

1 A bill to be entitled

2 An act relating to nursing home litigation; amending  
3 s. 400.023, F.S.; specifying that a cause of action  
4 for negligence or violation of residents' rights  
5 alleging direct or vicarious liability for the injury  
6 or death of nursing home resident may be brought  
7 against a licensee, its management or consulting  
8 company, its managing employees, and any direct  
9 caregiver employees; providing that a cause of action  
10 may not be asserted against other individuals or  
11 entities except under certain circumstances; revising  
12 related judicial procedures; defining terms; amending  
13 s. 400.0237, F.S.; providing that a claim for punitive  
14 damages may not be brought unless there is a showing  
15 of evidence that provides a reasonable basis for  
16 recovery of such damages when certain criteria are  
17 applied; requiring the court to conduct a hearing to  
18 determine whether there is sufficient evidence to  
19 demonstrate that the recovery of punitive damages is  
20 warranted; requiring the trier of fact to find that a  
21 specific person or corporate defendant participated in  
22 or engaged in conduct that constituted gross  
23 negligence and contributed to the damages or injury  
24 suffered by the claimant before a defendant may be  
25 held liable for punitive damages; requiring an  
26 officer, director, or manager of the employer,

27 corporation, or legal entity to condone, ratify, or  
 28 consent to certain specified conduct before holding  
 29 such person or entity vicariously liable for punitive  
 30 damages; creating s. 400.024, F.S.; authorizing the  
 31 Agency for Health Care Administration to suspend the  
 32 license of a nursing home facility that fails to pay a  
 33 judgment or settlement agreement; providing  
 34 exceptions; providing agency procedures for  
 35 suspension; prohibiting certain parties from applying  
 36 for a license for an affected facility; amending s.  
 37 400.145, F.S.; revising procedures for obtaining the  
 38 records of a resident; specifying which records may be  
 39 obtained and who may obtain them; providing immunity  
 40 from liability to a facility that provides such  
 41 records in good faith; providing that the agency may  
 42 not cite a facility that does not meet these records  
 43 requirements; providing applicability; providing an  
 44 effective date.

45

46 Be It Enacted by the Legislature of the State of Florida:

47

48 Section 1. Section 400.023, Florida Statutes, is amended  
 49 to read:

50 400.023 Civil enforcement.—

51 (1) An exclusive cause of action for negligence or a  
 52 violation of residents' ~~Any resident whose~~ rights as specified

53 under ~~in~~ this part which alleges direct or vicarious liability  
 54 for the personal injury or death of a nursing home resident  
 55 arising from such negligence or violation of rights and which  
 56 seeks damages for such injury or death may be brought against  
 57 the licensee, the licensee's management or consulting company,  
 58 the licensee's managing employees, and any direct caregivers,  
 59 whether employees or contractors ~~are violated shall have a cause~~  
 60 of action. A passive investor is not liable under this section.  
 61 An action against any other individual or entity may be brought  
 62 only pursuant to subsection (3).

63 (a) The action may be brought by the resident or his or  
 64 her guardian, by a person or organization acting on behalf of a  
 65 resident with the consent of the resident or his or her  
 66 guardian, or by the personal representative of the estate of a  
 67 deceased resident regardless of the cause of death.

68 (b) If the action alleges a claim for the resident's  
 69 rights or for negligence that caused the death of the resident,  
 70 the claimant shall, after the verdict, but before the judgment  
 71 is entered, ~~be required to~~ elect either survival damages  
 72 pursuant to s. 46.021 or wrongful death damages pursuant to s.  
 73 768.21. If the action alleges a claim for the resident's rights  
 74 or for negligence that did not cause the death of the resident,  
 75 the personal representative of the estate may recover damages  
 76 for the negligence that caused injury to the resident.

77 (c) The action may be brought in any court of competent  
 78 jurisdiction to enforce such rights and to recover actual and

79 punitive damages for the ~~any~~ violation of the rights of a  
 80 resident or for negligence.

