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5D23-3131

In the
District Court of Appeal of Florida
Fifth District

FANNIE HURLEY,

Appellant/Plaintiff,

v.

VITAS HEALTHCARE CORPORATION and VITAS HEALTHCARE CORPORATION OF FLORIDA.

Appellees/Defendants.

Appeal from the Final Judgment of the Circuit Court of the 7th Judicial Circuit, in and for Putnam County, Florida, rendered on September 18, 2023, at Case No. 2023-CA-069 (Janesk, J.), entered in favor of Defendants/Appellees.

ANSWER BRIEF OF APPELLEES

VITAS HEALTHCARE CORPORATION and VITAS HEALTHCARE CORPORATION OF FLORIDA

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INTRODUCTION

Vitas Healthcare Corporation and Vitas Healthcare Corporation of Florida provided palliative care services for Fannie Hurley while she was admitted to a nursing home facility. Ms. Hurley spent a short time at the nursing home before her discharge to the hospital for surgery on her left hip. Thereafter, she sued the nursing home entities as well as Vitas for a violation of resident rights under section 400.22, Florida Statutes. The trial court dismissed with prejudice the complaint against Vitas. Ms. Hurley appealed.

Ms. Hurley's brief curiously focuses only on whether her claim against Vitas was for medical negligence. Ms. Hurley wrongly asserts that it was not.

Ms. Hurley's appeal fails for several reasons. First, and this point is dispositive, Ms. Hurley did not state a cause of action for violation of resident rights under section 400.22 against Vitas—a hospice corporation, and she failed to preserve this issue for appeal. The Court need go no further. But, even had this issue not been waived for appellate purposes, this Court can look directly at the allegations in the complaint to determine that Ms. Hurley's cause of action against Vitas for violation of resident rights failed.

Second, a look at the complete record will demonstrate that the case against Vitas was actually a claim for medical negligence. The box on the civil cover sheet was marked to designate the case as a medical malpractice

case. In the complaint, the specific allegations against Vitas referred only to the acts or omissions of its nurses. Yet, Ms. Hurley did not comply with the presuit requirements under Chapter 766, which served as part of the trial court's basis for dismissing the complaint against Vitas.

Finally, the face of the complaint reflects that Ms. Hurley failed to file her complaint before the expiration of the 2-year statute of limitations. Since she could not cure the defect in her complaint with an amendment of the complaint, the trial court properly dismissed the case against Vitas with prejudice.

This Court should affirm the final judgment entered in favor of Vitas and against Ms. Hurley.

STATEMENT OF THE CASE AND FACTS

Ms. Hurley's Statement of the Case and Facts lacks key details needed to resolve the issues on appeal. Vitas submits the following in its stead.

Vitas is a hospice corporation licensed pursuant to section 400.602, Florida Statutes. [R. 72]. It provides palliative care services for individuals with terminal illnesses. [R. 72].

Fannie Hurley was capable of bearing weight on her lower extremities, with an unsteady gait and a history of falls, when she was admitted to Crestwood Nursing Home-SNF, where Vitas nurses were providing palliative

care, on October 16, 2020. [R. 24]. A day later, a Vitas nurse observed her lying in bed with no pain or discomfort. [R. 25]. Hours later, that same Vitas nurse found Ms. Hurley barely able to move and in pain when she tried to roll her from side to side. [R. 25]. An X-ray was ordered. [R. 25].

The X-ray revealed that Ms. Hurley fractured her left hip. [R. 25]. Ms. Hurley continued to complain of pain after the X-ray but she was not transferred to the emergency department for further treatment or evaluation. [R. 25].

The next day, Ms. Hurley's daughter was called. [R. 26]. The daughter revealed she was aware of the fracture, which occurred six months earlier. [R. 26]. The daughter also indicated, "she didn't want to do anything about it." [R. 26]. Following this response from the daughter, no further treatment or evaluation of the hip fracture was completed. [R. 26].

Three days later, Ms. Hurley was discharged from the nursing home with complaints of leg pain. [R. 26]. The imaging again revealed the left hip fracture. [R. 26]. On October 22, 2020, Ms. Hurley underwent an open reduction and internal fixation of the left hip. [R. 26].

Over two years later, on February 23, 2023, Ms. Hurley sued the nursing home and Vitas for "Violation of Residents' Rights" for alleged injuries that occurred while she was a resident receiving respite care at the

nursing home. [R. 22-36]. The civil cover sheet checked the box for "Professional malpractice" generally, and "Malpractice-medical," for a more specific category. [R. 20].

