

By Senator Bogdanoff

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1 A bill to be entitled
2 An act relating to nursing home litigation reform;
3 amending s. 400.023, F.S.; specifying conditions under
4 which a nursing home resident has a cause of action
5 against a licensee or management company; requiring
6 the trial judge to conduct an evidentiary hearing
7 before a claimant can assert a claim against certain
8 interested parties; providing a timeframe for a
9 claimant to elect survival damages or wrongful death
10 damages; providing a limitation on recovery; amending
11 s. 400.0237, F.S.; requiring evidence of the basis for
12 punitive damages; requiring the trial judge to conduct
13 an evidentiary hearing before a claimant can assert a
14 claim for punitive damages; permitting a licensee or
15 management company to be held liable for punitive
16 damages under certain circumstances; providing
17 criteria for awarding of punitive damages in a case of
18 vicarious liability of certain entities; amending s.
19 400.0238, F.S.; providing additional conditions for
20 settlements involving claims for punitive damages;
21 amending s. 400.23, F.S.; providing limitations for
22 admissibility of survey and licensure reports and the
23 presentation of testimony or other evidence of
24 staffing deficiencies; providing an effective date.

25
26 Be It Enacted by the Legislature of the State of Florida:

27
28 Section 1. Section 400.023, Florida Statutes, is amended to
29 read:

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30 400.023 Civil enforcement.—

31 (1) Any resident who alleges negligence or a violation of
32 ~~whose~~ rights as specified in this part has ~~are violated~~ shall
33 ~~have~~ a cause of action against the licensee or its management
34 company, as specifically identified in the application for
35 nursing home licensure, and its direct caregiver employees.
36 Sections 400.023-400.0238 provide the exclusive remedy against a
37 licensee or management company for a cause of action for
38 recovery of damages for the personal injury or death of a
39 nursing home resident arising out of negligence or a violation
40 of residents' rights specified in s. 400.022.

41 (2) A cause of action may not be asserted individually
42 against an employee, officer, director, owner, including any
43 designated as having a "controlling interest" on the application
44 for nursing home licensure, or agent of a licensee or management
45 company under this part unless, following an evidentiary
46 hearing, the court determines there is sufficient evidence in
47 the record or proffered by the claimant that establishes a
48 reasonable basis for a finding that:

49 (a) The officer, director, owner, or agent breached, failed
50 to perform, or acted outside the scope of duties as an officer,
51 director, owner, or agent; and

52 (b) The breach, failure to perform, or conduct outside the
53 scope of duties is a legal cause of actual loss, injury, death,
54 or damage to the resident.

55 (3) If an action is brought by or on behalf of a resident
56 under this part, a cause of action under s. 415.111 may not be
57 asserted against an employee, officer, director, owner, or agent
58 of a licensee or management company.

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59 (4) The action may be brought by the resident or his or her
60 guardian, by a person or organization acting on behalf of a
61 resident with the consent of the resident or his or her
62 guardian, or by the personal representative of the estate of a
63 deceased resident regardless of the cause of death. If the
64 action alleges a claim for the resident's rights or for
65 negligence that caused the death of the resident, the claimant
66 shall be required to elect, at the end of discovery but not
67 later than 60 days before trial, either survival damages
68 pursuant to s. 46.021 or wrongful death damages pursuant to s.
69 768.21. In any claim for wrongful death brought under this
70 section, noneconomic damages may not exceed a total of \$250,000,
71 regardless of the number of claimants or defendants.

72 (5) If the action alleges a claim for the resident's rights
73 or for negligence that did not cause the death of the resident,
74 the personal representative of the estate may recover damages
75 for the negligence that caused injury to the resident. The
76 action may be brought in any court of competent jurisdiction to
77 enforce such rights and to recover actual and punitive damages
78 for any violation of the rights of a resident or for negligence.

79 (6) Any resident who prevails in seeking injunctive relief
80 or a claim for an administrative remedy may ~~is entitled to~~
81 recover the costs of the action, and a reasonable attorney's fee
82 assessed against the defendant not to exceed \$25,000. Fees shall
83 be awarded solely for the injunctive or administrative relief
84 and not for any claim or action for damages whether such claim
85 or action is brought ~~together~~ with a request for an injunction
86 or administrative relief or as a separate action, except as
87 provided under s. 768.79 or the Florida Rules of Civil

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88 Procedure. Sections ~~400.023-400.0238~~ provide the exclusive
89 remedy for a cause of action for recovery of damages for the
90 personal injury or death of a nursing home resident arising out
91 of negligence or a violation of rights specified in s. 400.022.
92 This section does not preclude theories of recovery not arising
93 out of negligence or s. 400.022 which are available to a
94 resident or to the agency. The provisions of Chapter 766 does ~~do~~
95 not apply to any cause of action brought under ss. 400.023-
96 400.0238.