81 (d) ~~A~~ Any resident who prevails in seeking injunctive  
 82 relief or ~~a claim for~~ an administrative remedy is entitled to  
 83 recover the costs of the action, and a reasonable attorney  
 84 ~~attorney's~~ fee assessed against the defendant of up to not to  
 85 ~~exceed~~ \$25,000. Fees shall be awarded solely for the injunctive  
 86 or administrative relief and not for any claim or action for  
 87 damages whether such claim or action is brought ~~together~~ with a  
 88 request for an injunction or administrative relief or as a  
 89 separate action, except as provided under s. 768.79 or the  
 90 Florida Rules of Civil Procedure. ~~Sections 400.023-400.0238~~  
 91 ~~provide the exclusive remedy for a cause of action for recovery~~  
 92 ~~of damages for the personal injury or death of a nursing home~~  
 93 ~~resident arising out of negligence or a violation of rights~~  
 94 ~~specified in s. 400.022.~~

95 (e) This section does not preclude theories of recovery  
 96 not arising out of negligence or s. 400.022 which are available  
 97 to a resident or to the agency. ~~The provisions of Chapter 766~~  
 98 does ~~do~~ not apply to a ~~any~~ cause of action brought under ss.  
 99 400.023-400.0238.

100 (2) As used in this section, the term:

101 (a) "Licensee" means an individual, corporation,  
 102 partnership, firm, association, governmental entity, or other  
 103 entity that is issued a permit, registration, certificate, or  
 104 license by the agency, and that is legally responsible for all

105 aspects of the operation of the nursing home facility.

106 (b) "Management or consulting company" means an individual  
 107 or entity who contracts with, or receives a fee from a licensee  
 108 to provide any of the following services for a nursing home  
 109 facility:

110 1. Hiring or firing of the administrator or director of  
 111 nursing;

112 2. Controlling or having control over the staffing levels  
 113 at the facility;

114 3. Having control over the budget of the facility; or

115 4. Implementing and enforcing the policies and procedures  
 116 of the facility.

117 (c) "Passive investor" means an individual or entity that  
 118 does not participate in the decisionmaking or operations of a  
 119 facility.

120 (3) A cause of action may not be asserted against an  
 121 individual or entity, other than the licensee, the licensee's  
 122 management or consulting company, the licensee's managing  
 123 employees, and any direct caregivers, whether employees or  
 124 contractors, unless, after a motion for leave to amend hearing,  
 125 the court or an arbitration panel determines that there is  
 126 sufficient evidence in the record or proffered by the claimant  
 127 to establish a reasonable showing that:

128 (a) The individual or entity owed a duty of reasonable  
 129 care to the resident and the individual or entity breached that  
 130 duty; and

131 (b) The breach of that duty is a legal cause of loss,  
 132 injury, or damage to or death of the resident.

133  
 134 For purposes of this subsection, if, in a proposed amended  
 135 pleading, it is asserted that such cause of action arose out of  
 136 the conduct, transaction, or occurrence set forth or attempted  
 137 to be set forth in the original pleading, the proposed amendment  
 138 relates back to the original pleading.

139 (4)(2) In a ~~any~~ claim brought pursuant to this part  
 140 alleging a violation of residents' ~~resident's~~ rights or  
 141 negligence causing injury to or the death of a resident, the  
 142 claimant has ~~shall have~~ the burden of proving, by a  
 143 preponderance of the evidence, that:

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

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

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

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

150  
 151 ~~Nothing in~~ This part does not ~~shall be interpreted to create~~  
 152 strict liability. A violation of the rights set forth in s.  
 153 400.022, ~~or~~ in any other standard or guidelines specified in  
 154 this part, or in any applicable administrative standard or  
 155 guidelines of this state or a federal regulatory agency is ~~shall~~  
 156 ~~be~~ evidence of negligence but is ~~shall~~ not ~~be~~ considered

157 negligence per se.

158 (5)~~(3)~~ In a any claim brought pursuant to this section, a  
 159 licensee, individual person, or entity has ~~shall have~~ a duty to  
 160 exercise reasonable care. Reasonable care is that degree of care  
 161 which a reasonably careful licensee, individual person, or  
 162 entity would use under like circumstances.