The allegations in the complaint against both the nursing home defendants and Vitas were similar. [R. 27-30] compare with [R. 31-35]. Ms. Hurley alleged that she received care, treatment, and rehabilitation from the named defendants. [R. 23]. She alleged the nursing home defendants (but not Vitas) operated under Florida Statute Chapter 400. [R. 23]. Ms. Hurley also alleged the defendants collectively were vicariously liable for all acts and/or omissions of their agents (actual/apparent), employees, servants, and administrators, while they acted within the course and scope of their employment. [R. 24].

As it related to Vitas, Ms. Hurley alleged that Vitas "by and through its employees and agents provided care to Fannie Hurley, as more specifically described below." [R. 23-24]. When the complaint specifically referred to Vitas, Ms. Hurley alleged as follows:

> 16. On October 17, 2020, a note was documented at 12:37 by **Dalisha, LPN with Vitas** that Ms. Hurley was lying in bed and not "showing signs of pain or discomfort at the moment."
>
> ****
>
> 21. On October 18, 2020, between 13:50 and 14:00, **Vitas nurse Andrea Campbell, R.N.**, ….
>
> ****

> 23. On October 18, 2020, between 14:00 and 14:10, **Vitas nurse Andrea Campbell, R.N.** noted the following: ….
>
> 24. Even with the knowledge of the fractured hip as demonstrated in the x-ray from October 17, 2020, the **Vitas nurses, including Ms. Campbell**, failed to obtain treatment for Ms. Hurley's fractured hip and failed to assess her.

[R. 25-26] (Emphasis added).

Ms. Hurley alleged that Vitas "owed a duty pursuant to Section 400.22 of the Florida Statutes to provide adequate and appropriate health care consistent with the established and recognized standards within the community, and to provide a safe and decent living environment, free from neglect." [R. 32, 33]. She also alleged that Vitas: (a) failed to provide nursing and home health aide services; (b) failed to provide oversight care and treatment during Fannie Hurley's respite stay at Crestwood Nursing Home; (c) failed to assess, care for, and obtain medical treatment for a fractured hip; and (d) failed to assess Fannie Hurley when notified of a fractured hip. [R. 32-34]. Ms. Hurley further alleged that because of Vitas' alleged "negligence and violation of rights," she suffered an acute left intertrochanteric fracture and complications therefrom. [R. 33-34].

Vitas moved to dismiss and/or to strike the complaint. [R. 67-76]. Vitas contended that Ms. Hurley failed to allege any basis against a hospice for a

violation of a resident's rights under section 400.22, Florida Statutes. [R. 71-73]. Vitas also asserted that the complaint should be dismissed because Ms. Hurley failed to comply with presuit requirements under Chapter 766 governing medical malpractice claims. [R. 69-73]. Further, Vitas argued dismissal with prejudice was appropriate because Ms. Hurley failed to file suit before the 2-year statute of limitations expired. [R. 73-75].

Following a hearing, the trial court entered a detailed order, granting the motion and dismissing the complaint against Vitas with prejudice. [R. 233-274, R. 223-226]. The court then entered final judgment in favor of Vitas and against Ms. Hurley. [R. 228-229].

This appeal followed. [R. 283-293].

STANDARD OF REVIEW

The purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. The trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them. The question for the trial court to decide is simply whether, assuming all the allegations in the

complaint to be true, the plaintiff would be entitled to the relief requested. *Huet v. Mike Shad Ford, Inc.*, 915 So. 2d 723, 725 (Fla. 5th DCA 2005) (citing *Fox v. Prof'l Wrecker Operators of Fla., Inc.*, 801 So. 2d 175 (Fla. 5th DCA 2001)).

When reviewing an order determining the sufficiency of a complaint, this Court must apply the same principles as the trial court. *Fox*, 801 So. 2d 175. This Court's standard of review of a dismissal with prejudice is *de novo*. *See* Appellant Br. at 9-10.

SUMMARY OF THE ARGUMENT

The trial court properly dismissed the violation of resident rights claims against a hospice corporation—Vitas. To proceed on this claim against Vitas, Ms. Hurley had to allege that Vitas was a licensee, the licensee's management or consulting company, the licensee's managing employees, or a direct caregiver, whether employee or contractor. If Ms. Hurley was not pursuing a claim against one one of those entities or individuals, then Ms. Hurley had to follow specific procedures to pursue a claim against another entity such as Vitas. Ms. Hurley failed to do so, and the allegations in the complaint were insufficient against Vitas for violation of resident rights.

