERE IS A PROVISION OF 400 IS THAT THAT PRECLUDES THAT -- -- OF 400 THAT PRECLUDES THAT, AND THAT IS ONE OF THE REASONS WHY THE LEGISLATURE DEEMED IT UNFAIR TO HOLD A NURSING HOME RESPONSIBLE FOR A PHYSICIAN, BECAUSE THERE IS NOBODY WITH THE TRAINING TO OVER SEE THAT PHYSICIAN'S EXERCISING OF PROFESSIONAL JUDGMENT, SO THEY ARE NOT OVERSEEING. THEY WOULD NOT BE EMPLOYEES. THAT WOULD NOT BE A VICARIOUS ACTION. I DON'T KNOW IF --

I UNDERSTAND THAT, BUT WHAT I AM TRYING TO GET TO IS YOUR CONTENTION IS THAT ALL OF 766 APPLIES, IF YOU HAVE SOMEONE THAT IS DEFINED AS A HEALTHCARE PROVIDER, UNDER 766, EVEN THOUGH THE ACTION IS BROUGHT ON THE BASIS OF SECTION 400.

ABSOLUTELY. ABSOLUTELY. THERE IS NOTHING IN 766. THERE IS NOTHING IN YOUR OPINION IN MUSCULO- SKELETAL CASE THAT EXEMPTS THE STATUTORY ACTIONS. IN FACT, IN THE PEARSON CASE, WE HAD AN ANTI-DUMPING STATUTE AND CASE, AND WHAT THE COURT DID WAS LOOK AT THE SUBSTANCE OVER THE FORM, AND YOU RAISE SUBSTANCE OVER FORM. IF THE ANTI-DUMPING DEPENDS ON WHETHER OR NOT YOU HAVE MADE A DIAGNOSIS, THEN IT IS AT ITS CORE, A MEDICAL NEGLIGENCE CASE, AND 766 APPLIES. THERE IS NOTHING IN 400 THAT SAYS THAT CHAPTER 766 DOESN'T APPLY, AND THE LEGISLATURE HAS DEMONSTRATED IN THE NEW LAW THAT THEY ARE MORE THAN ABLE TO DO THAT IF THEY CHOOSE. THE BURDEN IS NOT ON THE PETITIONER IN THIS CASE, TO DEMONSTRATOR EXPLAIN WHY THE LEGISLATURE DIDN'T CHOOSE TO REFERENCE 766. 400 WAS DROPPED INTO AN EXISTING STATUTORY FRAMEWORK THAT INCLUDED CHAPTER 766. THEY ARE ONLY TO RECONCILE THEM AT THIS POINT, THEY BOTH APPLY. I WOULD LIKE TO RESERVE THE REST OF MY TIME FOR REBUTTAL, IF I MAY.

CHIEF JUSTICE: THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS SUSAN MORRISON, FROM THE FIRMS OF WILKES AND McHUGH, REPRESENTING THE STATE OF ALBERT RED WAY, PAULINE LANG-REDWAY, PERSONAL REPRESENTATIVE. GOOD MORNING, CHIEF JUSTICE, JUSTICES. I AM HERE TO ASK THE COURT TO DECLINE JURISDICTION OR ALTERNATIVELY TO ASK THE COURT TO APPROVE RED WAY, BUT MORE IMPORTANTLY, I AM HERE TO DEFEND CHAPTER 400, IN PARTICULAR THE RESIDENTS' RIGHTS STATUTE AND SECTION 400.022 AND3, FROM THE DELIBERATE, ON THE PART OF NURSING HOME EMPLOYEES, TO PROTECT NURSING HOME RESIDENTS. PARTICULARLY IN THE AMENDED RESPONSE REPLY, THE RESPONDENT HAS DISGUISED ITS CHAPTER 400 CLAIM, AND IT IS, IN REALITY, A MEDICAL MALPRACTICE CASE. PETITIONERS' GOAL IN THIS CASE IS TO CONFUSE AND DISTRACT THIS COURT AND ASK THE COURT TO LOSE SIGHT OF THE PURPOSE OF CHAPTER 400.