163 (6)~~(4)~~ In a any claim for a residents' ~~resident's~~ rights  
 164 violation or negligence by a nurse licensed under part I of  
 165 chapter 464, such nurse has ~~shall have~~ the duty to exercise care  
 166 consistent with the prevailing professional standard of care for  
 167 a nurse. The prevailing professional standard of care for a  
 168 nurse is ~~shall be~~ that level of care, skill, and treatment  
 169 which, in light of all relevant surrounding circumstances, is  
 170 recognized as acceptable and appropriate by reasonably prudent  
 171 similar nurses.

172 (7)~~(5)~~ A licensee is ~~shall not be~~ liable for the medical  
 173 negligence of a any physician rendering care or treatment to the  
 174 resident except for the administrative services of a medical  
 175 director as required under ~~in~~ this part. ~~Nothing in~~ This  
 176 subsection does not ~~shall be construed to~~ protect a licensee,  
 177 individual person, or entity from liability for failure to  
 178 provide a resident with appropriate observation, assessment,  
 179 nursing diagnosis, planning, intervention, and evaluation of  
 180 care by nursing staff.

181 (8)~~(6)~~ The resident or the resident's legal representative  
 182 shall serve a copy of a any complaint alleging in whole or in

183 part a violation of any rights specified in this part to the  
 184 agency ~~for Health Care Administration~~ at the time of filing the  
 185 initial complaint with the clerk of the court for the county in  
 186 which the action is pursued. The requirement of providing a copy  
 187 of the complaint to the agency does not impair the resident's  
 188 legal rights or ability to seek relief for his or her claim.

189 (9) ~~(7)~~ An action under this part for a violation of rights  
 190 or negligence recognized herein is not a claim for medical  
 191 malpractice, and ~~the provisions of s. 768.21(8)~~ does ~~de~~ not  
 192 apply to a claim alleging death of the resident.

193 Section 2. Section 400.0237, Florida Statutes, is amended  
 194 to read:

195 400.0237 Punitive damages; pleading; burden of proof.—

196 (1) A ~~In any action for damages brought under this part,~~  
 197 ~~no~~ claim for punitive damages may not be brought under this part  
 198 ~~shall be permitted~~ unless there is a ~~reasonable~~ showing by  
 199 admissible evidence in the record or proffered by the parties  
 200 which provides ~~claimant which would provide~~ a reasonable basis  
 201 for recovery of such damages when the criteria in this section  
 202 are applied.

203 (a) The claimant may move to amend her or his complaint to  
 204 assert a claim for punitive damages as allowed by the rules of  
 205 civil procedure in accordance with evidentiary requirements set  
 206 forth in this section.

207 (b) The court shall conduct a hearing to determine whether  
 208 there is sufficient admissible evidence submitted by the parties

209 to ensure that there is a reasonable basis to believe that the  
 210 claimant, at trial, will be able to demonstrate by clear and  
 211 convincing evidence that the recovery of such damages is  
 212 warranted under a claim for direct liability as specified in  
 213 subsection (2), or a claim for vicarious liability as specified  
 214 in subsection (3).

215 (c) The rules of civil procedure shall be liberally  
 216 construed so as to allow the claimant discovery of evidence  
 217 which appears reasonably calculated to lead to admissible  
 218 evidence on the issue of punitive damages. ~~No~~ Discovery of  
 219 financial worth may not shall proceed until ~~after~~ the pleading  
 220 on concerning punitive damages is approved by the court  
 221 permitted.

