

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 995 Civil Actions Involving Assisted Living Facilities

SPONSOR(S): Civil Justice Subcommittee, Chamberlin

TIED BILLS: **IDEN./SIM. BILLS:** SB 238

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 5 N, As CS	Mawn	Jones
2) Select Committee on Health Innovation			
3) Judiciary Committee			

SUMMARY ANALYSIS

The main purpose of Florida's civil justice system is to properly and fairly redress the civil wrongs caused throughout the state, whether such wrongs be in the form of tortious conduct, breaches of contract, or other non-criminal harm for which the law provides a remedy. The civil justice system accomplishes this by providing a neutral court system empowered to decide the amount of monetary damages required to make each wronged person whole again, to the extent possible.

The Assisting Living Facilities Act ("Act"), codified in Part I of ch. 429, F.S., governs assisted living facilities ("ALFs") to promote the availability of appropriate services for elderly persons and adults with disabilities in the least restrictive and most homelike environment; to encourage the development of facilities that promote the dignity, individuality, privacy, and decision-making of such persons; to provide for the health, safety, and welfare of ALF residents in Florida; to promote continued improvement of ALFs; to encourage the development of innovative and affordable ALFs, particularly for persons with low to moderate incomes; to ensure that all state agencies cooperate in the protection of such residents; and to ensure that needed economic, social, mental health, and leisure services are made available to ALF residents.

Under the Act, no ALF resident may be deprived of any civil or legal rights, benefits, or privileges guaranteed by law, the Florida Constitution, or the United States Constitution. To that end, the Act provides a Resident Bill of Rights and vests any person or ALF resident whose rights (as specified in the Act) are violated with a civil cause of action. Such action may be brought in any court of competent jurisdiction, after compliance with the Act's pre-suit notice requirements, by the resident or other specified parties; and the claimant may seek actual and, in some instances, punitive damages.

CS/HB 995 amends ss. 429.29 and 429.297, F.S., to:

- Limit whom a civil cause of action for negligence or a violation of an ALF resident's rights may be brought against under the Act.
- Specify when a claimant must elect survival or wrongful death damages if the action alleges a claim for a violation of an ALF resident's rights or for negligence that caused the resident's death.
- Revise the requirements for a punitive damages award in a civil action brought under the Act.

The bill does not appear to have a fiscal impact on state or local government.

The bill provides an effective date of July 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Civil Justice System

The main purpose of Florida's civil justice system is to properly and fairly redress the civil wrongs caused throughout the state, whether such wrongs be in the form of tortious conduct, breaches of contract, or other non-criminal harm for which the law provides a remedy. The civil justice system accomplishes this by providing a neutral court system empowered to decide the amount of monetary damages required to make each wronged person whole again. A functioning civil justice system, when it operates justly:

- Provides a fair and equitable forum to resolve disputes;
- Discourages persons from resorting to self-help methods to redress wrongs;
- Appropriately compensates legitimately harmed persons;
- Shifts losses to responsible parties;
- Provides incentives to prevent future harm; and
- Deters undesirable behavior.¹

One of the goals of the civil justice system is to redress tortious conduct, or "torts." A tort is a wrong for which the law provides a remedy. Torts are generally divided into two categories, as follows:

- An intentional tort, examples of which include an assault, a battery, or a false imprisonment.
- Negligence, which is a tort that is unintentionally committed. To prevail in an ordinary negligence² lawsuit, the party seeking the remedy must prove four elements: duty, breach, causation, and damages.³

Duty of Care

The first of the four elements a plaintiff must prove to prevail in a negligence action is that the defendant owed the plaintiff a "duty of care" to do something or refrain from doing something. The existence of a legal duty is a threshold requirement that, if satisfied, "merely opens the courthouse doors."⁴ Whether a duty sufficient to support a negligence claim exists is a matter of law⁵ determined by the court.⁶ A duty may arise from various sources, including:

- Legislative enactments or administrative regulations;
- Judicial interpretations of such enactments or regulations;
- Other judicial precedent; and
- The general facts of the case.⁷

In determining whether a duty arises from the general facts of the case, courts look to whether the defendant's conduct foreseeably created a "zone of risk" that posed a general threat of harm to others—that is, whether there was a likelihood that the defendant's conduct would result in the type of

¹ Cf. Am. Jur. 2d Torts s. 2.

