

By Senator Galvano

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1                                   A bill to be entitled  
2       An act relating to nursing home litigation; amending  
3       s. 400.023, F.S.; providing that a nursing home  
4       resident who alleges negligence or a violation of  
5       residents' rights has a cause of action against the  
6       nursing home licensee or its management company and  
7       the licensee's direct caregiver employees; declaring  
8       that ss. 400.023-400.0238, F.S., provide the exclusive  
9       remedy against a nursing home licensee or its  
10      management company for a cause of action for recovery  
11      of damages arising out of negligence or a violation of  
12      residents' rights; providing that a cause of action  
13      may not be asserted against certain specified persons;  
14      providing exceptions; amending s. 400.0237, F.S.;  
15      providing that a claim for punitive damages may not be  
16      brought unless there is a showing of admissible  
17      evidence proffered by the parties which provides a  
18      reasonable basis for recovery of punitive damages when  
19      certain criteria are applied; requiring the court to  
20      conduct a hearing to determine whether there is  
21      sufficient admissible evidence to ensure that there is  
22      a reasonable basis to believe that the claimant will  
23      be able to demonstrate by clear and convincing  
24      evidence that the recovery of punitive damages is  
25      appropriate; requiring the trier of fact to find by  
26      clear and convincing evidence that a specific person  
27      or corporate defendant actively and knowingly  
28      participated in intentional misconduct or engaged in  
29      conduct that constituted gross negligence and

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30 contributed to the loss, damages, or injury suffered  
31 by the claimant before punitive damages may be  
32 awarded; requiring an officer, director, or manager of  
33 the employer, corporation, or legal entity to condone,  
34 ratify, or consent to certain specified conduct before  
35 holding the licensee vicariously liable for punitive  
36 damages; providing an effective date.

37  
38 Be It Enacted by the Legislature of the State of Florida:

39  
40 Section 1. Section 400.023, Florida Statutes, is amended to  
41 read:

42 400.023 Civil enforcement.—

43 (1) Any resident who alleges negligence or a violation of  
44 ~~whose~~ rights as specified in this part has ~~are violated~~ shall  
45 ~~have~~ a cause of action against the licensee or its management  
46 company, as specifically identified in the application for  
47 nursing home licensure, and the licensee's direct caregiver  
48 employees.

49 (a) Sections 400.023-400.0238 provide the exclusive remedy  
50 against a licensee or its management company for a cause of  
51 action for recovery of damages for the personal injury or death  
52 of a nursing home resident arising out of negligence or a  
53 violation of residents' rights specified in s. 400.022. The  
54 action may be brought by the resident or his or her guardian, by  
55 a person or organization acting on behalf of a resident with the  
56 consent of the resident or his or her guardian, or by the  
57 personal representative of the estate of a deceased resident  
58 regardless of the cause of death.

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59        (b) If the action alleges a claim for the resident's rights  
60 or for negligence that caused the death of the resident, the  
61 claimant shall ~~be required to~~ elect ~~either~~ survival damages  
62 pursuant to s. 46.021 or wrongful death damages pursuant to s.  
63 768.21. If the action alleges a claim for the resident's rights  
64 or for negligence that did not cause the death of the resident,  
65 the personal representative of the estate may recover damages  
66 for the negligence that caused injury to the resident.

67        (c) The action may be brought in any court of competent  
68 jurisdiction to enforce such rights and to recover actual and  
69 punitive damages for any violation of the rights of a resident  
70 or for negligence.

