

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 6029 Punitive Damages
SPONSOR(S): Mariano
TIED BILLS: IDEN./SIM. BILLS: SB 1226

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 1 N	Frost	Luczynski
2) Health Care Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

In Florida, a nursing home or assisted living facility (ALF) resident has specific legal rights, including the right to receive adequate and appropriate health care and protective and support services. A nursing home or ALF resident whose rights are violated has a cause of action against the nursing home. Florida law provides a comprehensive framework for litigation and recovery against a nursing home or ALF, including provisions for presuit notice, mediation, availability of records, and punitive damages.

Punitive damages are not compensation for an injury. Instead, they are private fines imposed by civil juries to punish reprehensible conduct and to deter its future occurrence. A nursing home or an ALF may be liable for punitive damages if a judge or jury finds, by clear and convincing evidence, that the nursing home or ALF actively and knowingly participated in intentional misconduct or engaged in conduct that constituted gross negligence, and contributed to the loss, damages, or injury suffered by the claimant.

The Quality of Long-Term Care Facility Improvement Trust Fund (Trust Fund) was created in 2001, within the Agency of Health Care Administration, to support activities and programs directly related to the care of nursing home and ALF residents. Punitive damages awarded in a claim against a nursing home or ALF must be split equally between the claimant and the Trust Fund. However, since 2008, only two awards for punitive damages have resulted in deposits into the Trust Fund, and no direct assisted living projects have been funded from those monies.

HB 6029 removes the requirement that punitive damages awarded in a claim against a nursing home or an ALF be split equally between the claimant and the Trust Fund. The bill makes conforming changes to s. 400.0239, F.S., to remove, as a source of funding for the Trust Fund, the proceeds generated from punitive damages awards.

The bill will eliminate a revenue source for the Trust Fund, but it does not appear that removing this source will have a meaningful impact on the Trust Fund.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In Florida, long-term care facilities include nursing home facilities and assisted living facilities (ALFs). A nursing home is a residential facility where a person lives or where a person can stay temporarily. A temporary nursing home stay may be for respite care or recuperation after being in a hospital.¹ An ALF is a residential establishment, or part of a residential establishment, that provides housing, meals, and one or more personal services² for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.³ Florida provides every resident of an ALF a number of specific rights

Litigation against Nursing Homes and ALFs

Section 400.022, F.S., provides the legal rights of nursing home residents and s. 429.28, F.S., provides the rights of ALF resident. Included in those rights is the right to receive "adequate and appropriate health care and protective and support services." A resident whose rights are violated by a nursing home or an ALF⁴ has a cause of action against the nursing home or the ALF.⁵ Florida law provides a comprehensive framework for litigation and recovery against a nursing home or an ALF, including provisions for presuit notice, mediation, availability of records, and punitive damages.⁶

Before filing a claim for a violation of a nursing home or ALF resident's rights resulting in death or injury, the claimant must notify each prospective defendant by certified mail.⁷

Named Defendants in Nursing Home Cases

If a cause of action for violation of a nursing home resident's rights alleges direct or vicarious liability for the nursing home resident's personal injury or death, the claim may only be brought against:⁸

- The licensee;
- The licensee's management or consulting company;
- The licensee's management employees; and
- Any direct caregivers, whether employees or contractors.

However, a cause of action cannot be brought against a passive investor.⁹

For the purpose of civil enforcement of a violation of a nursing home resident's rights:

- "Licensee" means 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.¹⁰

¹ State of Florida Department of Elder Affairs, *Nursing Homes*, <http://elderaffairs.state.fl.us/doea/nh.php> (last visited Feb. 5, 2020).

² A personal service is direct physical assistance with, or supervision of, the activities of daily living and the self-administration of medication. Activities of daily living include ambulation, bathing, dressing, eating, grooming, toileting, and other similar tasks. Ss. 429.02(1) and 429.02(16), F.S.

³ S. 429.02(5), F.S. An ALF does not include an adult family-care home or a non-transient public lodging establishment.

⁴ Ss. 400.02 and 429.29, F.S..

⁵ The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of the deceased resident regardless of the cause of death. Ss. 400.023(1) and 429.29, F.S.

⁶ Ss. 400.023–400.0238 and 429.29–429.298, F.S.

⁷ Ss. 400.0233(2) and 429.293(2), F.S.

⁸ S. 400.023(1), F.S.

⁹ *Id.*

¹⁰ S. 400.023(2)(a), F.S.