² Negligence may be ordinary negligence, in which the defendant's conduct must be evaluated for reasonableness, or negligence *per se*. Negligence *per se* is negligence as a matter of law – in other words, it is a legal doctrine that presumes a defendant was negligent when he or she violated a law, rule, or regulation that imposed a duty or prohibited an act to protect a particular class of persons. In a negligence *per se* claim, the plaintiff need only prove that the defendant's violation was the cause in fact and the proximate cause of the plaintiff's injury. *DeJesus v. Seaboard Coast Line R. Co.*, 281 So. 2d 198 (Fla. 1973).

³ 6 *Florida Practice Series* s. 1.1; see *Barnett v. Dept. of Fin. Serv.*, 303 So. 3d 508 (Fla. 2020).

⁴ *Kohl v. Kohl*, 149 So. 3d 127 (Fla. 4th DCA 2014).

⁵ A matter of law is a matter determined by the court, while a matter of fact must generally be determined by the jury. Matters of law include issues regarding a law's application or interpretation, issues regarding what the relevant law is, and issues of fact reserved for judges to resolve. Legal Information Institute, *Question of Law*, https://www.law.cornell.edu/wex/question_of_law (last visited Feb. 1, 2024); Legal Information Institute, *Question of Fact*, https://www.law.cornell.edu/wex/Question_of_fact (last visited Feb. 1, 2024).

⁶ *Kohl*, 149 So. 3d at 135; *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1110 (Fla. 2005).

⁷ *Goldberg*, 899 So. 2d at 1105 (citing *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182 (Fla. 2003)).

injury suffered by the plaintiff.⁸ Such zone of risk defines the scope of the defendant's legal duty, which is typically to either lessen the risk or ensure that sufficient precautions are taken to protect others from the harm the risk poses.⁹ However, it is not enough that a risk merely exists or that a particular risk is foreseeable; rather, the defendant's conduct must create or control the risk before liability may be imposed.¹⁰

Breach of the Duty of Care

The second element a plaintiff must prove is that the defendant "breached," or failed to discharge, the duty of care. Whether a breach occurred is generally a matter of fact for the jury to determine.¹¹

Causation

The third element a plaintiff must prove is that the defendant's breach of the duty of care "proximately caused" the plaintiff's injury. Whether or not proximate causation exists is generally a matter of fact for the jury to determine.¹²

Florida follows the "more likely than not" standard in proving causation; thus, the inquiry for the factfinder is whether the defendant's negligence probably caused the plaintiff's injury.¹³ In making such a determination, the factfinder must analyze whether the injury was a foreseeable consequence of the danger created by the defendant's negligent act or omission.¹⁴ It is not required that the defendant's conduct be the exclusive cause, or even the primary cause, of the plaintiff's injury suffered; instead, the plaintiff must only show that the defendant's conduct substantially caused the injury.¹⁵

Damages

The fourth and final element a plaintiff must prove to prevail in a negligence action is that the plaintiff suffered some harm, or "damages." Juries award "actual damages" to compensate an injured person for the damages the person actually suffered due to the defendant's negligence.¹⁶ Such damages consist of both:

- "Economic damages," which are financial losses that can be easily quantified (such as lost wages, the cost to replace damaged property, or the cost of medical treatment); and
- "Non-economic damages," which are nonfinancial losses that cannot be easily quantified (such as pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, and loss of the capacity to enjoy life).¹⁷

In certain limited situations, a court may also award "punitive damages," the purpose of which is to punish a defendant for bad behavior and deter future bad conduct, rather than to compensate the plaintiff for a loss.¹⁸

⁸ *Kohl*, 149 So. 3d at 135 (citing *McCain v. Fla. Power Corp.*, 593 So. 2d 500 (Fla. 1992); *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001)).

