

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED _____ (Y/N)
ADOPTED AS AMENDED _____ (Y/N)
ADOPTED W/O OBJECTION _____ (Y/N)
FAILED TO ADOPT _____ (Y/N)
WITHDRAWN _____ (Y/N)
OTHER _____

1 Committee/Subcommittee hearing bill: Judiciary Committee
2 Representative Gaetz offered the following:

3
4 **Amendment (with title amendment)**

5 Remove everything after the enacting clause and insert:

6 Section 1. Section 400.023, Florida Statutes, is amended
7 to read:

8 400.023 Civil enforcement.—

9 (1) An exclusive cause of action for negligence or a
10 violation of residents' Any resident whose rights as specified
11 under ~~in~~ this part which alleges direct or vicarious liability
12 for the personal injury or death of a nursing home resident
13 arising from such negligence or violation of rights and which
14 seeks damages for such injury or death may be brought only
15 against the licensee, the licensee's management or consulting
16 company, the licensee's managing employees, and any direct
17 caregivers, whether employees or contractors are violated shall

Amendment No. 1

18 ~~have a cause of action. A passive investor is not liable under~~
19 ~~this section. An action against any other individual or entity~~
20 ~~may be brought only pursuant to subsection (3).~~

21 (a) The action may be brought by the resident or his or
22 her guardian, by a person or organization acting on behalf of a
23 resident with the consent of the resident or his or her
24 guardian, or by the personal representative of the estate of a
25 deceased resident regardless of the cause of death.

26 (b) If the action alleges a claim for the resident's
27 rights or for negligence that caused the death of the resident,
28 the claimant shall, after the verdict, but before the judgment
29 is entered, ~~be required to~~ elect either survival damages
30 pursuant to s. 46.021 or wrongful death damages pursuant to s.
31 768.21. If the action alleges a claim for the resident's rights
32 or for negligence that did not cause the death of the resident,
33 the personal representative of the estate may recover damages
34 for the negligence that caused injury to the resident.

35 (c) The action may be brought in any court of competent
36 jurisdiction to enforce such rights and to recover actual and
37 punitive damages for the any violation of the rights of a
38 resident or for negligence.

39 (d) A Any resident who prevails in seeking injunctive
40 relief or ~~a claim for~~ an administrative remedy is entitled to
41 recover the costs of the action, and a reasonable attorney fees
42 ~~attorney's fee~~ assessed against the defendant of up to not to
43 ~~exceed~~ \$25,000. Fees shall be awarded solely for the injunctive

170533 - h0569-strike.docx

Published On: 3/20/2014 6:16:03 PM

Amendment No. 1

44 or administrative relief and not for any claim or action for
45 damages whether such claim or action is brought ~~together~~ with a
46 request for an injunction or administrative relief or as a
47 separate action, except as provided under s. 768.79 or the
48 Florida Rules of Civil Procedure. ~~Sections 400.023-400.0238~~
49 ~~provide the exclusive remedy for a cause of action for recovery~~
50 ~~of damages for the personal injury or death of a nursing home~~
51 ~~resident arising out of negligence or a violation of rights~~
52 ~~specified in s. 400.022.~~

53 (e) This section does not preclude theories of recovery
54 not arising out of negligence or s. 400.022 which are available
55 to a resident or to the agency. ~~The provisions of Chapter 766~~
56 does ~~de~~ not apply to a ~~any~~ cause of action brought under ss.
57 400.023-400.0238.

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

59 (a) "Licensee" means an individual, corporation,
60 partnership, firm, association, governmental entity, or other
61 entity that is issued a permit, registration, certificate, or
62 license by the agency, and that is legally responsible for all
63 aspects of the operation of the nursing home facility.

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

68 1. Hiring or firing of the administrator or director of
69 nursing;

170533 - h0569-strike.docx

Published On: 3/20/2014 6:16:03 PM

Amendment No. 1

70 2. Controlling or having control over the staffing levels
71 at the facility;

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

73 4. Implementing and enforcing the policies and procedures
74 of the facility.