222 (2) A defendant may be held liable for punitive damages  
 223 only if the trier of fact, by ~~based on~~ clear and convincing  
 224 evidence, finds that a specific person or corporate defendant  
 225 actively and knowingly participated in intentional misconduct or  
 226 engaged in conduct that constitutes gross negligence and  
 227 contributed to the loss, damages, or injury suffered by the  
 228 claimant ~~the defendant was personally guilty of intentional~~  
 229 ~~misconduct or gross negligence.~~ As used in this section, the  
 230 term:

231 (a) "Intentional misconduct" means that the defendant  
 232 against whom punitive damages are sought had actual knowledge of  
 233 the wrongfulness of the conduct and the high probability that  
 234 injury or damage to the claimant would result and, despite that

235 knowledge, intentionally pursued that course of conduct,  
236 resulting in injury or damage.

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

241 (3) In the case of vicarious liability of an individual,  
242 employer, principal, corporation, or other legal entity,  
243 punitive damages may not be imposed for the conduct of an  
244 employee or agent unless ~~only if~~ the conduct of the employee or  
245 agent meets the criteria specified in subsection (2) and an  
246 officer, director, or manager of the actual employer,  
247 corporation, or legal entity condoned, ratified, or consented to  
248 the specific conduct as provided in subsection (2)÷

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

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

254 ~~(c) The employer, principal, corporation, or other legal~~  
255 ~~entity engaged in conduct that constituted gross negligence and~~  
256 ~~that contributed to the loss, damages, or injury suffered by the~~  
257 ~~claimant.~~

258 (4) The plaintiff shall ~~must~~ establish at trial, by clear  
259 and convincing evidence, its entitlement to an award of punitive  
260 damages. The "greater weight of the evidence" burden of proof

261 applies to a determination of the amount of damages.

262 ~~(5) This section is remedial in nature and shall take~~  
 263 ~~effect upon becoming a law.~~

264 Section 3. Section 400.024, Florida Statutes, is created  
 265 to read:

266 400.024 Failure to satisfy a judgment or settlement  
 267 agreement.—

268 (1) Upon the entry of an adverse final judgment arising  
 269 from an award, including an arbitration award, from a claim of  
 270 negligence or violation of residents' rights, in contract or  
 271 tort, or from noncompliance with the terms of a settlement  
 272 agreement arising from a claim pursuant to s. 400.023, as  
 273 determined by a court or arbitration panel, the licensee, as  
 274 defined in s. 400.023(2), shall pay the judgment creditor the  
 275 entire amount of the judgment and all accrued interest within 60  
 276 days after the date such judgment becomes final and subject to  
 277 execution, unless otherwise mutually agreed to in writing by the  
 278 parties. Failure to pay shall provide grounds for the agency to  
 279 suspend a nursing home facility license, deny a license renewal  
 280 application, or deny a change of ownership application as  
 281 provided in this section.

282 (2) Upon notification of the existence of an unsatisfied  
 283 judgment or settlement pursuant to subsection (1), the agency  
 284 shall notify the licensee by certified mail that it is subject  
 285 to disciplinary action unless, within 30 days after receipt of  
 286 the notification, the licensee:

287        (a) Provides proof that the unsatisfied judgment or  
288 settlement has been paid in the amount specified;

289        (b) Provides proof of the existence of a payment plan  
290 mutually agreed upon by the parties in writing;

291        (c) Furnishes the agency with a copy of a timely filed  
292 notice of appeal;

293        (d) Furnishes the agency with a copy of a court order  
294 staying execution of the final judgment; or

295        (e) Provides written proof from a court or an arbitration  
296 panel overseeing the action that it is seeking indemnification  
297 from an insurance carrier or any other party that it believes is  
298 required to pay the award.

299        (3) If, after 30 days, the licensee fails to demonstrate  
300 compliance in accordance with subsection (2), the agency shall  
301 issue an emergency order finding that the nursing home facility  
302 lacks financial ability to operate and that the agency is in the  
303 process of suspending the facility's license.

304        (4) Following or during the period of suspension, an  
305 individual or entity identified as having a controlling interest  
306 in the facility whose license is being suspended, as identified  
307 on the facility's licensee application, may not file an  
308 application for licensure of the facility at issue. Further, if  
309 a judgment at trial or arbitration occurs, the agency may not  
310 approve a change of ownership application to a related party  
311 until the requirements of subsection (1) or subsection (2) are  
312 met.