⁹ *Kohl*, 149 So. 3d at 135; *Whitt*, 788 So. 2d at 217.

¹⁰ *Bongiorno v. Americorp, Inc.*, 159 So. 3d 1027 (Fla. 5th DCA 2015) (citing *Demelus v. King Motor Co. of Fort Lauderdale*, 24 So. 3d 759 (Fla. 4th DCA 2009)).

¹¹ *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009).

¹² *Sanders v. ERP Operating Ltd. P'ship*, 157 So. 3d 273 (Fla. 2015).

¹³ *Ruiz v. Tenent Hialeah Healthsystem, Inc.*, 260 So. 3d 977 (Fla. 2018).

¹⁴ *Id.* at 981-982.

¹⁵ *Id.* at 982.

¹⁶ *Birdsall v. Coolidge*, 93 U.S. 64 (1876); *St. Regis Paper Co. v. Watson*, 428 So. 2d 243 (Fla. 1983).

¹⁷ *Cf.* s. 766.202(8), F.S.

¹⁸ *See* ss. 768.72, 768.725, and 768.73, F.S. (providing standards and requirements for awarding punitive damages).

Assisted Living Facilities

The Assisting Living Facilities Act (“Act”), codified in Part I of ch. 429, F.S., governs assisted living facilities (“ALFs”) to:

- Promote the availability of appropriate services for elderly persons and adults with disabilities in the least restrictive and most homelike environment;
- Encourage the development of facilities that promote the dignity, individuality, privacy, and decision-making of such persons;
- Provide for the health, safety, and welfare of ALF residents in Florida;
- Promote continued improvement of ALFs;
- Encourage the development of innovative and affordable ALFs, particularly for persons with low to moderate incomes;
- Ensure that all state agencies cooperate in the protection of such residents; and
- Ensure that needed economic, social, mental health, and leisure services are made available to ALF residents through the efforts of the Agency for Health Care Administration (“AHCA”), the Department of Elderly Affairs (“DOEA”), the Department of Children and Families (“DCF”), the Department of Health (“DOH”), ALFs, and other community agencies.¹⁹

Licensing

ALFs must generally be licensed by AHCA to operate in Florida, unless an exception applies.²⁰ Each applicant for licensure must comply with all provisions of Part II of chapter 408, Florida Statutes, relating to general provisions for health care licensing, and:

- Identify all other homes or facilities, including the address and the license or licenses under which they operate, if applicable, which are currently operated by the applicant or administrator and which provide housing, meals, and personal services to residents;
- Provide the location of the facility for which a license is sought and documentation, signed by the appropriate local government official, which states that the applicant has met local zoning requirements;
- Provide the name, address, date of birth, social security number, education, and experience of the administrator,²¹ if different from the applicant;
- Provide proof of liability insurance;
- If the applicant is a community residential home,²² provide proof that the applicant has met the requirements of ch. 419, F.S., relating to such homes;
- Furnish proof that the facility has received a satisfactory fire safety inspection; and
- Furnish documentation of a satisfactory sanitation inspection of the facility by the county health department.²³

Separate licenses are required for ALFs maintained in separate premises, even though operated under the same management, but a separate license is not required for separate buildings on the same grounds.²⁴ A license must be displayed in a conspicuous place readily visible to clients who enter at the address that appears on the license and is valid only in the hands of the licensee to whom it is issued; thus, a license may not be sold, assigned or otherwise transferred.²⁵ Further, a license must be renewed in accordance with the Act and the provision of satisfactory proof of ability to operate and conduct the ALF in accordance with the requirements of the Act and related rules.²⁶

¹⁹ S. 429.01, F.S.

²⁰ Exceptions exist for facilities operated by the federal government or any agency thereof and facilities licensed as some other type of facility under Florida law (such as a nursing home licensed under Part II of chapter 400, F.S., an intermediate care facility licensed under part VIII of chapter 400, or a transitional living facility licensed under part XI of chapter 400). S. 429.04, F.S.