Ms. Hurley's brief ignores that key point and instead only focuses on whether the claim was for medical negligence and whether she was required

to comply with presuit requirements under Florida's Medical Malpractice Act. Her argument on this point fails.

The civil cover sheet designated the case as a medical malpractice case. Moreover, the specific allegations against Vitas were for vicarious liability for the acts and omissions of its nurses only. Even though Vitas was a non-health care provider, Ms. Hurley was required to comply with presuit requirements under Chapter 766 since Vitas was alleged to be vicariously liable for its health care provider nurses, whom are subject to chapter 766, accused of failing to assess and obtain treatment for Ms. Hurley's fractured hip.

Finally, the trial court properly dismissed with prejudice the claims against Vitas. It was clear from the face of the complaint that Ms. Hurley failed to file the lawsuit within two years from when Ms. Hurley was diagnosed with a fractured hip and was then admitted to the hospital to have surgery on her left hip. Having not complied with the presuit requirements, she could not cure the defect with an amendment of the complaint. Therefore, dismissal with prejudice was warranted.

This Court should affirm the final judgment in favor of Vitas and against Ms. Hurley.

ARGUMENT

I. The trial court correctly dismissed Ms. Hurley's complaint against Vitas because Ms. Hurley's claims against hospice corporation Vitas failed to state a cause of action under section 400.022, Florida Statutes.

Ms. Hurley glosses over one of the trial court's reasons for dismissing the case, i.e. "Vitas did not owe a duty of care pursuant to Florida Statute § 400.022, as alleged in the Complaint." [R. 226]. The failure to brief this issue constitutes a waiver. *See Coolen v. State*, 696 So. 2d 738, 748 n. 2 (Fla. 1997) (noting that the failure to fully brief and argue issues constitutes a waiver of those claims). Even without waiver, it is clear the allegations in the complaint were fatal to Ms. Hurley's claim for a violation of resident rights pursuant to section 400.022 against Vitas.

Florida law permits plaintiffs to pursue claims against nursing homes to ensure "safe, adequate, and appropriate care, treatment, and health of persons in such facilities." § 400.011(2), Fla. Stat. A "nursing home facility" is any facility, which provides nursing services as defined in part I of chapter 464 and which is licensed according to chapter 400. § 400.021(12), Fla. Stat.

Section 400.022 provides that "[a]ll licensees of nursing home facilities shall adopt and make public a statement of the rights and responsibilities of the residents of such facilities and shall treat such residents in accordance

with the provisions of that statement…." § 400.022(1), Fla. Stat. From these established rights, the Legislature has prescribed:

> [a]n exclusive cause of action for negligence or a violation of residents' rights as specified under this part which alleges direct or vicarious liability for the personal injury or death of a nursing home resident arising from such negligence or violation of rights and which seeks damages for such injury or death may be brought only against the licensee, the licensee's management or consulting company, the licensee's managing employees, and any direct caregivers, whether employees or contractors.

§ 400.023(1), Fla. Stat. (Emphasis added).

For purposes of this section, a "licensee" is an individual, corporation, partnership, firm, association, governmental entity, or other entity that is issued a permit, registration, certificate, or license by the agency and that is legally responsible for all aspects of the operation of the nursing home facility. § 400.023(2)(a), Fla. Stat. A "management or consulting company" is an individual or entity who contracts with, or receives a fee from, a licensee to provide: hiring or firing of the administrator or director of nursing; control over the staffing levels and budget at the facility; or implementation and enforcement of the policies and procedures of the facility. § 400.023(2)(b), Fla. Stat.

A cause of action for negligence or violation of resident rights cannot be asserted against another individual or entity without following additional

procedures. § 400.023(3), Fla. Stat. If a claimant plans to pursue a claim against an entity not listed above, then the claimant must first move for leave to amend. *Id.* After the hearing, the court (or an arbitration panel) must determine there is sufficient evidence in the record or proffered by the claimant to establish: (a) the individual or entity owed a duty of reasonable care to the resident and that the individual or entity breached that duty; and (b) the breach of that duty is a legal cause of loss, injury, death, or damage to the resident. *Id.*

Here, it is undisputed that Ms. Hurley did not comply with the statutory procedures to properly assert a claim for violation of resident rights against Vitas—an entity not covered by section 400.023(1). [R. 22-36]. The complaint did not allege that Vitas was a licensee, a licensee's management or consulting company, the licensee's managing employee or any direct caregiver, whether employee or contractor, for which a violation of residents rights could be pursued under section 400.22.