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

78 (3) A cause of action may not be asserted against an
79 individual or entity other than the licensee, the licensee's
80 management or consulting company, the licensee's managing
81 employees, and any direct caregivers, whether employees or
82 contractors, unless, after a motion for leave to amend hearing,
83 the court or an arbitration panel determines that there is
84 sufficient evidence in the record or proffered by the claimant
85 to establish a reasonable showing that:

86 (a) The individual or entity owed a duty of reasonable
87 care to the resident and that the individual or entity breached
88 that duty; and

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

91
92 For purposes of this subsection, if, in a proposed amended
93 pleading, it is asserted that such cause of action arose out of
94 the conduct, transaction, or occurrence set forth or attempted

Amendment No. 1

95 to be set forth in the original pleading, the proposed amendment
96 relates back to the original pleading.

97 ~~(4)(2)~~ In a ~~any~~ claim brought pursuant to this part
98 alleging a violation of residents' ~~resident's~~ rights or
99 negligence causing injury to or the death of a resident, the
100 claimant has ~~shall have~~ the burden of proving, by a
101 preponderance of the evidence, that:

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

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

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

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

108
109 ~~Nothing in~~ This part does not ~~shall be interpreted to~~ create
110 strict liability. A violation of the rights set forth in s.
111 400.022, ~~or~~ in any other standard or guidelines specified in
112 this part, or in any applicable administrative standard or
113 guidelines of this state or a federal regulatory agency is ~~shall~~
114 ~~be~~ evidence of negligence but is ~~shall~~ not ~~be~~ considered
115 negligence per se.

116 ~~(5)(3)~~ In a ~~any~~ claim brought pursuant to this section, a
117 licensee, individual ~~person~~, or entity has ~~shall have~~ a duty to
118 exercise reasonable care. Reasonable care is that degree of care
119 which a reasonably careful licensee, individual ~~person~~, or
120 entity would use under like circumstances.

Amendment No. 1

121 ~~(6)(4)~~ In a ~~any~~ claim for a residents' ~~resident's~~ rights
122 violation or negligence by a nurse licensed under part I of
123 chapter 464, such nurse has ~~shall have~~ the duty to exercise care
124 consistent with the prevailing professional standard of care for
125 a nurse. The prevailing professional standard of care for a
126 nurse is ~~shall be~~ that level of care, skill, and treatment
127 which, in light of all relevant surrounding circumstances, is
128 recognized as acceptable and appropriate by reasonably prudent
129 similar nurses.

130 ~~(7)(5)~~ A licensee is ~~shall~~ not be liable for the medical
131 negligence of a ~~any~~ physician rendering care or treatment to the
132 resident except for the administrative services of a medical
133 director as required under ~~in~~ this part. ~~Nothing in~~ This
134 subsection does not ~~shall be construed to~~ protect a licensee,
135 individual person, or entity from liability for failure to
136 provide a resident with appropriate observation, assessment,
137 nursing diagnosis, planning, intervention, and evaluation of
138 care by nursing staff.

139 ~~(8)(6)~~ The resident or the resident's legal representative
140 shall serve a copy of a ~~any~~ complaint alleging in whole or in
141 part a violation of any rights specified in this part to the
142 agency ~~for Health Care Administration~~ at the time of filing the
143 initial complaint with the clerk of the court for the county in
144 which the action is pursued. The requirement of providing a copy
145 of the complaint to the agency does not impair the resident's
146 legal rights or ability to seek relief for his or her claim.

170533 - h0569-strike.docx

Published On: 3/20/2014 6:16:03 PM

Amendment No. 1

147 ~~(9)(7)~~ An action under this part for a violation of rights
148 or negligence recognized herein is not a claim for medical
149 malpractice, and ~~the provisions of s. 768.21(8)~~ does ~~de~~ not
150 apply to a claim alleging death of the resident.