- "Management or consulting company" means an individual or entity who contracts with, or receives a fee from a licensee to provide any of the following services for a nursing home facility:
 - Hiring or firing of the administrator or director of nursing;
 - Controlling or having control over the staffing levels at the facility;
 - Having control over the budget of the facility; or
 - Implementing and enforcing the policies and procedures of the facility.¹¹
- "Passive investor" means an individual or entity that has an interest in a facility but does not participate in the decision making or operations of the facility.¹²

Before a person other than the licensee, the licensee's management or consulting company, the licensee's managing employees, or a direct caregiver employee may be named as a defendant in a lawsuit alleging violation of a nursing home resident's rights, the court or arbitration panel must find that sufficient evidence exists to show that the:

- Individual or entity owed a duty of reasonable care to the resident;
- Individual or entity breached that duty; and
- Breach of duty was a legal cause of loss, injury, or damage to, or death of, the resident.¹³

Once the court or arbitration panel makes this finding, and a proposed amended pleading asserts that the cause of action arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the proposed amendment is considered to relate back to the original pleading.¹⁴

If a violation of rights resulted in a nursing home or ALF resident's death, the resident's estate must choose either survival damages under s. 46.021, F.S., or wrongful death damages under s. 768.21, F.S. This choice must be made after the verdict and before the judgment is entered.¹⁵

Punitive Damages and Limitations

Punitive damages are not compensation for an injury. Instead, they are private fines imposed by civil juries to punish reprehensible conduct and to deter its future occurrence.¹⁶ A nursing home or ALF may be liable for punitive damages only if the judge or jury finds, by clear and convincing evidence, that a nursing home actively and knowingly participated in intentional misconduct¹⁷ or engaged in conduct that constituted gross negligence,¹⁸ and contributed to the loss, damages, or injury suffered by the claimant.¹⁹

Punitive damages are generally limited to three times the amount of compensatory damages or \$1 million, whichever is greater.²⁰ However, a jury may award punitive damages not exceeding the greater of four times the amount of compensatory damages or \$4 million, if it finds that the:²¹

- Conduct was motivated primarily by unreasonable financial gain; and
- Unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant.

¹¹ S. 400.023(2)(b), F.S.

¹² S. 400.023(2)(c), F.S.

¹³ S. 400.023(4), F.S.

¹⁴ An amended pleading that relates back is considered to have been filed when the original lawsuit was filed for purposes of determining compliance with the statute of limitations. S. 400.023(3)(b), F.S.

¹⁵ Ss. 400.023(1)(b) and 429.29(1), F.S.

¹⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

¹⁷ Intentional misconduct means that the nursing home had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage. Ss. 400.0237(2)(a) and 429.297(2)(b), F.S.

¹⁸ Gross negligence means that a nursing home's or ALF's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct. Ss. 400.0237(2)(b) and 429.297(2)(b)F.S.

¹⁹ Ss. 400.0237(2) and 429.297(2), F.S.

²⁰ Ss. 400.0238(1)(a) and 429.298(1)(a), F.S.

²¹ Ss. 400.0238(4)(b) and 429.298(1)(b), F.S.

However, there is no cap on punitive damages if a jury determines that the:

- Defendant acted with specific intent to harm the claimant; and
- Defendant's conduct did in fact harm the claimant.²²

Quality of Long-Term Care Facility Improvement Trust Fund

Section 400.0239, F.S., created the Quality of Long-Term Care Facility Improvement Trust Fund (Trust Fund) within the Agency for Health Care Administration (AHCA).²³ The Trust Fund was created in 2001²⁴ to support activities and programs directly related to the care of nursing home and assisted living facility residents.²⁵ Expenditures from the Trust Fund can be made for direct support of the following:²⁶

- Development and operation of a mentoring program for increasing the competence, professionalism, and career preparation of long-term care facility direct care staff, including nurses, nursing assistances, and social service and dietary personnel.
- Development and implementation of specialized training programs for long-term care facility personnel who provide direct care of residents with Alzheimer's Disease and other dementias, residents at risk of developing pressure sores, and residents with special nutrition and hydration needs.
- Provision of economic and other incentives to enhance the stability and career development of the nursing home direct care workforce, including paid sabbaticals for exemplary direct care career staff to visit facilities throughout the state to train and motivate younger workers to commit to careers in long-term care.
- Promotion and support for the formation and active involvement of resident and family councils in the improvement of nursing home care.

The Trust Fund receives money through a combination of:

- General revenues;
- The Civil Money Penalty Fund; and
- Fifty-percent of any punitive damages awarded as part of lawsuit against a nursing home or related healthcare facility.²⁷

Punitive Damages

Sections 400.0238, F.S., and 429.298, F.S., both require the amount of punitive damages awarded in a claim against a nursing home and assisted living facility, respectively, to be split equally between the claimant and the Trust Fund.