To the contrary, the allegations relating to Vitas conveniently left out any identifying business relationship. For instance, the complaint alleges as follows:

> 7. At all times material hereto, Defendant, VITAS HEALTHCARE CORPORATION (hereinafter, "VITAS"), was and is a foreign profit corporation authorized to do business and in fact doing business

> in Putnam County, Florida, which by and through its employees and agents, provided care to FANNIE HURLEY, as more particularly described below.
> 8. At all times material hereto, Defendant, VITAS HEALTHCARE CORPORATION OF FLORIDA (hereinafter, "VITAS FLORIDA"), was and is a foreign profit corporation authorized to do business and in fact doing business in Putnam County, Florida, which by and through its employees and agents, provided care to FANNIE HURLEY, as more particularly described below.

[R. 23-24]. This is in stark contrast to the allegations against the three nursing home defendants, who are defending identical causes of action. [compare R. 27-31 with R. 31-34]. Allegations against those defendants included language, "that at all material times material hereto [the defendant] owned, operated, and maintained its facility as defined under Florida Statute Chapter 400." [R. 23].

Without sufficient allegations against Vitas to create a duty under Part II of Chapter 400 (§ 400.011-§400.334, Fla. Stat.), Ms. Hurley's complaint failed to state of a cause of action against Vitas—a hospice governed by Part IV of Chapter 400 (§ 400.6005-§ 400.611). And, Ms. Hurley never sought leave of court to pursue a claim against Vitas as required by section 400.023(3). The trial court properly dismissed the complaint on this basis. [R. 226]. This Court should affirm.

II. The trial court properly dismissed Ms. Hurley's complaint against Vitas because Ms. Hurley failed to comply with the presuit provisions of Florida's Medical Malpractice Act (Chapter 766).

Ms. Hurley's principal argument is that her claims against Vitas are not for medical malpractice. The record belies Ms. Hurley's argument in multiple places.

A. The civil cover sheet designated the case as medical malpractice.

The first place where this is obvious is on the civil cover sheet. The party initiating a new civil action must prepare a cover sheet on the form approved by the supreme court. *See The Florida Bar Re: Amendment to Rules of Civil Procedure Rule 1.100(c) (Caption of Pleadings)*, 488 So. 2d 57 (Fla. 1986); *see also Naranja Princeton Cmty. Dev. Corp. v. Cornerstone Dev. Grp., Inc.*, 34 So. 3d 124 (Fla. 3d DCA 2010) (noting that the information in the cover sheet is for clerical use and that it does not replace the need to file motions and pleadings); Fla. R. Civ. P. Form 1.997.

Category III on Form 1.997 requires a party to designate the type of case. [R. 19-21]. There are various types of cases one can choose from, including "Negligence—other" with a subcategory of "Nursing home negligence." [R. 20]. There is also a separate category for "Professional Malpractice" with a subcategory of "Malpractice—medical." [R. 20].

Civil cover sheets are typically used for clerical purposes; yet, some federal courts have found the civil cover sheet to be quite material, if not dispositive. *Martinez-Lopez v. Bowden*, 2024 WL 1252381 at *3 (M.D. Fla. Mar. 25, 2024) (collecting cases where federal courts found amount of damages listed in civil cover sheet as dispositive of amount in controversy).

Recently, the middle district discussed the civil cover sheet in the context of determining the amount of controversy for diversity jurisdiction. In *Martinez-Lopez*, Judge Corrigan aptly noted:

> [a]dmittedly, the Florida Supreme Court states the civil cover sheet estimate of the amount of the claim is "for data collection and clerical processing purposes only" and "shall not be used for any other purpose." However, this statement does not bind a federal court trying to determine the amount in controversy for diversity jurisdiction. The civil cover sheet does appear to be some evidence of the value a plaintiff places on the claim. If a plaintiff selected one of the boxes to indicate the claim was worth <u>less</u> than $75,000, the Court would surely take that into consideration along with other evidence in assessing the amount in controversy. Likewise, when a plaintiff checks a box that the claim is worth more than $75,000, it must mean something, especially when a lawyer, an officer of the court, is completing the form, certifying that the provided information "is accurate to the best of [the lawyer's] knowledge and belief."