²¹ “Administrator” means an individual at least 21 years of age who is responsible for ALF operation and maintenance. S. 429.02, F.S.

²² A “community residential home” is a dwelling unit licensed to serve residents who are clients of the DOEA, the Agency for Persons with Disabilities, the Department of Juvenile Justice, or DCF or licensed by AHCA which provides a living environment for 7 to 14 unrelated residents who operate as the functional equivalent of a family, including such supervision and care by supportive staff as may be necessary to meet the residents’ physical, emotional, and social needs. S. 419.001, F.S.

²³ Ss. 429.07 and 429.11, F.S.

²⁴ S. 429.07, F.S.

²⁵ S. 408.804, F.S.

²⁶ S. 429.17, F.S.

Any person who knowingly alters, defaces, or falsifies a license certificate issued by AHCA, or causes or procures any person to commit such an offense, commits a second-degree misdemeanor.²⁷ Further, any person who owns, rents, or otherwise maintains a building or property used as an unlicensed ALF commits a third-degree felony, and each day of continued operation is a separate offense.²⁸ However, any person found guilty of such an offense for a second or subsequent time commits a second-degree felony.²⁹ Administrative penalties may also apply where an ALF licensee or license applicant violates the Act or any applicable rules, which penalties may include the denial, revocation, or suspension of any ALF license and the imposition of an administrative fine.³⁰

Resident Bill of Rights

The Act provides that no ALF resident may be deprived of any civil or legal rights, benefits, or privileges guaranteed by law, the Florida Constitution, or the United States Constitution.³¹ To that end, the Act provides a Resident Bill of Rights³² giving every ALF resident the right to:

- Live in a safe and decent living environment, free from abuse or neglect.
- Be treated with consideration and respect and with due recognition of personal dignity, individuality, and the need for privacy.
- Retain and use his or her own clothes and other personal property in his or her immediate living quarters, so as to maintain individuality and personal dignity, except when the facility can show that such would be unsafe, impractical, or an infringement upon other residents' rights.
- Unrestricted private communication, including receiving and sending unopened correspondence, access to a telephone, and visiting with any person of his or her choice, at any time between the hours of 9 a.m. and 9 p.m. at a minimum.
- Freedom to participate in and benefit from community services and activities and to pursue the highest possible level of independence, autonomy, and community interaction.
- Manage his or her financial affairs unless the resident or, if applicable, the resident's representative, designee, surrogate, guardian, or attorney authorizes the ALF's administrator to provide safekeeping for funds.
- Share a room with his or her spouse if both are residents in the same ALF.
- Reasonable opportunity for regular exercise several times a week and to be outdoors at regular and frequent intervals except when prevented by inclement weather.
- Exercise civil and religious liberties, including the right to independent personal decisions.
- Assistance with obtaining access to adequate and appropriate health care.
- At least 45 days' notice of relocation or termination of residency from the ALF unless, for medical reasons, the resident is certified by a physician to require an emergency relocation to a facility providing a more skilled level of care or the resident engages in a pattern of conduct that is harmful or offensive to other residents.
- Present grievances and recommend changes in policies, procedures, and services to the ALF's staff, governing officials, or any other person without restraint, interference, coercion, discrimination, or reprisal.

The ALF administrator must ensure that a written notice of the rights, obligations, and prohibitions set forth in the Act is posted in a prominent place in each ALF and read or explained to residents who cannot read.³³ Such notice must, in addition to providing specified information, include the statewide toll-free telephone number and e-mail address of the State Long-Term Care Ombudsman Program³⁴

²⁷ A second-degree misdemeanor is punishable by up to 60 days in jail and a \$500 fine. SS. 408.804, 775.082, and 775.083, F.S.

²⁸ A third-degree felony is punishable by up to 5 years in prison and a \$5,000 fine. Ss. 429.08, 775.082, 775.083, and 775.084, F.S.

²⁹ *Id.*

³⁰ See s. 429.14, F.S., providing for administrative penalties.

³¹ S. 429.28, F.S.

³² *Id.*

³³ *Id.*

³⁴ The Long-Term Care Ombudsman Program is a statewide, volunteer-based system of local units that act as advocates for residents of long-term care facilities. The Program was established by Title VII of the federal Older Americans Act and its operation is governed by part I of Chapter 400, F.S. Long-Term Care Ombudsman Program Florida, *What is a Long-Term Care Ombudsman*, <https://ombudsman.elderaffairs.org/> (last visited Feb. 1, 2024).

and the telephone number of the local ombudsman council, the Elder Abuse Hotline,³⁵ and, if applicable, Disability Rights Florida, where complaints may be lodged.³⁶

Civil Actions to Enforce Rights

The Act vests any person or ALF resident whose rights (as specified in the Act) are violated with a civil cause of action.³⁷ Such action may be brought in any court of competent jurisdiction, after compliance with the act's pre-suit notice requirements, 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 a deceased resident.³⁸ The claimant may seek actual and, in some instances, punitive damages, and the resident or the resident's legal representative must serve a copy of any complaint alleging in whole or in part a violation of any rights specified in the Act to AHCA at the time of filing the initial complaint.³⁹

Sections 429.29-429.298, F.S., provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of an ALF resident arising out of negligence or a violation of the Resident's Bill of Rights.⁴⁰ In any such claim, the claimant has the burden of proving, by a preponderance of the evidence, that:

- The defendant owed a duty to the resident;
- The defendant breached such duty;
- The breach is a legal cause of loss, injury, death, or damage to the resident; and
- The resident sustained loss, injury, death, or damage as a result of the breach.⁴¹

Further, the Act species that:

- If a civil action alleges a claim for a violation of an ALF resident's rights or for negligence that:
 - Caused the resident's death, the claimant must elect either survival damages or wrongful death damages.⁴²
 - Did not cause the resident's death, but the resident is now deceased, the personal representative of the decedent's estate may recover damages for the negligence that caused the resident's injury.⁴³
- A violation of the Resident's Bill of Rights is evidence of negligence but is not negligence *per se*.⁴⁴

³⁵ DOEA operates the Elder Abuse Hotline in conjunction with DCF. DOEA, *Elder Protection Programs*, <https://elderaffairs.org/programs-services/elder-protection-programs/#:-:text=How%20to%20Report%20Elder%20Abuse%2C%20Neglect%2C%20and%20Exploitation&text=To%20report%20by%20phone%20%E2%80%93%20call.number%20is%20available%2024%2F7> (last visited Feb. 1, 2024).

³⁶ *Id.*

³⁷ S. 429.29, F.S.

³⁸ *Id.*; see s. 429.293, F.S., providing pre-suit notice requirements

³⁹ S. 429.29, F.S.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Survival damages, awardable under s. 46.021, F.S., are damages awarded for the pain and suffering a decedent endured due to his or her injuries before his or her death but that are payable to the decedent's estate. Meanwhile, wrongful death damages, awardable under s. 768.21, F.S., are damages awarded to a decedent's surviving family members for the loss or injury the decedent's family suffered due to the decedent's death. *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

Punitive Damages

In any action for damages brought under the Act, no punitive damages claim is allowed unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.⁴⁵ The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure, and such rules must be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages.⁴⁶ However, no discovery of financial worth may proceed until after the pleading concerning punitive damages is allowed.⁴⁷ Further, discovery of financial information for the purpose of determining the value of punitive damages may not be had unless the plaintiff shows the court by proffer or evidence in the record that a reasonable basis exists to support a punitive damages claim.⁴⁸

Under the Act, a defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct⁴⁹ or gross negligence.⁵⁰ Further, an employer, principal, corporation, or other legal entity may not be held liable for punitive damages for an employee's or agent's conduct unless the agent or employee was guilty of intentional misconduct or gross negligence and:

- The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;
- The officers, directors, or managers of the employer, principal, corporation or other legal entity condoned, ratified, or consented to such conduct; or
- The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the claimant's loss, damages, or injury.⁵¹

In any case, a punitive damages award must be reasonable in light of the actual harm suffered by the resident and the egregiousness of the conduct that caused such actual harm, and may not exceed the limits for such damages set forth in the Act.⁵²

Statute of Limitations

Pursuant to the statutes of limitation and repose, a civil action for damages brought under the Act must be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; and in no event may the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued.⁵³ However, where it can be shown that fraudulent concealment or intentional misrepresentation of fact prevented the injury's discovery, the period of limitations is extended forward two years from the time that the injury is discovered with the exercise of due diligence, but in no event more than six years from the date the incident giving rise to the injury occurred.⁵⁴

⁴⁵ S. 429.297, F.S.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ S. 429.29, F.S.

⁴⁹ "Intentional misconduct" means that the defendant had actual knowledge of the conduct's wrongfulness and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued the course of conduct, resulting in injury or damage. *Id.*

⁵⁰ "Gross negligence" means that the defendant'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. S. 429.297, F.S.

⁵¹ *Id.*

⁵² *Id.*; see s. 429.298, F.S., providing punitive damages limits.

⁵³ S. 429.296, F.S.

⁵⁴ *Id.*

Attorney Fees and Costs

In any civil action for damages brought under the Act,⁵⁵ attorney fees and costs are not recoverable except as provided under s. 768.79, F.S.,⁵⁶ or the Florida Rules of Civil Procedure.⁵⁷

Effect of Proposed Changes

Liability Limitation

CS/HB 995 amends s. 429.29, F.S., to limit the liability of certain persons for negligence or a violation of an ALF resident's rights in specified situations. Specifically, the bill provides that an exclusive cause of action for negligence or a violation of an ALF resident's rights which alleges direct or vicarious liability⁵⁸ for an ALF resident's personal injury or death arising from such negligence or violation and which seeks damages for such injury or death may generally be brought only against the licensee;⁵⁹ the licensee's management company or active participant;⁶⁰ the licensee's managing employees; or any direct caregivers, whether employees or contractors. Under the bill, such an action may not be brought against a "passive investor,"⁶¹ and may be brought against any other individual only where, after a motion for leave to amend hearing, the court or an arbitration panel determines that there is sufficient evidence in the record or proffered by the claimant to establish a reasonable showing that:

- The individual or entity owed a duty of reasonable care to the resident, and breached that duty; and
- The breach is a legal cause of the resident's loss, injury, death, or damage.

Further, the bill specifies that if:

- In a proposed amended pleading, it is asserted that a 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 relates back to the original pleading.
- If the action alleges a claim for a violation of an ALF resident's rights or for negligence that caused the death of a resident, the claimant, after the verdict, but before the judgment is entered, must elect either survival or wrongful death damages.

Punitive Damages Limitation

The bill amends s. 429.297, F.S., to modify when punitive damages may be awarded in any action for damages brought under the Act. Specifically, under the bill, the evidence used to provide a reasonable basis for a punitive damages award must be "admissible evidence submitted by the parties," rather than "evidence in the record or proffered by the claimant" as required under current law. The bill also requires a court to conduct a hearing to determine whether there is sufficient admissible evidence submitted by the parties to ensure that there is a reasonable basis to believe that the claimant, at trial, will be able to demonstrate by clear and convincing evidence that the recovery of such damages is warranted under a claim for direct or vicarious liability.

⁵⁵ Reasonable costs and attorney fees not exceeding \$25,000 are recoverable in an action by an ALF resident seeking injunctive relief or an administrative remedy.

⁵⁶ S. 768.79, F.S., establishes procedures for the offer of or demand for judgment.

⁵⁷ S. 429.29, F.S.

⁵⁸ "Direct liability" is liability for one's own acts or omissions. "Vicarious liability," meanwhile, is liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties. Legal Information Institute, Liability, <https://www.law.cornell.edu/wex/liability> (last visited Feb. 1, 2024); Legal Information Institute, *Vicarious Liability*, https://www.law.cornell.edu/wex/vicarious_liability (last visited Feb. 1, 2024).