97 (7)~~(2)~~ In any claim brought under ~~pursuant to~~ this part
98 alleging a violation of resident's rights or negligence causing
99 injury to or the death of a resident, the claimant has ~~shall~~
100 ~~have~~ the burden of proving, by a preponderance of the evidence,
101 that:

102 (a) The defendant breached the applicable standard of care;
103 and ~~owed a duty to the resident;~~

104 ~~(b) The defendant breached the duty to the resident;~~

105 (b)~~(c)~~ The breach ~~of the duty~~ is a legal cause of actual
106 loss, injury, death, or damage to the resident; ~~and~~

107 ~~(d) The resident sustained loss, injury, death, or damage~~
108 ~~as a result of the breach.~~

109 (8) Nothing in this part shall be interpreted to create
110 strict liability. A violation of the rights set forth in s.
111 400.022 or in any other standard or guidelines specified in this
112 part or in any applicable administrative standard or guidelines
113 of this state or a federal regulatory agency shall be evidence
114 of negligence but shall not be considered negligence per se.

115 (9)~~(3)~~ In any claim brought pursuant to this section, a
116 licensee, person, or entity shall have a duty to exercise

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117 reasonable care. Reasonable care is that degree of care which a
118 reasonably careful licensee, person, or entity would use under
119 like circumstances.

120 (10)~~(4)~~ In any claim for resident's rights violation or
121 negligence by a nurse licensed under part I of chapter 464, such
122 nurse shall have the duty to exercise care consistent with the
123 prevailing professional standard of care for a nurse. The
124 prevailing professional standard of care for a nurse shall be
125 that level of care, skill, and treatment which, in light of all
126 relevant surrounding circumstances, is recognized as acceptable
127 and appropriate by reasonably prudent similar nurses.

128 (11)~~(5)~~ A licensee shall not be liable for the medical
129 negligence of any physician rendering care or treatment to the
130 resident except for the administrative services of a medical
131 director as required in this part. Nothing in this subsection
132 shall be construed to protect a licensee, person, or entity from
133 liability for failure to provide a resident with appropriate
134 observation, assessment, nursing diagnosis, planning,
135 intervention, and evaluation of care by nursing staff.

136 (12)~~(6)~~ The resident or the resident's legal representative
137 shall serve a copy of any complaint alleging in whole or in part
138 a violation of any rights specified in this part to the Agency
139 for Health Care Administration at the time of filing the initial
140 complaint with the clerk of the court for the county in which
141 the action is pursued. The requirement of providing a copy of
142 the complaint to the agency does not impair the resident's legal
143 rights or ability to seek relief for his or her claim.

144 (13)~~(7)~~ An action under this part for a violation of rights
145 or negligence recognized herein is not a claim for medical

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146 malpractice, and ~~the provisions of s. 768.21(8) does de~~ not
147 apply to a claim alleging death of the resident.

148 Section 2. Subsections (1), (2), and (3) of section
149 400.0237, Florida Statutes, are amended to read:

150 400.0237 Punitive damages; pleading; burden of proof.—

151 (1) In any action ~~for damages~~ brought under this part, ~~a ne~~
152 claim for punitive damages may not be brought ~~shall be permitted~~
153 unless there is a ~~reasonable~~ showing of admissible ~~by~~ evidence
154 that has been in the record or proffered by the parties and
155 provides ~~claimant which would provide~~ a reasonable basis for
156 recovery of such damages when the criteria set forth in this
157 section are applied. The claimant may move to amend her or his
158 complaint to assert a claim for punitive damages as allowed by
159 the rules of civil procedure. The trial judge shall conduct an
160 evidentiary hearing and weigh the admissible evidence proffered
161 by all parties to ensure that there is a reasonable basis to
162 believe that the claimant, at trial, will be able to demonstrate
163 by clear and convincing evidence that the recovery of such
164 damages is warranted. ~~The rules of civil procedure shall be~~
165 ~~liberally construed so as to allow the claimant discovery of~~
166 ~~evidence which appears reasonably calculated to lead to~~
167 ~~admissible evidence on the issue of punitive damages. No A~~
168 discovery of financial worth shall not proceed until ~~after~~ the
169 pleading on concerning punitive damages is approved ~~permitted~~.