Martinez-Lopez, 2024 WL 1252381 at *3 (internal citations omitted, emphasis in original).

Notably, for this case, Ms. Hurley clicked the boxes next to "professional malpractice" and "malpractice—medical"—not next to "negligence—other" or "nursing home negligence." [R. 20]. Thus, just like in *Martinez-Lopez*, regardless if Ms. Hurley's counsel clicked the wrong boxes inadvertently, it must mean something when Ms. Hurley's lawyer completes the form indicating that the claim was for professional medical malpractice and certifies that the information is accurate to the best of the lawyer's knowledge and belief.

Thus, this Court can, and should, consider the civil cover sheet when determining if the trial court properly concluded the type of case Ms. Hurley intended to pursue against Vitas.

B. The allegations in the complaint involved claims against Vitas' nurses for acts and omissions arising out of the rendering of, or the failure to render, medical care or services to Ms. Hurley.

The next place where Ms. Hurley disguised a medical negligence claim against Vitas as a violation of resident rights claim is in the allegations of the complaint. The complaint contained the following key allegations:

Ms. Hurley alleged that Vitas was vicariously liable for "all acts and/or omissions of its agents (actual and apparent), employees, servants, and administrators, while they acted within the course and scope of their employment." [R. 24]. She also alleged that, "at all times material hereto,

Defendants provided nursing services and care to Fannie Hurley, or were responsible for the services and care provided to Fannie Hurley, as more particularly described below." [R. 24].

As factual allegations, Ms. Hurley alleged as follows:

> 16. On October 17, 2020, a note was documented at 12:37 by **Dalisha, LPN with Vitas** that Ms. Hurley was lying in bed and not "showing signs of pain or discomfort at the moment."
>
> ****
>
> 21. On October 18, 2020, between 13:50 and 14:00, **Vitas nurse Andrea Campbell, R.N.**, ….
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> 23. On October 18, 2020, between 14:00 and 14:10, **Vitas nurse Andrea Campbell, R.N.** noted the following: ….
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> 24. Even with the knowledge of the fractured hip as demonstrated in the x-ray from October 17, 2020, the **Vitas nurses, including Ms. Campbell**, failed to obtain treatment for Ms. Hurley's fractured hip and failed to assess her.

[R. 25-26] (Emphasis added).

For Vitas' acts or omissions, Ms. Hurley alleged as follows:

> a. Failure to provide nursing and home health aide services to Fannie Hurley from October 17, 2020, through October 21, 2020;
> b. Failure to provide oversight care and treatment during Fannie Hurley's respite stay at Crestwood Nursing Home from October 17, 2020, through October 21, 2020;
> c. Failure to assess, care for, and obtain medical treatment for a fractured hip from October 17, 2020, through October 21, 2020; and

> d. Failure to assess Fannie Hurley when notified of a fractured hip on October 17, 2020.

[R. 32-34].

"The allegations of the complaint, and not the legal conclusions of a plaintiff as to the type of cause of action asserted, controls the analysis." *Dr. Navarro's Vein Ctr. of Palm Beach, Inc. v. Miller*, 22 So. 3d 776, 778 (Fla. 4th DCA 2009). Thus, the trial court had to determine whether Ms. Hurley's allegations against Vitas constituted medical negligence.

Medical negligence or malpractice is a claim "arising out of the rendering of, or the failure to render, medical care or services." *Joseph v. Univ. Behavioral LLC*, 71 So. 3d 913, 917 (Fla. 5th DCA 2011). "The wrongful act must be directly related to the improper application of medical services and the use of professional judgment or skill." *Id. (quoting Liles v. P.I.A. Medfield, Inc.*, 681 So. 2d 711 (Fla. 2d DCA 1995) (concluding that general negligence claim allowed where process of complying with statutory requirements did not involve medical skill or judgment)). Thus, trial courts are tasked with looking at the allegations in the complaint, "on a case-by-case basis" to determine whether a suit raises an issue of ordinary negligence or medical malpractice. *Id. (citing S. Baptist Hosp. of Fla., Inc. v. Ashe*, 948 So. 2d 889, 890 (Fla. 1st DCA 2007)); *see also Martin Mem'l Health Sys., Inc. v. Gorham*, 337 So. 3d 71, 74 (Fla. 4th DCA 2022) ("Putting

aside the labels, the complaint alleged Eileen Gorham fell because of negligent nursing conduct. As a result, Vincent Gorham needed to comply with chapter 766's pre-suit notice requirements.").