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

153 400.0237 Punitive damages; pleading; burden of proof.—

154 (1) ~~A In any action for damages brought under this part,~~
155 ~~no~~ claim for punitive damages may not be brought under this part
156 ~~shall be permitted~~ unless there is a ~~reasonable~~ showing by
157 admissible evidence that has been submitted by the parties that
158 provides in the record or proffered by the claimant which would
159 ~~provide~~ a reasonable basis for recovery of such damages when the
160 criteria in this section are applied.

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

165 (b) The court shall conduct a hearing to determine whether
166 there is sufficient admissible evidence submitted by the parties
167 to ensure that there is a reasonable basis to believe that the
168 claimant, at trial, will be able to demonstrate by clear and
169 convincing evidence that the recovery of such damages is
170 warranted under a claim for direct liability as specified in
171 subsection (2) or under a claim for vicarious liability as
172 specified in subsection (3).

170533 - h0569-strike.docx

Published On: 3/20/2014 6:16:03 PM

Amendment No. 1

173 (c) The rules of civil procedure shall be liberally
174 construed so as to allow the claimant discovery of evidence
175 which appears reasonably calculated to lead to admissible
176 evidence on the issue of punitive damages. ~~No~~ Discovery of
177 financial worth may not shall proceed until ~~after~~ the pleading
178 on concerning punitive damages is approved by the court
179 permitted.

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

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

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

170533 - h0569-strike.docx

Published On: 3/20/2014 6:16:03 PM

Amendment No. 1

199 (3) In the case of vicarious liability of an individual,
200 employer, principal, corporation, or other legal entity,
201 punitive damages may not be imposed for the conduct of an
202 employee or agent unless ~~only if~~ the conduct of the employee or
203 agent meets the criteria specified in subsection (2) and an
204 officer, director, or manager of the actual employer,
205 corporation, or legal entity condoned, ratified, or consented to
206 the specific conduct as provided in subsection (2):

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

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

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

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

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

222 Section 3. Section 400.024, Florida Statutes, is created
223 to read:

Amendment No. 1

224 400.024 Failure to satisfy a judgment or settlement
225 agreement.-

226 (1) Upon the entry by a Florida court of an adverse final
227 judgment against a licensee as defined in s. 400.023(2) which
228 arises from an award pursuant to s. 400.023, including an
229 arbitration award, for a claim of negligence or a violation of
230 residents' rights, in contract or tort, or from noncompliance
231 with the terms of a settlement agreement as determined by a
232 court or arbitration panel, which arises from a claim pursuant
233 to s. 400.023, the licensee shall pay the judgment creditor the
234 entire amount of the judgment, award, or settlement and all
235 accrued interest within 60 days after the date such judgment,
236 award, or settlement becomes final and subject to execution
237 unless otherwise mutually agreed to in writing by the parties.
238 Failure to make such payment shall result in additional grounds
239 that may be used by the agency for revoking a license or for
240 denying a renewal application or a related party change of
241 ownership application as provided in this section.

242 (2) The agency is deemed notified of an unsatisfied
243 judgment or settlement under subsection (1) when a certified
244 copy of the judgment and a certified copy of a valid judgment
245 lien certificate, filed in accordance with ss. 55.202 and
246 55.203, are served to the agency by process server or received
247 by certified mail, return receipt requested. Within 60 days
248 after receiving such documents, the agency shall notify the
249 licensee by certified mail, return receipt requested, that it is

170533 - h0569-strike.docx

Published On: 3/20/2014 6:16:03 PM

Amendment No. 1

250 subject to disciplinary action unless, within 30 days after the
251 date of mailing the notice, the licensee:

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

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

256 (c) Furnishes the agency with a copy of a timely filed
257 notice of appeal;

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

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

264 (3) If the agency is placed on notice pursuant to
265 subsection (2) and proof pursuant to subsection (2) is not
266 provided by the licensee, the agency shall issue an emergency
267 order pursuant to s. 120.60 declaring that the facility lacks
268 financial ability to operate and a notice of intent to revoke or
269 deny a license.