170 (2) A defendant, including the licensee or management
171 company against whom punitive damages is sought, may be held
172 liable for punitive damages only if the trier of fact, based on
173 clear and convincing evidence, finds that a specific individual
174 or corporate defendant actively and knowingly participated in

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175 intentional misconduct or engaged in conduct that constituted
176 gross negligence and contributed to the loss, damages, or injury
177 suffered by the claimant ~~the defendant was personally guilty of~~
178 ~~intentional misconduct or gross negligence~~. As used in this
179 section, the term:

180 (a) "Intentional misconduct" means that the defendant
181 against whom punitive damages are sought had actual knowledge of
182 the wrongfulness of the conduct and the high probability that
183 injury or damage to the claimant would result and, despite that
184 knowledge, intentionally pursued that course of conduct,
185 resulting in injury or damage.

186 (b) "Gross negligence" means that the defendant's conduct
187 was so reckless or wanting in care that it constituted a
188 conscious disregard or indifference to the life, safety, or
189 rights of persons exposed to such conduct.

190 (3) In the case of vicarious liability of an employer,
191 principal, corporation, or other legal entity, punitive damages
192 may not be imposed for the conduct of an employee or agent
193 unless only if the conduct of a specifically identified ~~the~~
194 employee or agent meets the criteria specified in subsection (2)
195 and an officer, director, or manager of the actual employer,
196 corporation, or legal entity condoned, ratified, or consented to
197 the specific conduct as alleged in subsection (2). A state or
198 federal survey report of nursing facilities may not be used to
199 establish an entitlement to punitive damages under this
200 section.÷

201 ~~(a) The employer, principal, corporation, or other legal~~
202 ~~entity actively and knowingly participated in such conduct;~~

203 ~~(b) The officers, directors, or managers of the employer,~~

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204 ~~principal, corporation, or other legal entity condoned,~~
205 ~~ratified, or consented to such conduct; or~~

206 ~~(c) The employer, principal, corporation, or other legal~~
207 ~~entity engaged in conduct that constituted gross negligence and~~
208 ~~that contributed to the loss, damages, or injury suffered by the~~
209 ~~claimant.~~

210 Section 3. Subsections (2) and (4) of section 400.0238,
211 Florida Statutes, are amended to read:

212 400.0238 Punitive damages; limitation.—

213 (2) The claimant's attorney's fees, if payable from the
214 judgment, are, to the extent that the fees are based on the
215 punitive damages, calculated based on the claimant's share of
216 ~~final judgment for~~ punitive damages. This subsection does not
217 limit the payment of attorney's fees based upon an award of
218 damages other than punitive damages.

219 (4) Notwithstanding any other law to the contrary, if a
220 claimant has received a final judgment for the amount of
221 punitive damages or there is a settlement of a case in which the
222 claimant was granted leave to amend his or her complaint to add
223 a claim for punitive damages, the punitive award awarded
224 ~~pursuant to this section~~ shall be equally divided, before any
225 distribution to the claimant's counsel for fees or costs,
226 between the claimant and the Quality of Long-Term Care Facility
227 Improvement Trust Fund, in accordance with the following
228 provisions:

229 (a) In the event of a judgment, the clerk of the court
230 shall transmit a copy of the jury verdict to the Chief Financial
231 Officer by certified mail. In the final judgment, the court
232 shall order the percentages of the award, payable as provided

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233 herein. In the event of a settlement, the parties shall transmit
234 by certified mail to the Chief Financial Officer a statement of
235 the proportionate share due to the Quality of Long-Term Care
236 Facility Improvement Trust Fund.

237 (b) A settlement agreement entered into between the
238 original parties to the action after a verdict has been returned
239 must provide a proportionate share payable to the Quality of
240 Long-Term Care Facility Improvement Trust Fund specified herein.
241 For purposes of this paragraph, a proportionate share is a 50-
242 percent share of that percentage of the settlement amount which
243 the punitive damages portion of the verdict bore to the total of
244 the compensatory and punitive damages in the verdict.

245 (c) For a settlement agreement entered into between the
246 parties to the action, at any time after a claimant is permitted
247 by the court to amend the agreement to add a count for punitive
248 damages, but before a final judgment on the issue, 50 percent of
249 the total settlement amount shall be the punitive award. The
250 punitive award shall be equally divided, before any distribution
251 to the claimant's counsel for fees or costs, between the
252 claimant and the Quality of Long-Term Care Facility Improvement
253 Trust Fund. The amount of the punitive award and the allocation
254 of that award provided for in this subsection may not be altered
255 in any way by agreement of the parties after the claimant has
256 been granted leave to amend his or her complaint to include a
257 claim for punitive damages.

258 (d) Settlement of a claim before a verdict by a defendant
259 in which a claimant was permitted at any time to amend the claim
260 to add a count for punitive damages is not an admission of
261 liability for conduct described in subsection (2) and is not

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262 governed by this section.

263 (e)~~(e)~~ The Department of Financial Services shall collect
264 or cause to be collected all payments due the state under this
265 section. Such payments are made to the Chief Financial Officer
266 and deposited in the appropriate fund specified in this
267 subsection.

268 (f)~~(d)~~ If the full amount of punitive damages awarded
269 cannot be collected, the claimant and the other recipient
270 designated pursuant to this subsection are each entitled to a
271 proportionate share of the punitive damages collected.

272 Section 4. Paragraph (d) is added to subsection (3) and
273 paragraph (e) is added to subsection (8) of section 400.23,
274 Florida Statutes, to read:

275 400.23 Rules; evaluation and deficiencies; licensure
276 status.-

277 (3)

278 (d) In any action brought under ss. 400.023-400.0238, if
279 the licensee demonstrates compliance with the minimum staffing
280 requirements under this part, the licensee is entitled to a
281 presumption that appropriate staffing was provided and the
282 claimant may not be permitted to present any testimony or other
283 evidence of understaffing. The testimony or other evidence is
284 only permissible for days on which it can be demonstrated that
285 the licensee was not in compliance with the minimum staffing
286 requirements under this part. Evidence that the licensee was
287 staffed by an insufficient number of nursing assistants or
288 licensed nurses may not be qualified or admitted on behalf of a
289 resident who makes a claim, unless the licensee received a class
290 I, class II, or uncorrected class III deficiency for failure to

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291 comply with the minimum staffing requirements under this part
292 and the claimant resident was identified by the agency as having
293 suffered actual harm because of that failure.

294 (8) The agency shall adopt rules pursuant to this part and
295 part II of chapter 408 to provide that, when the criteria
296 established under subsection (2) are not met, such deficiencies
297 shall be classified according to the nature and the scope of the
298 deficiency. The scope shall be cited as isolated, patterned, or
299 widespread. An isolated deficiency is a deficiency affecting one
300 or a very limited number of residents, or involving one or a
301 very limited number of staff, or a situation that occurred only
302 occasionally or in a very limited number of locations. A
303 patterned deficiency is a deficiency where more than a very
304 limited number of residents are affected, or more than a very
305 limited number of staff are involved, or the situation has
306 occurred in several locations, or the same resident or residents
307 have been affected by repeated occurrences of the same deficient
308 practice but the effect of the deficient practice is not found
309 to be pervasive throughout the facility. A widespread deficiency
310 is a deficiency in which the problems causing the deficiency are
311 pervasive in the facility or represent systemic failure that has
312 affected or has the potential to affect a large portion of the
313 facility's residents. The agency shall indicate the
314 classification on the face of the notice of deficiencies as
315 follows:

316 (e) A deficiency identified by the agency in a nursing home
317 survey is not admissible for any purpose in an action under ss.
318 400.023-400.0238. However:

319 1. A survey deficiency citing a resident on whose behalf

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320 the action is brought may be introduced as evidence of
321 negligence if the agency has determined that the resident
322 sustained actual harm as a result thereof; or

323 2. A survey deficiency may be introduced after an
324 evidentiary hearing to determine its relevance, if the
325 deficiency is:

326 a. Found to have caused actual harm to residents and was
327 widespread; or

328 b. Determined by the agency to be an uncorrected pattern of
329 activity related to the injury sustained by the claimant.

330
331 If a claimant in an action under ss. 400.023-400.0238 was a
332 member of a survey resident roster or otherwise was the subject
333 of any survey by the agency and the agency did not allege or
334 determine that any deficiency occurred with respect to that
335 claimant during that survey, the licensee may introduce the
336 absence of a deficiency citation to refute an allegation of
337 neglect or noncompliance with regulatory standards.

338 Section 5. This act shall take effect July 1, 2011.