The above allegations certainly pertain to alleged medical negligence of Vitas' nurses. The specific wrongful acts involved Vitas nurses' delivery of medical services and use of professional medical judgment in failing to assess, care for, and/or treat the hip fracture. Thus, the trial court correctly concluded the allegations were against Vitas' nurses. And, these claims will necessarily be decided on the standard of nursing care.

Ms. Hurley's argument that the court erred in stating, "[p]aragraphs 7-9 make it very clear that Plaintiff's theory of fault, toward Vitas is vicarious liability for the actions or inactions of the nurses in their employment" has no merit. Initial Br. at 32-35. Those paragraphs directed the court to review the allegations "as more particularly described below." In reading those allegations below, which specified the acts or omissions, it was clear that the claims against Vitas were for its nurses and not the staff in general.

Even considering the allegations in Ms. Hurley's favor, the court correctly found that the claims against Vitas, as per Ms. Hurley's allegations set forth in the complaint, were for vicarious liability of Vitas' nurses. This Court should affirm the final judgment in Vitas' favor.

C. Ms. Hurley's failure to comply with the presuit requirements of Florida's Medical Malpractice Act, warranted dismissal of her claims against non-health care provider Vitas alleged to be vicariously liable for the acts and omissions of its nurses.

After reviewing the allegations of the complaint, the trial court had to determine whether Ms. Hurley was required to comply with presuit requirements for medical malpractice actions. This issue is not new for the courts. To the contrary, for decades, Florida appellate courts have been tasked with analyzing if the alleged negligent or vicariously liable actor is a "health care provider" for purposes of applying Florida's Medical Malpractice Act.

Similar to this case, in *NME Properties, Inc. v. McCullough,* 590 So. 2d 439, 441 (Fla. 2d DCA 1991), a nursing home resident sued a nursing home alleging simple negligence and violation of resident rights. The nursing home moved to dismiss for failure to comply with presuit requirements for medical malpractice actions, which the trial court denied. On certiorari review, the Second District held that the nursing home was not a "health care provider" as defined in the medical malpractice statutes; and thus, the presuit requirements did not apply to the action. 590 So. 2d 439.

In so holding, the court agreed that the notice provisions may occasionally apply to a defendant that is not a health care provider, but it did not find the case of a nursing home to be one of those occasions. *Id.* at 441.

Thus, the court noted that "[t]he simplest test to determine whether the notice provisions apply to a claim is whether the professional medical negligence standard of care described in section 766.102, Florida Statutes (1989), applies to the active tortfeasor." *Id.* The court also suitably stated:

> [w]e recognize the possibility that a plaintiff could disguise a medical negligence claim as a simple negligence claim. In doing so, the plaintiff might hope to submit the case to a jury without expert testimony and to prove only the ordinary negligence standard of care. While such a tactic would seem to involve great risk, we do not rule out a defendant's option in such a case to move to strike the complaint as a sham pleading pursuant to Florida Rule of Civil Procedure 1.150, and to demand compliance with Chapter 766.

Id. at 441.

The Florida Supreme Court approved these principles in *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993). In *Weinstock*, the court concluded that the patient was not required to give a licensed clinical psychologist notice prior to filing the action because he was not a health care provider to which the section 766.102(1) standard of care applied. 629 So. 2d at 838.

In *GalenCare, Inc. v. Mosley,* 59 So. 3d 138 (Fla. 2d DCA 2011), the Second District concluded that pharmacists who are licensed under Florida's Pharmacy Act are not "healthcare providers," who are entitled to presuit notice. 59 So. 3d at 142. The court also concluded that the provisions of

chapter 766 did not extend to the pharmacists' parent company on a theory of vicarious liability. *Id.* at 143-44. This conclusion was dependent on the prior finding that the pharmacists are not health care providers subject to chapter 766.