Civil Money Penalty Funds

Civil Money Penalties (CMP) are monetary penalties imposed by the Centers for Medicare and Medicaid Services against nursing facilities that have failed to maintain compliance with federal requirements. A portion of these funds are returned to states and may be used for projects supporting activities that benefit nursing facility residents or that protect and improve their quality of life or care. CMP funds may be used for, but not limited to the following:²⁸

- Training;
- Transition preparation;

²² Ss. 400.0238(4)(c) and 429.298(1)(c), F.S.

²³ S. 400.0239(1), F.S.

²⁴ Ch. 2001-205, L.O.F.

²⁵ Office of the Assistant Secretary for Planning and Evaluation, *State Nursing Home Quality Improvement Programs*, <https://aspe.hhs.gov/report/state-nursing-home-quality-improvement-programs-site-visit-and-synthesis-report/funding-quality-long-term-care-facility-improvement-trust-fund> (last visited Feb. 5, 2018).

²⁶ S. 400.0239(2), F.S.

²⁷ S. 400.0238(4), F.S.

²⁸ Agency for Health Care Administration, *Nursing Home Civil Money Penalty (CMP) Reinvestment Projects*,

https://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Long_Term_Care/CMP.shtml (last visited Feb. 5, 2020)

- Culture change/quality of life;
- Projects that support resident and family councils; and
- Resident transition due to facility closure or downsizing.

AHCA began this project in 2005 in an effort to use federal CMP funds (fines) to support innovative ideas that directly impact quality of care or quality of life of nursing home residents beyond minimum standards. The ideas proposed must be innovative to the facility, the state or to long-term care.²⁹

Trust Fund Balance

As of December 31, 2019, there total balance in the Trust Fund was \$29,965,929.58.³⁰ This amount includes \$473,475.19 deposited from two punitive damages awards and \$29,492,454.39 deposited from Civil Money Penalty Funds.³¹ The total spent from the Trust Fund in FY 2018-2019 was \$157,228.97.³² Since its creation, AHCA estimates that approximately \$1,040,990.53 have been spent from the Trust Fund.³³

Since 2008, only \$473,475.19 have been deposited in the Trust Fund from two punitive damages awards.³⁴ To date, no funds from punitive damages have been spent from the Trust Fund.³⁵ The majority of proceeds in the Trust Fund are deposited from nursing home federal civil monetary penalties, but these funds may only be used for resident-related projects in nursing homes, while funds from punitive damages may be used for assisted living facility-related projects.^{36, 37} While current law directs the Clerk of Court to send certified copies of punitive damages jury verdicts to the Chief Financial Officer of the Department of Financial Services, AHCA is unaware of any actions taken to monitor the verdicts to ensure a portion of the punitive damages go into the Trust Fund.³⁸

Effect of Proposed Changes

HB 6029 removes the requirement that punitive damages awarded in a claim against a nursing home or an assisted living facility be split equally between the claimant and the Trust Fund. The bill makes conforming changes to s. 400.0239, F.S., to remove, as a source of funding for the Trust Fund, the proceeds generated pursuant to punitive damages.

The bill provides an effective date of July 1, 2020.

²⁹ *Id.*

³⁰ Email from James Kotas, Deputy Chief of Staff/Legislative Affairs Director, Agency for Health Care Administration, received January 10, 2020.

³¹ *Id.*

³² *Id.*

³³ Florida Agency for Health Care Administration, Agency Analysis of 2020 House Bill 6029, p. 2 (Jan 8, 2020).

³⁴ *Supra*, note 30.

³⁵ *Id.*

³⁶ *Supra*, note 30, p. 2

³⁷ According to AHCA, no direct assisted living projects have been funded to date, but there is interest in expanding programs developed for nursing home staff to include assisted living staff. *Supra*, note 30, p. 3.

³⁸ *Id.*

B. SECTION DIRECTORY:

- Section 1:** Amends s. 400.0238, F.S., relating to punitive damages; limitation.
- Section 2:** Amends s. 400.0239, F.S., relating to Quality of Long-Term Care Facility Improvement Trust Fund.
- Section 3:** Amends s. 429.298, F.S., relating to punitive damages; limitation.
- Section 4:** Provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

- 1. Revenues:

None.

- 2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

- 1. Revenues:

None.

- 2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

While AHCA indicates the bill will eliminate a revenue source for the Trust Fund, it does not appear that removing this source will have any meaningful impact on the Trust Fund, given that only two deposits from punitive damages awards have been made in the last 12 years.³⁹

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

- 1. Applicability of Municipality/County Mandates Provision:

None.

- 2. Other:

None.

³⁹ *Supra*, notes 27, 30, and 31.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES