

By the Committees on Judiciary; and 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 a 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 or contractors; providing that a
10 cause of action may not be asserted against other
11 individuals or entities except under certain
12 circumstances; revising related judicial procedures;
13 defining terms; amending s. 400.0237, F.S.; providing
14 that a claim for punitive damages may not be brought
15 unless there is a showing of evidence that provides a
16 reasonable basis for recovery of such damages when
17 certain criteria are applied; requiring the court to
18 conduct a hearing to determine whether there is
19 sufficient evidence to demonstrate that the recovery
20 of punitive damages is warranted; requiring the trier
21 of fact to find that a specific person or corporate
22 defendant participated in or engaged in conduct that
23 constituted gross negligence and contributed to the
24 damages or injury suffered by the claimant before a
25 defendant may be held liable for punitive damages;
26 requiring an officer, director, or manager of the
27 employer, corporation, or legal entity to condone,
28 ratify, or consent to 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 revoke the
32 license or deny a license renewal or change of
33 ownership application of a nursing home facility that
34 fails to pay a judgment or settlement agreement;
35 providing for notification to the agency of such
36 failure and for agency notification to the licensee of
37 disciplinary action; providing licensee grounds for
38 overcoming failure to pay; authorizing the agency to
39 issue an emergency order and notice of intent to
40 revoke or deny a license; authorizing the agency to
41 deny a license renewal and requiring the agency to
42 deny a change of ownership; amending s. 400.145, F.S.;
43 revising procedures for obtaining the records of a
44 resident; specifying which records may be obtained and
45 who may obtain them; providing immunity from liability
46 to a facility that provides such records in good
47 faith; providing that the agency may not cite a
48 facility that does not meet these records
49 requirements; providing applicability; providing an
50 effective date.

51
52 Be It Enacted by the Legislature of the State of Florida:

53
54 Section 1. Section 400.023, Florida Statutes, is amended to
55 read:

56 400.023 Civil enforcement.—

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

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

69 (a) The action may be brought by the resident or his or her
70 guardian, by a person or organization acting on behalf of a
71 resident with the consent of the resident or his or her
72 guardian, or by the personal representative of the estate of a
73 deceased resident regardless of the cause of death.

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

83 (c) The action may be brought in any court of competent
84 jurisdiction to enforce such rights and to recover actual and
85 punitive damages for the any violation of the rights of a
86 resident or for negligence.

87 (d) A Any resident who prevails in seeking injunctive

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

101 (e) This section does not preclude theories of recovery not
102 arising out of negligence or s. 400.022 which are available to a
103 resident or to the agency. ~~The provisions of Chapter 766~~ does de
104 not apply to a any cause of action brought under ss. 400.023-
105 400.0238.

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

107 (a) "Licensee" means an individual, corporation,
108 partnership, firm, association, governmental entity, or other
109 entity that is issued a permit, registration, certificate, or
110 license by the agency, and that is legally responsible for all
111 aspects of the operation of the nursing home facility.

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

116 1. Hiring or firing of the administrator or director of

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117 nursing;

118 2. Controlling or having control over the staffing levels
119 at the facility;

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

121 4. Implementing and enforcing the policies and procedures
122 of the facility.

123 (c) "Passive investor" means an individual or entity that
124 has an interest in a facility but does not participate in the
125 decisionmaking or operations of the facility.

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

134 (a) The individual or entity owed a duty of reasonable care
135 to the resident and that the individual or entity breached that
136 duty; and

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

139
140 For purposes of this subsection, if, in a proposed amended
141 pleading, it is asserted that such cause of action arose out of
142 the conduct, transaction, or occurrence set forth or attempted
143 to be set forth in the original pleading, the proposed amendment
144 relates back to the original pleading.

145 (4)-(2) In a ~~any~~ claim brought pursuant to this part

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146 alleging a violation of residents' ~~resident's~~ rights or
 147 negligence causing injury to or the death of a resident, the
 148 claimant has ~~shall have~~ the burden of proving, by a
 149 preponderance of the evidence, that:

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

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

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

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

156

157 ~~Nothing in~~ This part does not ~~shall be interpreted to~~ create
 158 strict liability. A violation of the rights set forth in s.
 159 400.022, ~~or~~ in any other standard or guidelines specified in
 160 this part, or in any applicable administrative standard or
 161 guidelines of this state or a federal regulatory agency is ~~shall~~
 162 ~~be~~ evidence of negligence but is ~~shall~~ not ~~be~~ considered
 163 negligence per se.

164 ~~(5)(3)~~ In a ~~any~~ claim brought pursuant to this section, a
 165 licensee, individual ~~person~~, or entity has ~~shall have~~ a duty to
 166 exercise reasonable care. Reasonable care is that degree of care
 167 which a reasonably careful licensee, individual ~~person~~, or
 168 entity would use under like circumstances.