COULD YOU JUST GO BACK, BECAUSE I AM A LITTLE UNCLEAR ABOUT WHETHER THESE ARE, IN FACT BOTH A SECTION 400 CLAIM, AS WELL AS THERE WAS REFERENCE TO THESE OTHER TWO COUNTS THAT ARE FOR WRONGFUL-DEATH, AND WHETHER THE DAMAGES THE JURY WOULD BE ASKED TO AWARD WOULD BE THE SAME AS IF THIS WAS A MEDICAL NEGLIGENCE CASE, SO --

YES, YOUR HONOR. THE DAMAGES, IN FACT, ARE DIFFERENT. UNDER COUNT I, THE CHAPTER 400 CLAIM, THE PERSONAL REPRESENTATIVE IS ENTITLED TO RECOVER PAIN AND SUFFERING DAMAGES FOR ADULT CHILDREN, UNDER THE WRONGFUL-DEATH STATUTE STATUTE. ALSO ENTITLED TO RECOVER STATUTORY CLAIMS AND PUNITIVE DAMAGE CLAIMS. IF THIS WERE A MEDICAL MALPRACTICE CLAIM, UNDER THE COMMON LAW, SECTION 768.21-8, WOULD EXPRESSLY LIMIT THE DAMAGES RECOVERABLE UNDER WRONGFUL-DEATH, TO EXCLUDE PAIN AND SUFFERING FOR SURVIVORS, OTHER THAN FOR MINOR CHILDREN. SO THERE IS A VAST

DIFFERENCE BETWEEN TREATING A NURSING HOME CLAIM AS A MEDICAL MALPRACTICE CLAIM, UNDER THE COMMON LAW, AND ONE AS A STATUTORY INFRINGEMENT OF RESIDENTS' RIGHTS, UNDER CHAPTER 400, AND WHAT THE DEFENDANTS OR PETITIONERS IN THIS CASE ARE ATTEMPTING TO DO IS ASK THIS COURT, E TSIN HOME CASES THAT ARE PENDING THIS TERM, KNOWLES, ERG AND REDY, TO ENTIRELY HE MASSCLATE -- TO ENTIRELY EMASCULATE CHAPTER 400 AND TO EVISCERATE AND REMOVE NURSING HOME RESIDENTS AND THE ESTATES OF NURSING HOME RESIDENTS.

IN THIS CASE WE ARE JUST ASKED WHETHER YOU COMPLIED WITH THE REQUIREMENTS OF 766 BEFORE THIS SUIT COULD BE FILED. THAT IS THE NARROW ISSUE IN FRONT OF US.

YES, YOUR HONOR, BUT THE NARROW ISSUE IN FRONT OF US IS REALLY NOT ABOUT PRE-SUIT NOTICE. IT IS ABOUT EMASCULATEING THE REMEDY, WHICH THE LEGISLATURE CLEARLY HAS EXPRESSED A VERY STRONG PUBLIC POLICY INTEREST IN PROTECTING THESE PEOPLE, NOT ONLY BECAUSE THEY ARE ELDER AND INFIRM AND UNABLE TO PROTECT THEMSELVES, BUT IN RESPONSE, IN 1980, TO GRAND JURY REPORTS AND TESTIMONY OF ABUSE --

BUT WHY ISN'T, IF YOU ARE, ALSO, CLAIMING THAT THIS, THAT THE ACTION AROSE OUT OF THE FAILURE TO PROVIDE PROPER TREATMENT BY NURSES, WHY ISN'T THAT, ALSO, UNDER 766, AND IN PARTICULAR, THAT IF THE NURSE WAS IN A HOSPITAL, AND THE TREATMENT WAS FOR, YOU KNOW, WAS IMPROPER TREATMENT, THAT THERE WOULD BE THE 766 PRESUIT NOTIFICATION -- PRE-SUIT NOTIFICATION.

YES, YOUR HONOR. THERE ARE VERY GOOD REASONS FOR. THAT NUMBER ONE IS THE NURSING HOME PROVIDES A MIXTURE OF SERVICES. IN A HOSPITAL SETTING, THE HOSPITAL PROVIDES MEDICAL SERVICES, NURSING SERVICES IN AN ACUTE CARE SETTING. IN A NURSING HOME, THESE FOLKS ARE INSTITUTIONALIZED, AND THE LICENSEE, THE NURSING HOME, IS CHARGED, UNDER FEDERAL LAW AND UNDER CHAPTER 400, WITH ENSURING THE PROVISION OF CARE TO MEET THE DAILY NEED REQUIREMENTS OF THE RESIDENTS.

YOU ARE NOT SAYING THERE COULDN'T BE, THERE IS NOT A SITUATION IN A NURSING HOME, WHERE A PLAINTIFF, FOR WHATEVER ASON, BECAUSE THE REMEDIES MIGHT BE BETTER, WOULDN'T WANT TO FILE A MEDICAL NEGLIGENCE CASE.