⁵⁹ The bill defines "licensee" as an individual, corporation, partnership, firm, association, governmental entity, or other entity that is issued a permit, registration, certificate, or license by AHCA and is legally responsible for all aspects of an ALF's operation.

⁶⁰ The bill defines "management company or active participant" as an individual or entity who contracts or receives a fee to provide any of the following for an ALF: hiring or firing the administrator or director of nursing; controlling or having control over an ALF's staffing levels; having control over an ALF's budget; implementing and enforcing an ALF's policies and procedures; or receiving and controlling a line of credit, loan, or other credit instrument that is used either in whole or in part by, or the benefit of, the subject ALF where a resident resides or resided during the subject residency.

⁶¹ The bill defines "passive investor" as an individual or entity that has an interest in an ALF but does not participate in the ALF's decision-making or operation.

Further, the bill modifies the standards for imposing direct or vicarious liability for punitive damages in a civil action for damages brought under the Act. Specifically, under the bill, a defendant may be held liable for punitive damages only if the trier of fact, by clear and convincing evidence, finds that a specific individual or corporate defendant actively and knowingly participated in intentional misconduct⁶² or actively and knowingly engaged in conduct that constitutes gross negligence and contributed to the claimant's loss, damage, or injury. In the case of vicarious liability of an individual, employer, principal, corporation, or other legal entity, the bill provides that punitive damages may not be imposed for the conduct of an agent or employee thereof unless an officer, director, or manager of the actual employer, corporation, or legal entity condoned, ratified, or consented to the specific conduct as provided above.

Applicability

The changes made by the bill apply to causes of action accruing on or after the bill's effective date.

Effective Date

The bill provides an effective date of July 1, 2024.

B. SECTION DIRECTORY:

Section 1: Amends s. 429.29, F.S., relating to civil actions to enforce rights.

Section 2: Amends s. 429,297, F.S., relating to punitive damages; pleading; burden of proof.

Section 3: Provides applicability.

Section 4: Provides an effective date of July 1, 2024.

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:

The bill may have a positive economic impact on the private sector to the extent that it shields from:

- Civil liability certain persons connected with but not directly involved in the operations of an ALF or the care of ALF residents.
- Direct or vicarious liability for punitive damages persons connected with an ALF who may be subject to such liability under current law.

However, the bill may have a negative fiscal impact on ALF residents to the extent that it limits their ability to recover damages in a civil action for negligence or a violation of their rights which caused them harm.

⁶² The bill modifies the definition of "intentional misconduct" to refer to the knowledge and conduct of a defendant "against whom punitive damages are sought."

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

Access to Courts

The Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay."⁶³ In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court established a test to determine when the Legislature may restrict a judicial remedy. Where citizens have had a historical right of access to the courts, whether through statute or common law, the Legislature can only eliminate a judicial remedy under two circumstances. First, if it asserts a valid public purpose, the Legislature may restrict access to the courts if it provides a reasonable alternative to litigation.⁶⁴ Second, if the Legislature finds that there is an overpowering public necessity and that there is no alternative method for meeting that necessity, it may restrict access to the courts.⁶⁵

The bill limits the ability of an ALF resident and certain other persons to bring a civil action for negligence or a violation of rights under the Act against specified parties. Though the bill does not provide any legislative findings or assert a valid public purpose, the bill does not entirely eliminate the causes of action or all civil liability therefor; instead, it merely specifies who is the proper defendant in such actions.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 1, 2024, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Replaced "management or consulting company" as an entity against whom a civil action for a violation of an ALF resident's rights or for negligence may be brought under the Act with "management company or active participant," as defined by the bill, thereby expanding the types of persons against whom such a civil action may be brought.
- Made non-substantive, technical changes.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

⁶³ Art. I, s. 21, Fla. Const.

⁶⁴ See *Kluger*, 281 So. 2d at 4.

⁶⁵ *Id.*