Here, the trial court properly applied these principles to Vitas—a non-health care provider alleged to be vicariously liable for its nurses—health care providers subject to the provisions of chapter 766. Thus, because Vitas nurses are health care providers, the provisions of chapter 766 would extend to Vitas on the theory of vicarious liability. *GalenCare*, 59 So. 3d at 143-144 (citing as support, *McCullough,* 590 So. 2d at 441 (noting that a non-health care provider may be entitled to presuit notice because it is vicariously liable for employees or agents that are health care providers) compare with *Goldman v. Halifax Med. Ctr., Inc.*, 662 So. 2d 367, 370 (Fla. 5th DCA 1995) ("Just as non-health care employers are entitled to the presuit conditions where their health care employees have allegedly provided negligent medical care while in the course of their employment, *McCullough*, so too are health care providing employers entitled to these provisions when their health care or non-health care employees commit such acts or omissions.").

Simply put, a health care provider employer is entitled to presuit notice for its health care or non-health care employees. Moreover, and applicable

here, a non-health care employer is entitled to presuit notice for the acts or omissions of its health care employees.

Ms. Hurley's heavy reliance on *Integrated Healthcare Services, Inc. v. Lang-Redway*, 783 So. 2d 1108 (Fla. 2d DCA 2001) (*Integrated I*) approved by *Integrated Health Care Services, Inc. v. Lang-Redway*, 840 So. 2d 974 (Fla. 2003) (*Integrated II*) and on *Pierrot v. Osceola Mental Health, Inc*., 106 So. 3d 491 (Fla. 5th DCA 2013) is misplaced.

Integrated I and II involved claims regarding violation of a nursing home resident's rights brought against two nursing homes. In *Integrated II*, the Supreme Court noted that nursing homes employ numerous types of employees to care for their residents, including licensed nurses, aides, dieticians, and housekeepers. 840 So. 2d at 980. The plaintiff contended that the nursing home denied him his right to appropriate health care by failing to protect him from falling and from developing pressure sores. The Court noted that these failures may have been caused by the nursing staff, by the nursing home in not having adequate staff, by the negligence of aides or other workers, or by a combination of the above. *Id.* at 980-81.

Integrated I and *II* are easily distinguishable. *Integrated I* and *II* apply to claims against nursing homes. In *Integrated II*, the Supreme Court made this clear—"Chapter 400, on the other hand, provides for the development

and enforcement of basic standards of care imposed upon nursing homes. Section 400.022 creates twenty-two unique statutory requirements applicable to nursing homes." 840 So. 2d at 979 (Emphasis added). "Moreover, section 400.023 clearly demonstrates that the Legislature intended a nursing home to be liable for the "failure to provide a resident with appropriate observation, assessment, nursing diagnosis, planning, intervention, and evaluation of care by nursing staff." *Id.* at 980 (quoting § 400.023, Fla. Stat. (1997)) (Emphasis added). Thus, the Supreme Court found that the plaintiff had not pled a medical malpractice cause of action against a health care provider, which would require her to abide by the presuit requirements of chapter 766. 840 So. 2d at 980. The court expressly limited its holding to those cases where the plaintiff has limited his or her cause of action to violations of section 400.022. *Id.* at n. 9.

Following *Integrated II*, this Court held that a mental health facility licensed under Chapter 394 was not a health care provider for purposes of the Medical Malpractice Act. *See Pierrot,* 106 So. 3d 491. This Court recognized that the Supreme Court limited its holding to claims under section 400.022, *id*. at 980 n.9, and concluded the same rule applied to claims under other statutory standards of care. 106 So. 3d at 494, n. 5. Since the plaintiff made claims against a mental health facility directly and not for vicarious

liability of the actions of licensed health care providers, this Court found that presuit requirements did not apply.

Here, it is undisputed that Vitas is not a nursing home. It is also undisputed that Ms. Hurley did not plead in the complaint that Vitas was subject to Chapter 400, as it had for the nursing home defendants. Unlike in *Integrated I* and *II* and *Pierrot*, where the statutory claims against the nursing homes and the mental health facilities were properly alleged, Ms. Hurley failed to state a claim against Vitas for violation of resident rights under section 400.22. Thus, *Integrated I, Integrated II*, and *Pierrot* have no bearing.

Instead, the trial court properly concluded that Vitas was entitled to presuit notice under sections 766.106 and 766.203, where Ms. Hurley sought to hold it vicariously liable for the acts or omissions of its health care provider nurses. Thus, dismissal was warranted. This Court should affirm the final judgment entered in favor of Vitas and against Ms Hurley.