71        (d) Any resident who prevails in seeking injunctive relief  
72 or a claim for an administrative remedy is entitled to recover  
73 the costs of the action, and a reasonable attorney ~~attorney's~~  
74 fee assessed against the defendant not to exceed \$25,000. Fees  
75 shall be awarded solely for the injunctive or administrative  
76 relief and not for any claim or action for damages whether such  
77 claim or action is brought together with a request for an  
78 injunction or administrative relief or as a separate action,  
79 except as provided under s. 768.79 or the Florida Rules of Civil  
80 Procedure. ~~Sections 400.023-400.0238 provide the exclusive~~  
81 ~~remedy for a cause of action for recovery of damages for the~~  
82 ~~personal injury or death of a nursing home resident arising out~~  
83 ~~of negligence or a violation of rights specified in s. 400.022.~~

84        (e) This section does not preclude theories of recovery not  
85 arising out of negligence or s. 400.022 which are available to a  
86 resident or to the agency. The provisions of chapter 766 do not  
87 apply to any cause of action brought under ss. 400.023-400.0238.

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88       (2) A cause of action may not be asserted against a person  
89 or entity other than those identified in subsection (1) unless,  
90 following an evidentiary hearing at which the person or entity  
91 other than those identified in subsection (1) has been given  
92 sufficient notice and an opportunity to defend, the court  
93 determines there is sufficient evidence in the record or  
94 proffered by the claimant to establish a reasonable basis for a  
95 finding that:

96       (a) The person or entity owed a specific legal duty to the  
97 resident, and the person or entity breached that duty; and

98       (b) The breach of that duty is the legal cause of actual  
99 loss, injury, damage, or death to the resident.

100       (3)(2) In a ~~any~~ claim brought pursuant to this part  
101 alleging a violation of resident's rights or negligence causing  
102 injury to or the death of a resident, the claimant has ~~shall~~  
103 ~~have~~ the burden of proving, by a preponderance of the evidence,  
104 that:

105       (a) The defendant owed a duty to the resident;

106       (b) The defendant breached the duty to the resident;

107       (c) The breach of the duty is a legal cause of loss,  
108 injury, death, or damage to the resident; and

109       (d) The resident sustained loss, injury, death, or damage  
110 as a result of the breach.

111  
112 ~~Nothing in~~ This part does not ~~shall be interpreted to~~ create  
113 strict liability. A violation of the rights set forth in s.  
114 400.022, ~~or~~ in any other standard or guidelines specified in  
115 this part, or in any applicable administrative standard or  
116 guidelines of this state or a federal regulatory agency is ~~shall~~

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117 ~~be~~ evidence of negligence but is ~~shall~~ not ~~be~~ considered  
118 negligence per se.

119 (4)~~(3)~~ In a any claim brought pursuant to this section, a  
120 licensee, person, or entity has ~~shall have~~ a duty to exercise  
121 reasonable care. Reasonable care is that degree of care which a  
122 reasonably careful licensee, person, or entity would use under  
123 like circumstances.

124 (5)~~(4)~~ In a any claim for resident's rights violation or  
125 negligence by a nurse licensed under part I of chapter 464, such  
126 nurse has ~~shall have~~ the duty to exercise care consistent with  
127 the prevailing professional standard of care for a nurse. The  
128 prevailing professional standard of care for a nurse is ~~shall be~~  
129 that level of care, skill, and treatment which, in light of all  
130 relevant surrounding circumstances, is recognized as acceptable  
131 and appropriate by reasonably prudent similar nurses.

132 (6)~~(5)~~ A licensee is ~~shall~~ not ~~be~~ liable for the medical  
133 negligence of any physician rendering care or treatment to the  
134 resident except for the administrative services of a medical  
135 director as required in this part. ~~Nothing in~~ This subsection  
136 does not ~~shall be construed to~~ protect a licensee, person, or  
137 entity from liability for failure to provide a resident with  
138 appropriate observation, assessment, nursing diagnosis,  
139 planning, intervention, and evaluation of care by nursing staff.

140 (7)~~(6)~~ The resident or the resident's legal representative  
141 shall serve a copy of any complaint alleging in whole or in part  
142 a violation of any rights specified in this part to the Agency  
143 for Health Care Administration at the time of filing the initial  
144 complaint with the clerk of the court for the county in which  
145 the action is pursued. The requirement of providing a copy of

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146 the complaint to the agency does not impair the resident's legal  
147 rights or ability to seek relief for his or her claim.