NO, YOUR HONOR.

YOU AGREE WITH THAT SENTENCE.

I AGREE THAT THERE COULD BE A POTENTIAL CLAIM FOR MEDICAL MALPRACTICE, FOR EXAMPLE WHERE A MEDICAL DIRECTOR COMMITS AN ACT OF MEDICAL MALPRACTICE, 400.023-SUB4, EXPRESSLY -- SUB3, RATHER, EXPRESSLY STATES THAT THE NURSING HOME COULD BE LIABLE VICARIOUSLY FOR THAT BUT NOT VICARIOUSLY LIABLE FOR THE ACTS OF OTHER DOCTORS THAT COME INTO A HOSPITAL SETTING, BUT INTERESTINGLY, 400.023, WHICH WAS ENACTED IN 1993, EXPRESSLY SAID THAT NURSING HOMES WILL NOT BE VICARIOUSLY LIABLE FOR THE TREATING DOCTORS THAT COME IN BUT WILL BE LIABLE FOR ITS OWN MEDICAL DIRECTOR, SO THERE COULD BE A CASE WHERE, BASED UPON SOME MEDICAL NEGLIGENCE ON THE PART OF THAT MEDICAL DIRECTOR, THAT THE NURSING HOME WOULD BE VICARIOUSLY LIABLE FOR MEDICAL NEGLIGENCE, SUCH THAT 766 WOULD APPLY.

WE HAVE TWO STATUTES THAT WE ARE DEALING WITH HERE, AND IT IS OUR JOB TO RECONCILE THE TWO, IF WE CAN. TELL US, SPECIFICALLY, WHY THESE TWO STATUTES CANNOT BE RECONCILED.

YES, SIR. UNDER RULES OF STATUTORY CONSTRUCTION, THERE ARE NUMEROUS REASONS WHY THESE STATUTES CAN OPERATE INDEPENDENTLY AND, IN FACT, THAT 766 DOES NOT APPLY IN THIS

SETTING. NUMBER ONE, THE FACT THAT CHAPTER 400, WHICH WAS ENACTED IN 1993, IS A SPECIFIC STATUTE, ADDRESSES THE NEEDS AND CODIFIES STRONG PUBLIC POLICY OF PROTECTING ELDERS FROM ABUSE, NEGLECT AND EXPLOITATION. SPECIFIC STATUTES CONTROL OVER GENERAL STATUTES. ALSO THE LEGISLATURE IS PRESUMED TO KNOW THE LAW, WHEN IT ENACTS A STATUTE. MCCULLOUGH SAYS THAT AND THIS COURT, IN WEINSTOCK, SAID THAT. IN 1993, WHEN THE LEGISLATURE SECPTER 400, IT COULD VERY EASILY INCORPORATED, BY REFERENCE, THE PRE-SUIT REQUIREMENTS OF 766 BUT IT DID NOT.

DO YOU AGREE THAT PRE-SUIT REQUIREMENTS, DO YOU THINK THEY ARE DIFFERENT OR ARE THEY THE SAME?

I THINK THEY ARE DIFFERENT, YOUR HONOR. UNDER CHAPTER 4 ON 0, THE 1993 LEGISLATE -- UNDER CHAPTER 400, THE 1993 LEGISLATURE ENACTED A PRE-SUIT INVESTIGATION REQUIREMENT. THE SAME CONCERN IN 766 THAT THERE BE SOME CORROBORATION BY A MEDICAL EXPERT WITH EXPERIENCE IN NURSING HOME CARE SETTINGS, TO CORROBORATE THE VALIDITY OF THE CLAIM, TO PROTECT DEFENDANTS FROM FRIVOLOUS LAWSUITS. THAT IS THE SAME. UNDER CHAPTER 400, HOWEVER, AFTER THAT CORROBORATION AND A VERIFIED STATEMENT IS PREPARED, THE PLAINTIFF IS FREE TO GO FORWARD WITH THEIR SUIT. UNDER 766, THE PRE-SUIT REQUIREMENTS, WHICH WERE ADOPTED IN 1976, REVISED IN 1985, ARE, I APOLOGIZE, 1985, WERE A DEROGATION OF THE COMMON LAW, AND RESTRICT A PLAINTIFF'S RIGHT OF ACCESS TO THE COURT. THIS COURT HAS HELD, IN CUCOREL AND WEINSTOCK, THAT THEY BE FAVORED IN THE COURSE.