169 ~~(6)(4)~~ In a ~~any~~ claim for a residents' ~~resident's~~ rights
 170 violation or negligence by a nurse licensed under part I of
 171 chapter 464, such nurse has ~~shall have~~ the duty to exercise care
 172 consistent with the prevailing professional standard of care for
 173 a nurse. The prevailing professional standard of care for a
 174 nurse is ~~shall be~~ that level of care, skill, and treatment

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175 which, in light of all relevant surrounding circumstances, is
176 recognized as acceptable and appropriate by reasonably prudent
177 similar nurses.

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

187 (8)~~(6)~~ The resident or the resident's legal representative
188 shall serve a copy of a any complaint alleging in whole or in
189 part a violation of any rights specified in this part to the
190 agency ~~for Health Care Administration~~ at the time of filing the
191 initial complaint with the clerk of the court for the county in
192 which the action is pursued. The requirement of providing a copy
193 of the complaint to the agency does not impair the resident's
194 legal rights or ability to seek relief for his or her claim.

195 (9)~~(7)~~ An action under this part for a violation of rights
196 or negligence recognized herein is not a claim for medical
197 malpractice, and ~~the provisions of~~ s. 768.21(8) does ~~de~~ not
198 apply to a claim alleging death of the resident.

199 Section 2. Section 400.0237, Florida Statutes, is amended
200 to read:

201 400.0237 Punitive damages; pleading; burden of proof.—

202 (1) A ~~In any action for damages brought under this part, no~~
203 claim for punitive damages may not be brought under this part

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204 ~~shall be permitted~~ unless there is a reasonable showing by
205 admissible evidence that has been submitted by the parties that
206 provides in the record or proffered by the claimant which would
207 ~~provide~~ a reasonable basis for recovery of such damages when the
208 criteria in this section are applied.

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

213 (b) The court shall conduct a hearing to determine whether
214 there is sufficient admissible evidence submitted by the parties
215 to ensure that there is a reasonable basis to believe that the
216 claimant, at trial, will be able to demonstrate by clear and
217 convincing evidence that the recovery of such damages is
218 warranted under a claim for direct liability as specified in
219 subsection (2) or under a claim for vicarious liability as
220 specified in subsection (3).

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

228 (2) A defendant may be held liable for punitive damages
229 only if the trier of fact, by ~~based on~~ clear and convincing
230 evidence, finds that a specific person or corporate defendant
231 actively and knowingly participated in intentional misconduct or
232 engaged in conduct that constitutes gross negligence and

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233 contributed to the loss, damages, or injury suffered by the
234 claimant ~~the defendant was personally guilty of intentional~~
235 ~~misconduct or gross negligence.~~ As used in this section, the
236 term:

237 (a) "Intentional misconduct" means that the defendant
238 against whom punitive damages are sought had actual knowledge of
239 the wrongfulness of the conduct and the high probability that
240 injury or damage to the claimant would result and, despite that
241 knowledge, intentionally pursued that course of conduct,
242 resulting in injury or damage.

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

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

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

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

260 ~~(c) The employer, principal, corporation, or other legal~~
261 ~~entity engaged in conduct that constituted gross negligence and~~

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262 ~~that contributed to the loss, damages, or injury suffered by the~~
263 ~~claimant.~~

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

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

270 Section 3. Section 400.024, Florida Statutes, is created to
271 read:

272 400.024 Failure to satisfy a judgment or settlement
273 agreement.—

274 (1) Upon the entry by a Florida court of an adverse final
275 judgment against a licensee as defined in s. 400.023(2) which
276 arises from an award pursuant to s. 400.023, including an
277 arbitration award, for a claim of negligence or a violation of
278 residents' rights, in contract or tort, or from noncompliance
279 with the terms of a settlement agreement as determined by a
280 court or arbitration panel, which arises from a claim pursuant
281 to s. 400.023, the licensee shall pay the judgment creditor the
282 entire amount of the judgment, award, or settlement and all
283 accrued interest within 60 days after the date such judgment,
284 award, or settlement becomes final and subject to execution
285 unless otherwise mutually agreed to in writing by the parties.
286 Failure to make such payment shall result in additional grounds
287 that may be used by the agency for revoking a license or for
288 denying a renewal application or a related party change of
289 ownership application as provided in this section.

290 (2) The agency is deemed notified of an unsatisfied

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291 judgment or settlement under subsection (1) when a certified
292 copy of the judgment and a certified copy of a valid judgment
293 lien certificate, filed in accordance with ss. 55.202 and
294 55.203, are served to the agency by process server or received
295 by certified mail, return receipt requested. Within 60 days
296 after receiving such documents, the agency shall notify the
297 licensee by certified mail, return receipt requested, that it is
298 subject to disciplinary action unless, within 30 days after the
299 date of mailing the notice, the licensee:

300 (a) Shows proof that the unsatisfied judgment or settlement
301 has been paid in the amount specified;

302 (b) Shows proof of the existence of a payment plan mutually
303 agreed upon by the parties in writing;

304 (c) Furnishes the agency with a copy of a timely filed
305 notice of appeal;

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

308 (e) Shows proof by submitting an order from a court or
309 arbitration panel that is overseeing any action seeking
310 indemnification from an insurance carrier or other party that
311 the licensee believes is required to pay the award.

