

By the Committee on Health Policy; and Senator Thrasher

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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.; 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

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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 to
49 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,

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

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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 not
96 arising out of negligence or s. 400.022 which are available to a
97 resident or to the agency. ~~The provisions of Chapter 766 does de~~
98 not apply to a ~~any~~ cause of action brought under ss. 400.023-
99 400.0238.

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.

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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 care
129 to the resident and the individual or entity breached that duty;
130 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'~~ 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;

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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

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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, no~~
197 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

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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

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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 conduct
238 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.

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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 to
265 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;

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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 to
314 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

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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 provided
340 in paragraph (a), any person designated by the resident to act
341 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;

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

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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 order
353 appointing such person as the representative of the resident's
354 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 for
362 the copying of resident records. Such fee may not exceed \$1 per
363 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

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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
391 noncompliance with any of the requirements of this section.

392 Section 5. The amendments to ss. 400.023 and 400.0237 made
393 by this act apply to causes of action accruing on or after the
394 effective date of this act.

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