DO YOU AGREE THAT IF A MEDICAL CARE NURSE IS A PATIENT IN A HOSPITAL OR A NURSING HOME?

YOUR HONOR, I THINK THAT IS A CUSTODIAL ISSUE, WHICH ISN'T COVERED. IT IS NOT EVEN A NURSING SERVICE, TO BE QUITE CANDID, BUT EVEN IF A NURSE WERE TO PROVIDE A SERVICE IN A NURSING HOME SETTING, CHAPTER 400 PROVIDES FOR A REMEDY FOR A CAUSE OF ACTION. IN 400.1044, WE HAVE A RIGHT TO RESIDENTS' ADEQUATEDPR HEALTHCARE. 400.2203, SAYS THAT THE NURSING HOME SHALL BE LIABLE TO THE PLAINTIFF FOR NURSING ASSESSMENTS, FOR NURSING CARE, FOR THE WHOLE GAMUT OF NURSING SERVICES. SHALL BE LIABLE! THE LEGISLATURE SOUGHT TO HOLD NURSING HOMES ACCOUNTABLE FOR THE PROVISION OF CARE, AND SIMILARLY, IN THE RECENT CASE OUT OF THE FOURTH DCA, OF HINKLEY V PALM BEACH, THE COURT SAID THAT ONE WHO CARES FOR PEOPLE WHO ARE PHYSICALLY DISABLED OR MENTALLY DISABLED, HAVE A SPECIAL RELATIONSHIP, GIVING RISE TO A DUTY TO CONTROL THE CONDUCT OF THIRD PARTIES. THAT CONCEPT IS CODIFIED IN 400.022, AND IN PARTICULAR 011, WHERE THE LEGISLATURE SAID NURSING HOME, WE ARE GOING TO HOLD YOU LIABLE AND ACCOUNTABLE, TO ENSURE THE PROVISION OF ADEQUATE AND APPROPRIATE CARE AND TREATMENT TO THESE RESIDENTS.

OKAY. WHAT SPECIFIC ACTS OR OMISSIONS IS THIS COMPLAINT ALLEGING THAT THIS NURSING HOME IS LIABLE FOR?

YOUR HONOR, THIS COMPLAINT IS BASED UPON VARIOUS VIOLATIONS OF 400.022, ONE OF WHICH IS THE VIOLATION OF THE RIGHT TO ADEQUATE AND APPROPRIATE HEALTHCARE. IN THAT CONTEXT, WE ALLEGE THAT THE NURSING HOME FAILED TO PROPERLY ASSESS MR. RED WAY FOR SKIN BREAKDOWN, PROPERLY ASSESS HIS RISK OF FALSE, PROVIDE HIM WITH A DURABLE MEDICAL EQUIPMENT SUCH AS BEDS, MATTRESS PADS AND SO FORTH, WHICH WOULD PREVENT SKIN BREAKDOWN. WE, ALSO, ALLEGE THAT THEY BREACHED HIS RIGHT TO SAFETY AND PROTECTIVE SERVICES, BY ALLOWING HIM TO FALL SEVERAL TIMES AT THE NURSING HOME, THAT THEY DROPPED HIM FROM A HOYER LIFT, WHEN THEY WERE TRANSFERRING HIM FROM BED TO CHAIR, AND OTHER CUSTODIAL NEGLECT, VIOLATIONS OF HIS RIGHTS TO PRIVACY, VIOLATIONS OF HIS RIGHT TO HAVE HIS FAMILY AND SICIIED OF CHANGES IN HIS CONDITION. IT IS A MIXTURE OF ACTS WHICH CONTEMPLATE THE FULL GAMUT OF SERVICES PROVIDED BY THE

NURSING HOME, TO SOMEONE WHO IS ENTIRELY DEPENDENT HOME FOR ALL OF ITS ACTIVITIES OF DAILY LIVING AND ALL OF HIS NEEDS.

AND ARE THESE, IS THIS PROVIDED BY NURSES, BY LICENSED NURSES?