148 ~~(8)~~<sup>(7)</sup> An action under this part for a violation of rights  
149 or negligence recognized herein is not a claim for medical  
150 malpractice, and the provisions of s. 768.21(8) do not apply to  
151 a claim alleging death of the resident.

152 Section 2. Section 400.0237, Florida Statutes, is amended  
153 to read:

154 400.0237 Punitive damages; pleading; burden of proof.—

155 (1) (a) In any action ~~for damages~~ brought under this part, a  
156 ~~no~~ claim for punitive damages may not be brought ~~shall be~~  
157 ~~permitted~~ unless there is a reasonable showing of admissible by  
158 evidence that has been submitted in the record or proffered by  
159 the parties and provides claimant ~~which would provide a~~  
160 reasonable basis for recovery of such damages when the criteria  
161 in this section are applied. The claimant may move to amend her  
162 or his complaint to assert a claim for punitive damages as  
163 allowed by the rules of civil procedure in accordance with  
164 evidentiary requirements set forth in this section.

165 (b) The court shall conduct a hearing to determine whether  
166 there is sufficient admissible evidence submitted by the parties  
167 to ensure that there is a reasonable basis to believe that the  
168 claimant, at trial, will be able to demonstrate by clear and  
169 convincing evidence that the recovery of such damages is  
170 warranted. ~~A The rules of civil procedure shall be liberally~~  
171 ~~construed so as to allow the claimant discovery of evidence~~  
172 ~~which appears reasonably calculated to lead to admissible~~  
173 ~~evidence on the issue of punitive damages. No discovery of~~  
174 financial worth may not ~~shall~~ proceed until ~~after~~ the pleading

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175 ~~on concerning~~ punitive damages is approved by the court  
176 ~~permitted.~~

177 (2) A defendant may be held liable for punitive damages  
178 only if the trier of fact, ~~by based on~~ clear and convincing  
179 evidence, finds that a specific person or corporate defendant  
180 actively and knowingly participated in intentional misconduct or  
181 engaged in conduct that constitutes gross negligence and  
182 contributed to the loss, damages, or injury suffered by the  
183 claimant ~~the defendant was personally guilty of intentional~~  
184 ~~misconduct or gross negligence.~~ As used in this section, the  
185 term:

186 (a) "Intentional misconduct" means that the defendant  
187 against whom punitive damages are sought had actual knowledge of  
188 the wrongfulness of the conduct and the high probability that  
189 injury or damage to the claimant would result and, despite that  
190 knowledge, intentionally pursued that course of conduct,  
191 resulting in injury or damage.

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

196 (3) In the case of vicarious liability of an employer,  
197 principal, corporation, or other legal entity, punitive damages  
198 may not be imposed for the conduct of an employee or agent  
199 unless only if the conduct of a specifically identified the  
200 employee or agent meets the criteria specified in subsection (2)  
201 and an officer, director, or manager of the actual employer,  
202 corporation, or legal entity condoned, ratified, or consented to  
203 the specific conduct as alleged in subsection (2). A state or

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204 federal survey report of nursing facilities may not be used to  
205 establish an entitlement to punitive damages under this section.

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

208 ~~(b) The officers, directors, or managers of the employer,~~  
209 ~~principal, corporation, or other legal entity condoned,~~  
210 ~~ratified, or consented to such conduct; or~~

211 ~~(c) The employer, principal, corporation, or other legal~~  
212 ~~entity engaged in conduct that constituted gross negligence and~~  
213 ~~that contributed to the loss, damages, or injury suffered by the~~  
214 ~~claimant.~~

215 (4) The plaintiff shall ~~must~~ establish at trial, by clear  
216 and convincing evidence, its entitlement to an award of punitive  
217 damages. The "greater weight of the evidence" burden of proof  
218 applies to a determination of the amount of damages.

219 (5) This section is remedial in nature and takes ~~shall take~~  
220 effect upon becoming a law.

221 Section 3. This act shall take effect upon becoming a law.