313 Section 4. Section 400.145, Florida Statutes, is amended  
 314 to read:

315 (Substantial rewording of section. See  
 316 s. 400.145, F.S., for present text.)

317 400.145 Copies of records of care and treatment of  
 318 resident.—

319 (1) Upon receipt of a written request that complies with  
 320 the federal Health Insurance Portability and Accountability Act  
 321 of 1996 (HIPAA) and this section, a nursing home facility shall  
 322 furnish to a competent resident or to a representative of that  
 323 resident who is authorized to make requests for the resident's  
 324 records under HIPAA or subsection (2) copies of the resident's  
 325 paper and electronic records that are in possession of the  
 326 facility. Such records must include any medical records and  
 327 records concerning the care and treatment of the resident  
 328 performed by the facility, except for progress notes and  
 329 consultation report sections of a psychiatric nature. The  
 330 facility shall provide the requested records within 14 working  
 331 days after receipt of a request relating to a current resident  
 332 or within 30 working days after receipt of a request relating to  
 333 a former resident.

334 (2) Requests for a deceased resident's medical records  
 335 under this section may be made by:

336 (a) Any person appointed by a court to act as the personal  
 337 representative, executor, administrator, or temporary  
 338 administrator of the deceased resident's estate.

339 (b) If a judicial appointment has not been made as  
340 provided in paragraph (a), any person designated by the resident  
341 to act as his or her representative in a legally valid will; or

342 (c) If there is no judicially appointed representative or  
343 person designated by the resident in a valid will, by only the  
344 following individuals:

345 1. A surviving spouse;

346 2. If there is no surviving spouse, a surviving child of  
347 the resident; or

348 3. If there is no surviving spouse or child, a parent of  
349 the resident.

350 (3) All requests for a deceased resident's records made by  
351 a person authorized under:

352 (a) Paragraph (2) (a) must include a copy of the court  
353 order appointing such person as the representative of the  
354 resident's estate.

355 (b) Paragraph (2) (b) must include a copy of the will  
356 designating the person as the resident's representative.

357 (c) Paragraph (2) (c) must be accompanied by a letter from  
358 the person's attorney verifying the person's relationship to the  
359 resident and the absence of a court-appointed representative and  
360 will.

361 (4) A nursing home facility may charge a reasonable fee  
362 for the copying of resident records. Such fee may not exceed \$1  
363 per page for the first 25 pages and 25 cents per page for each  
364 additional page. The facility shall allow a person who is

365 authorized to act on behalf of the resident to examine the  
366 original records, microfilms, or other suitable reproductions of  
367 the records in its possession upon any reasonable terms imposed  
368 by the facility to ensure that the records are not damaged,  
369 destroyed, or altered.

370 (5) If a nursing home facility determines that disclosure  
371 of the records to the resident would be detrimental to the  
372 physical or mental health of the resident, the facility may  
373 refuse to furnish the record; however, upon such refusal, the  
374 resident's record shall, upon written request by the resident,  
375 be furnished to any other medical provider designated by the  
376 resident.

377 (6) A nursing home facility that in good faith and in  
378 reliance upon this section releases copies of records shall be  
379 indemnified by the requesting party, and may not be found to  
380 have violated any criminal or civil laws, and is not civilly  
381 liable to the resident, the resident's estate, or any other  
382 person for any damages resulting from such release.

383 (7) A nursing home facility is not required to provide  
384 copies of a resident's records requested pursuant to this  
385 section more than once per month, except that copies of  
386 physician reports in the resident's records must be provided as  
387 often as necessary to allow the effective monitoring of the  
388 resident's condition.

389 (8) A nursing home facility may not be cited by the agency  
390 through the survey process for any alleged or actual

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391 noncompliance with any of the requirements of this section.

392 Section 5. The amendments made by this act to ss. 400.023

393 and 400.0237, Florida Statutes, apply to causes of action

394 accruing on or after the effective date of this act.

395 Section 6. This act shall take effect upon becoming a law.