SOME CARE IS PROVIDED BY LICENSED NURSES, BUT IN ACCORDANCE WITH THE REGULATIONS APPLICABLE TO THE OPERATION OF NURSING HOME, THE VAST MAJORITY OF THE CARE PROVIDED IS BY UNLICENSED PERSONS AND CNAs, AIDS, DIETARY FOLKS, THE WHOLE GAMUT OF SERVICES. IN FACT, IN THE CONTEXT OF SKIN BREAKDOWN, PROPER NUTRITION IS IMPORTANT. DIETARY CONCERNS. THE DIETARY DIRECTOR IS DIRECTLY INVOLVED IN THE CARE PLAN FOR A RESIDENT, TO MAKE SURE THAT THEY GET SUFFICIENT FLUIDS AND PROPER NUTRITION, IN ORDER TO PREVENT SKIN BREAKDOWN AND IN ORDER TO FACILITATE THE HEALING OF SKIN THAT HAS BEEN SUBJECTED TO SKIN BREAKDOWN. THIS IS A MIXTURE OF ACTS, AS HAS BEEN RECOGNIZED IN PREVIOUS CASES, IN ARTHUR VUNICARE AND, AGAIN, MOST RECENTLY IN REDWAY, WHERE JUDGE ALTENBURN SAID THESE SERVICES ARE INTERWOVEN. THE LEGISLATURE HAS SOUGHT TO TREAT THIS CLASS OF PERSON SPECIALLY, AND THE FACT THAT A NURSE IN A HOSPITAL SETTING MIGHT BE ENTITLED TO 766 NOTICE BUT SHE IS NOT ENTITLED TO IT IN CHAPTER 400, IS BECAUSE WE ARE, IN THIS CASE, NOT SUING THE NURSING HOME FOR VICARIOUS LIABILITY FOR THE MEDICAL NEGLIGENCE OF A NURSE. WE ARE SUING THE NURSING HOME, IN COUNT I, FOR VIOLATIONS OF THE NURSING HOME DIRECT, NONDELEGABLE DUTY TO ENSURE THE PROVISION OF HEALTHCARE.

SO IN THIS CASE IT WOULD SOLE SOLELY RELATE TO 400 AND THE VIOLATIONS THAT ARE ALLEGED, OR WOULD THERE BE ANY QUESTIONS WHERE IT WOULD ASK, HAS, THROUGH THE AGENTS OF THIS NURSING HOME, HAVE THE, HS THERE BEEN A DEVIATION IN THE STANDARD OF ACCEPTED CARE?

YOUR HONOR, THE COUNT II, WHICH I DIDN'T GET TO ADDRESS YET, IS A COMMON LAW COUNT, BUT IT IS NOT COMMON LAW MEDICAL NEGLIGENCE. IT IS A COMMON LAW BREACH OF A DUTY BY THE NURSING HOME, BASED ON THE NURSING HOME'S FAILURE TO COMPLY WITHR 400, SO OUR COMMON LAW COUNT IS BASED ON THE BREACH OF A STATUTORY DUTY, WHICH, IN BEVERLY VERSUS McSKRA, IS- VERSUS McVEIGH, IS INAPPROPRIATE.

WOULD THE QUESTION BE ASKED, WOULD THE NURSING HOME, THROUGH ITS AGENTS, DEVIATED FROM THE ACCEPTED STANDARD OF MEDICAL CARE AND NURSING --

YOUR HONOR, A CORPORATION CAN ONLY ACT THROUGH ITS AGENTS, BUT THERE IS A VAST DIFFERENCE IN OUR OPINION, BETWEEN SUING ON A VICARIOUS LIABILITY THEORY, UNDER PRINCIPLES OF RESPONDIAT SUPERIOR, WHICH DO NOT AT ALL CONSIDER THE CULPABILITY OF THE NURSING HOME, AND WHICH WE HAVE SUED, THAT THIS NURSING HOME HAD A DIRECT, NONDELEGABLE DUTY, UNDER STATE AND FEDERAL LAW, TO ENSURE THE PROVISION OF ADEQUATE CARE, THE PROVISION OF PROTECTIVE SERVICES, THE PROVISION OF ALL ACTIVITIES OF DAILY LIVING TO MR. REDWAY. THEY BREACHED THAT DUTY.

CAN YOU ENVISION A CASE WHERE THE FACTS WOULD BE SUCH THAT THERE WOULD BE, BOTH, A 766 TYPE OF SITUATION, AS WELL AS A 400, IN A NURSING HOME?

YES, YOUR HONOR. PARDON ME. I DIDN'T MEAN TO SPEAK OVER YOU. YES, YOUR HONOR. AS I MENTIONED EARLIER, IF, IN FACT, A MEDICAL DIRECTOR CAME IN AS THEY SOMETIMES, AND ACT AS A TREATING PHYSICIAN IN THE NURSING HOME SETTING, AND MISDIAGNOSE A PATIENT'S CONDITION.

WHAT ABOUT, LET'S JUST USE THE NURSE, BECAUSE THE NURSES ARE THE PRIMARY --

I THINK, YOUR HONOR --

-- CAREGIVERS.

-- THE INTENTN CHR 400 IS NOT TO ALLOW NURSES THE PROTECTION OF 766, WHEN THEY ARE PROVIDING NURSING SERVICES IN THE NURSING HOME SETTING, BECAUSE THE '93 LEGISLATURE HAS SOUGHT TO ENACT SEPARATE PRE-SUIT INVESTIGATION. WE CAN'T LOSE SIGHT OF THE FACT THAT PRE-SUIT NOTICE IS NOT A COMMON LAW RIGHT. IT IS IN DEROGATION OF COMMON LAW, AND IT HAS A PURPOSE, AND THE PURPOSE IS TO PROTECT DEFENDANTS FROM FRIVOLOUS LAWSUIT. THE '93 LEGISLATURE CONTEMPLATED THAT, AND HAD A CORROBORATING MEDICAL EXPERT OPINION REQUIREMENT, UNDER 400.0234, SO WE WOULD SAY THAT, UNDER NO CIRCUMSTANCES, COULD A NURSE IN A NURSING HOME SETTING, BE ENTITLED TO THE PROTECTIONS OF 766.

IF A NURSE, IN TRANSFERRING A PATIENT IN A HOSPITAL, DROPS THE PATIENT, IS THAT A MEDICAL NEGLIGENCE CASE?

IN SOME CASES, IT WOULD NOT BE, YOUR HONOR. THERE ARE SOME CASES THAT TALK ABOUT PRODUCTS LIABILITY OR SIMPLE NEGLIGENCE. THERE ARE NUMEROUS CASES THROUGHOUT -- THOSE WOULD NOT GO AT ALL, THROUGH 766, IF IT WAS IN A HOSPITAL SETTING.

I THINK THERE MIGHT BE ONE CASE, AND I CAN'T TELL YOU THE NAME OF IT, THAT SAYS THAT IT WOULD BE 766, BUT CERTAINLY IN A NURSING HOME SETTING AND IN THE CONTEXT OF THIS PARTICULAR NURSING HOME RESIDENT, WHO WAS DROPPED FROM A HOYER LIFT, THERE IS NO EVIDENCE WHETHER A REGISTERED NURSE DID IT OR NOT, BUT CERTAINLY THERE IS NO REQUIREMENT, UNDER THE REGULATIONS OR UNDER COMMON COMMUNITY PRACTICE STANDARD, WHICH REQUIRE A NURSE TO PROVIDE THAT TRANSFER, SO IN THAT CONTEXT, I WOULD SAY THAT THE NURSE WAS NOT PROVIDING A NURSING SERVICE.

DO YOU SEE AWAY THAT, WITH, WHERE IF WE HELD THAT THE PRE-SUIT REQUIREMENTS OF 766 WERE NECESSARY IN THIS CASE, AND I THINK YOU WERE STARTING TO TALK ABOUT THE POLICY ISSUES LATER, THAT THERE WOULD BE NO BASIS TO, NOT TO SAY THAT OTHER PARTS OF 766, ALSO, EXTENDED, SUCH AS THE SECTION THAT ALLOWS A DEFENDANT TO ADMIT LIABILITY AND GO TO ARBITRATION?