312 (3) If the agency is placed on notice pursuant to
313 subsection (2) and proof pursuant to subsection (2) is not
314 provided by the licensee, the agency shall issue an emergency
315 order pursuant to s. 120.60 declaring that the facility lacks
316 financial ability to operate and a notice of intent to revoke or
317 deny a license.

318 (4) If, after the agency is placed on notice pursuant to
319 subsection (2) and:

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320 (a) The license is subject to renewal, the agency may deny
321 the license renewal unless compliance with this section is
322 achieved; and

323 (b) A change of ownership application for the facility at
324 issue is submitted by the licensee, by a person or entity
325 identified as having a controlling interest in the licensee, or
326 by a related party, the agency shall deny the change of
327 ownership application unless compliance with this section is
328 achieved.

329 Section 4. Section 400.145, Florida Statutes, is amended to
330 read:

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

333 400.145 Copies of records of care and treatment of
334 resident.—

335 (1) Upon receipt of a written request that complies with
336 the federal Health Insurance Portability and Accountability Act
337 of 1996 (HIPAA) and this section, a nursing home facility shall
338 furnish to a competent resident, or to a representative of that
339 resident who is authorized to make requests for the resident's
340 records under HIPAA or subsection (2), copies of the resident's
341 paper and electronic records that are in possession of the
342 facility. Such records must include any medical records and
343 records concerning the care and treatment of the resident
344 performed by the facility, except for progress notes and
345 consultation report sections of a psychiatric nature. The
346 facility shall provide the requested records within 14 working
347 days after receipt of a request relating to a current resident
348 or within 30 working days after receipt of a request relating to

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349 a former resident.

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

352 (a) A person appointed by a court to act as the personal
353 representative, executor, administrator, curator, or temporary
354 administrator of the deceased resident's estate;

355 (b) If a judicial appointment has not been made as provided
356 in paragraph (a), a person designated by the resident to act as
357 his or her personal representative in a last will that is self-
358 proved under s. 732.503; or

359 (c) If no judicial appointment has been made as provided in
360 paragraph (a) or no person has been designated by the resident
361 in a last will as provided in paragraph (b), only the following
362 individuals:

363 1. A surviving spouse.

364 2. If there is no surviving spouse, a surviving child of
365 the resident.

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

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

370 (a) Paragraph (2) (a) must include a copy of the letter of
371 administration and a copy of the court order appointing such
372 person as the representative of the resident's estate.

373 (b) Paragraph (2) (b) must include a copy of the self-proved
374 last will designating the person as the resident's
375 representative.

376 (c) Paragraph (2) (c) must be accompanied by a letter from
377 the person's attorney verifying the person's relationship to the

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378 resident and the absence of a court-appointed representative and
379 self-proved last will.

380 (4) A nursing home facility may charge a reasonable fee for
381 the copying of resident records. Such fee may not exceed \$1 per
382 page for the first 25 pages and 25 cents per page for each
383 additional page. The facility shall allow a person who is
384 authorized to act on behalf of the resident to examine the
385 original records, microfilms, or other suitable reproductions of
386 the records in its possession upon any reasonable terms imposed
387 by the facility to ensure that the records are not damaged,
388 destroyed, or altered.

389 (5) If a nursing home facility determines that disclosure
390 of the records to the resident would be detrimental to the
391 physical or mental health of the resident, the facility may
392 refuse to furnish the record directly to the resident; however,
393 upon such refusal, the resident's records shall, upon written
394 request by the resident, be furnished to any other medical
395 provider designated by the resident.

396 (6) A nursing home facility that in good faith and in
397 reliance upon this section releases copies of records shall be
398 indemnified by the party who requested the records pursuant to
399 subsection (2) for any damages resulting from such release, and
400 may not be found to have violated any criminal or civil laws,
401 and is not civilly liable to the resident, the resident's
402 estate, or any other person for any damages resulting from such
403 release.

404 (7) A nursing home facility is not required to provide
405 copies of a resident's records requested pursuant to this
406 section more than once per month, except that copies of

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407 physician reports in the resident's records must be provided as
408 often as necessary to allow the effective monitoring of the
409 resident's condition.

410 (8) A nursing home facility may not be cited by the agency
411 through the survey process for any alleged or actual
412 noncompliance with any of the requirements of this section.

413 (9) This section does not limit any right to obtain records
414 by subpoena or other court process.

415 Section 5. The amendments to ss. 400.023 and 400.0237,
416 Florida Statutes, made by this act apply to causes of action
417 accruing on or after the effective date of this act.

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