III. The trial court properly dismissed Ms. Hurley's disguised medical negligence claim against Vitas with prejudice.

Ms. Hurley's final argument is built on a false premise that the claim against Vitas is not subject to the medical malpractice statute of limitations. As detailed above, Ms. Hurley's claim against Vitas for the vicarious liability of its nurses was based in medical malpractice, and Ms. Hurley failed to

comply with presuit requirements. However, if the claim were subject to section 400.0236, Florida Statutes, as Ms. Hurley contends, the result would be the same.

Both an action for medical malpractice or an action for violation of resident's rights "shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence." § 95.11(4)(b), Fla. Stat.; *see also* § 400.0236, Fla. Stat. ("within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered or should have been discovered with the exercise of due diligence.").

Below are key dates that are relevant to the statute of limitations issue:

October 16, 2020	Admission to Nursing Home
October 17, 2020	X-ray reveals hip fracture
October 21, 2020	Discharge from Nursing Home
October 22, 2020	Surgery at Hospital
February 23, 2023	Complaint Filed

The crux of Ms. Hurley's claims against Vitas encompass the alleged hip fracture and Vitas nurses' failure to assess, care for, and obtain medical treatment for it. Whether the hip fracture occurred six months prior or at the

nursing home is irrelevant for statute of limitations purposes. Instead, it is evident from the allegations in the complaint that Ms. Hurley was aware of her fractured hip (and the alleged lack of treatment) before she was discharged on October 21, 2020, and certainly by October 22, 2020, when she had surgery on her hip.

Based on the allegations in the complaint, Ms. Hurley had two years to file suit against Vitas or by at least October 22, 2022—two years after the surgery for the hip fracture. Yet, Ms. Hurley filed the complaint four months too late, on February 23, 2023—clearly outside the limitations period.

This period could have been tolled if Ms. Hurley fulfilled the presuit notice or screening requirements. However, it is undisputed that Ms. Hurley did not fulfill the presuit notice or screening requirements. Thus, Ms. Hurley could not now go back and attempt to cure the failure to comply with the presuit notice provisions of the Medical Malpractice Act as the applicable statute of limitations expired.

That is precisely why the trial court cited *Southern Neurosurgical Associates, P.A. v. Fine*, 591 So. 2d 252 (Fla. 4th DCA 1991) in its order. Yet, Ms. Hurley continues to plead that the case is not one of medical malpractice, and the above principle should not apply. This Court should

reject these arguments because both types of claims have a 2-year statute of limitations.

In addition, Ms. Hurley's argument that Vitas could not raise this issue on a motion to dismiss is of no moment. Contrary to her position, the statute of limitations defense can be raised by a motion to dismiss where it is clear from the face of the complaint that the application of the defense is apparent. *Nicarry v. Eslinger*, 990 So. 2d 661 (Fla. 5th DCA 2008); *Khalaf v. City of Holly Hill*, 652 So. 2d 1246 (Fla. 5th DCA 1995); *see also* Fla. R. Civ. P. 1.110(d) ("Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b) ....").

In *Khalaf*, it was not clear from the face of the complaint when the applicable statute of limitations began to run on multiple causes of action. Thus, this Court concluded that dismissal was improper.

More recently, this Court affirmed a dismissal with prejudice of a medical negligence claim. *See Ramsay v. South Lake Hosp.*, 357 So. 3d 253 (Fla. 5th DCA 2023). In *Ramsay,* this Court held that any efforts by the plaintiff to comply with chapter 766's presuit screening requirements would have been far too late under section 95.11(4)(b)'s statute of limitations or statute of repose. 357 So. 3d at 259.

Here, it is clear from the face of the complaint that Ms. Hurley knew or should have known about the alleged negligence by Vitas nurses failing to assess, care for, and obtain medical treatment for her hip fracture at the time of discharge. And, just like in *Ramsay*, any efforts for Ms. Hurley to comply with chapter 766's presuit requirements would have been far too late. Thus, because Ms. Hurley failed to file the complaint within two years, the trial court properly dismissed the complaint against Vitas with prejudice.

CONCLUSION

Based on the above reasons, Vitas Healthcare Corporation and Vitas Healthcare Corporation of Florida, respectfully requests this Court affirm the trial court's final judgment entered in its favor and against Fannie Hurley.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of June, 2024, I electronically filed a true and correct copy of the foregoing via the Florida Courts E-filing Portal,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer Brief was prepared using 14-point Arial font, in accordance with Florida Rule of Appellate Procedure 9.045(b). This brief is also within the word limits allowed by Florida Rule of Appellate Procedure 9.100(k).

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