WELL, YOUR HONOR, THAT QUESTION HASN'T BEEN RAISED YET, BUT I SUSPECT THAT WE WOULD HAVE A WHOLE OTHER SERIES OF LAWSUITS DETERMINING WHETHER THE PRESUIT APPLIES BUT NOT THE REST, AND CANDIDLY, YOUR HONOR, THE CONSTITUTIONALITY OF THE MEDICAL MALPRACTICE STATUTE, WAS CHALLENGED, AND THE SCALES TIPPED, IN FAVOR OF CONSTITUTIONALITY, BECAUSE OF EXPRESS FINDINGS BY THE LEGISLATURE, OF A NEED, AND THAT NEED WAS BASED ON MEDICAL MALPRACTICE PREMIUM CRISIS FOR PHYSICIANS. THERE WAS NO EVIDENCE, NO TESTIMONY, DURING THE '85 MEDICAL MALPRACTICE REFORM ACT, THAT DEALT WITH NURSING HOME REFORM RESPECT NURSING HOME CRISIS. -- NURSING HOME REFORM, NURSING HOME CRISIS. IN FACT, IN 1977, THE 1976 VERSION OF THE MEDICAL MALPRACTICE ACT, INCLUDED NURSING HOMES IN THE DEFINITION OF HEALTHCARE PROVIDERS. THE NURSING HOME LOBBYISTS EXPRESSLY ASKED TO BE CARVED OUT OF MEDICAL MALPRACTICE STATUTES, SAYING THAT THEY DON'T PROVIDE EMERGENCY ROOM SERVICES. THEY DON'T PROVIDE SURGERY, SURGICAL SERVICES, AND WHAT THEY REALLY SAID WAS WE DON'T WANT TO BE INVOLVED IN MEDICAL REVIEW COMMITTEE ISSUES. AND BECAUSE OF THAT, WE ARE ASKING YOU TO CARVE NURSING HOMES OUT OF 766, AND THAT WAS ACCOMPLISHED, SENATOR GALEN SPONSORED THE BILL IN 1977, SO NOW THEY ARE SAYING WE WANT OUR CAKE AND EAT IT, TOO. IN 1997, WE EXPRESSLY- IN 1977 WE EXPRESSLY ASKED THE LEGIS CARVUS OUT AND NOW WE WANT TO HIDE BEHIND THIS, AND THE REAL REASON IS NOT NOTICE. BECAUSE WE HAVE A CORROBORATION REQUIREMENT. THE REAL REASON IS THEY WANT TO TAKE THIS 3-LEGGEDTOOLDAW ONE LEG OFF AT A TIME. WITH REDWAY, THEY ARE SAWING OFF THE PAIN AND

SUFFERING DAMAGES OF ADULT SURVIVORS, UNDER CIRCUMSTANCES WHERE HARDLY ANY NURSING HOME RESIDENTS HAVE MINOR CHILDREN, SO THEY KNOW THERE ARE NO, IF THIS COURT WERE TO DISAPPROVE REDWAY, THERE GOES THAT ELEMENT OF .> WHY ISAT? WHAT IS IT ABOUT THE PRE-SUIT NOTIFICATION, THAT WOULD DIMINISH THE RIGHT TO CLAIM THE DAMAGES, UNDER SECTION 400, WHICH DOES INCLUDE THE PRE-DEATH PAIN AND SUFFERING?

BECAUSE THE NEXT STEP IN THIS PROCESS WOULD BE FOR THE NURSING HOMES TO COME IN AND SAY, WELL, THE COURT HAS RULED THAT WE ARE ENTITLED TO PRE-SUIT NOTICE. THEREFORE THIS IS MEDICAL MALPRACTICE. THEREFORE SECTION 28 OF THE WRONG -- 761.28 A, WHICH SAYS THAT ONLY MINOR CHILDREN GET PAIN AND SUFFERING DAMAGES. THAT REQUIREMENT DOES NOT CURRENTLY LIMIT THE DAMAGES AVAILABLE TO ADULT CHILDREN OF NURSING HOME RESIDENTS, UNDER 400, SO THAT IS THE FIRST LEG OF THE STOOL. THE SECOND ONE IS THE SOUNDBERG ISSUE, WHERE THE DEFENDANTS ASKED THIS -- THE SOUNDBERG ISSUE WHERE THE PETITIONERS ASKED THIS COURT TO TAKE AWAY PRE-DEATH PAIN AND SUFFERING, AND THEN THEY ASKED THIS COURT TO APPROVE KNOWLES.

CHIEF JUSTICE: THANK YOU. YOUR TIME IS UP. THANK YOU.

THANK YOU, YOUR HONOR.

CHIEF JUSTICE: REBUTTAL.

THANK YOU, JUSTICES. I WANT TO SEE IF I CAN RESPOND TO JUSTICE ANSTEAD'S CONCERN ABOUT THE BROADENING OF THE STATUTE, AS WELL AS JUSTICE SHAW'S CONCERN ABOUT THE AMPLIFICATION AND YOUR CONCERN, PARIENTE, ABOUT ACCOMMODATING DAMAGES. FIRST, I DON'T THINK WE ARE BROADENING 766 AT ALL, BECAUSE THE SUPREME COURT, YOU HAVE ALL HAVE SAID QUITE SPECIFICALLY THAT, IF IT INCLUDES OUT OF LICENSED HEALTHCARE PROVIDERS THEN YOU HAVE TO COMPLY WITH 766. CHAPTER 464 SAYS THAT NURSES ARE COVERED WITHIN THAT. THAT IS THE FIRST POINT. SECONDLY -- DO YOU WOULD VIEW THIS AS HAVING A DUPLICATE REVIEW. YOU WOULD HAVE THE PROCESS OF REVIEW, UNDER 400, AND THEN YOU WOULD, ALSO, REQUIRE A DUPLICATE REVIEW, UNDER THE MEDICAL NEGLIGENCE STANDARDS. I MEAN, THAT IS WHAT IT AMOUNTS TO.

I WOULD SAY, NO, YOUR HONOR, AND THIS IS WHY. I BELIEVE THAT THE AFFIDAVIT REQUIREMENT IN 400 IS VIRTUALLY IDENTICAL TO THE AFFIDAVIT REQUIREMENT IN CHAPTER 766. THE DIFFERENCE IS --

IF WE TAKE THAT VIEW, THEN WHY DO IT TWICE?

BECAUSE IN 766, IT REQUIRES A NUMBER OF OTHER PRE-SUIT REQUIREMENTS, TO ALLOW DEFENDANTS WHO ARE SUBJECT TO MEDICAL NEGLIGENCE CASE, THE OPPORTUNITY TO REVIEW IT, TO ELECT ARBITRATION, TO DO THE THINGS WHICH 766 WAS DESIGNED TO DO.

SO WE SHOULD REVIEW THE STATUTE. LET ME MAKE SURE I UNDERSTAND, THEN, THAT THE LEGISLATURE INTENDED THAT YOU HAD ALL THIS REVIEW UNDER ONE SECTION, AND THEN WE PUT IN THESE PROVISIONS IN AN ANOTHER STATUTE FOR WHAT REASON, THEN?

THERE IS TWO RESPONSES TO THAT. IF YOU HAVE INADEQUATE AND INAPPROPRIATE HEALTHCARE, WHICH IS NOT MEDICAL NEGLIGENCE, YOU WOULD HAVE TO COMPLY WITH 023. IVE A MEDL NEGLIGENCE CATEGORY ORION ANYONE, BY THE WAY, NURSING LICENSED, HEALTHCARE PROVIDERS. YOU WOULD HAVE TO COMPLY WITH 766. WHERE DO YOU SAY, IN 400 IT SAYS THIS? H I YOUR --. M SOR. I NOT SAY, BUT IT REPEAL CHAPTER 766. WE DON'T LOOK AT 400 AND 400 PROVIDED A LIMITED AFFIDAVIT REQUIREMENT OF ADEQUATE AND APPROPRIATE CARE, ONLY UNDER "L" AND IT DOESN'T COVER ANY OTHER SECTION, THAT THERE FOR YOU EXXONVATE OR EVISCERATE OR CLOSE OUT EVERY OTHER 766 CASE. THEY ARE REPEALING IT BY IMPLICATION, AND IF DO YOU

THAT, YOU NEED TO, FIRST, SAY TO YOURSELF, HEY, CAN WE RECONCILE THESE TWO? IS IT POSSIBLE? AND AS YOU MENTIONED, THE REQUIREMENTS ARE VIRTUALLY THE SAME. THE REAL QUESTION IS HERE IS WHETHER OR NOT IT IS AN ISACA CASE, AND JUSTICE PARIENTE, YOUR COMMENT, WE HAVE A LICENSEE AND A NONLICENSEE HERE. IF YOU ARE CLAIMING ONLY A CHAPTER 400 COUNT, THEN THE LICENSEE HAS TO BE DISMISSED AS A MATTER OF LAW, BECAUSE THEY ARE NOT SUBJECT TO 400. THEY ARE LIMITED TO 766. IF YOU ELIMINATED 400 AND JUST HAD A -- ELIMINATED 400 AND JUST HAD A WRONGFUL-DEATH COUNT, WHY WOULD I ADD A COUNT, WHICH IS IDENTICAL TO CHAPTER 766, WRONGFUL-DEATH AND SURVIVOR ACTION, AND THEN ELIMINATE MY IRMENTS REQUIREMENTS, BY CLAIM -- ELIMINATE MY REQUIREMENTS, BY CLAIMING IT ARISES OUT OF SIMILAR ALLEGATIONS, WHICH IT DOESN'T, AND NUMBER TWO, THE LICENSEE HAS NO CONNECTION TO CHAPTER 400.

CHIEF JUSTICE: I THINK YOUR TIME IS UP.

THANK YOU. WE WOULD ASK YOU TO ANSWER THE QUESTION IN THE AFFIRMATIVE. I APPRECIATE YOUR TIME.

CHIEF JUSTICE: THANK YOU VERY MUCH. WE WILL, AT THIS POINT, TAKE A FIVE-MINUTE RECESS.