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

272 (a) The license is subject to renewal, the agency may deny
273 the license renewal unless compliance with this section is
274 achieved; and

Amendment No. 1

275 (b) A change of ownership application for the facility at
276 issue is submitted by the licensee, by a person or entity
277 identified as having a controlling interest in the licensee, or
278 by a related party, the agency shall deny the change of
279 ownership application unless compliance with this section is
280 achieved.

281 Section 4. Section 400.145, Florida Statutes, is amended
282 to read:

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

285 400.145 Copies of records of care and treatment of
286 resident.—

287 (1) Upon receipt of a written request that complies with
288 the federal Health Insurance Portability and Accountability Act
289 of 1996 (HIPAA) and this section, a nursing home facility shall
290 furnish to a competent resident, or to a representative of that
291 resident who is authorized to make requests for the resident's
292 records under HIPAA or subsection (2), copies of the resident's
293 paper and electronic records that are in possession of the
294 facility. Such records must include any medical records and
295 records concerning the care and treatment of the resident
296 performed by the facility, except for progress notes and
297 consultation report sections of a psychiatric nature. The
298 facility shall provide the requested records within 14 working
299 days after receipt of a request relating to a current resident

Amendment No. 1

300 or within 30 working days after receipt of a request relating to
301 a former resident.

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

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

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

311 (c) If no judicial appointment has been made as provided
312 in paragraph (a) or no person has been designated by the
313 resident in a last will as provided in paragraph (b), only the
314 following individuals:

315 1. A surviving spouse.

316 2. If there is no surviving spouse, a surviving child of
317 the resident.

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

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

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

Amendment No. 1

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

328 (c) Paragraph (2)(c) must be accompanied by a letter from
329 the person's attorney verifying the person's relationship to the
330 resident and the absence of a court-appointed representative and
331 self-proved last will.

332 (4) A nursing home facility may charge a reasonable fee
333 for the copying of resident records. Such fee may not exceed \$1
334 per page for the first 25 pages and 25 cents per page for each
335 additional page. The facility shall allow a person who is
336 authorized to act on behalf of the resident to examine the
337 original records, microfilms, or other suitable reproductions of
338 the records in its possession upon any reasonable terms imposed
339 by the facility to ensure that the records are not damaged,
340 destroyed, or altered.

341 (5) If a nursing home facility determines that disclosure
342 of the records to the resident would be detrimental to the
343 physical or mental health of the resident, the facility may
344 refuse to furnish the record directly to the resident; however,
345 upon such refusal, the resident's records shall, upon written
346 request by the resident, be furnished to any other medical
347 provider designated by the resident.

348 (6) A nursing home facility that in good faith and in
349 reliance upon this section releases copies of records shall be
350 indemnified by the party who requested the records pursuant to

Amendment No. 1

351 subsection (2) for any damages resulting from such release, and
352 may not be found to have violated any criminal or civil laws,
353 and is not civilly liable to the resident, the resident's
354 estate, or any other person for any damages resulting from such
355 release.

356 (7) A nursing home facility is not required to provide
357 copies of a resident's records requested pursuant to this
358 section more than once per month, except that copies of
359 physician reports in the resident's records must be provided as
360 often as necessary to allow the effective monitoring of the
361 resident's condition.

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

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

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

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

371

372

373

374

T I T L E A M E N D M E N T

375

Remove everything before the enacting clause and insert:

376

A bill to be entitled

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 569 (2014)

Amendment No. 1

377 An act relating to nursing home litigation; amending s. 400.023,
378 F.S.; specifying that a cause of action for negligence or
379 violation of residents' rights alleging direct or vicarious
380 liability for the injury or death of a nursing home resident may
381 be brought against a licensee, its management or consulting
382 company, its managing employees, and any direct caregiver
383 employees or contractors; providing that a cause of action may
384 not be asserted against other individuals or entities except
385 under certain circumstances; revising related judicial
386 procedures; defining terms; amending s. 400.0237, F.S.;
387 providing that a claim for punitive damages may not be brought
388 unless there is a showing of evidence that provides a reasonable
389 basis for recovery of such damages when certain criteria are
390 applied; requiring the court to conduct a hearing to determine
391 whether there is sufficient evidence to demonstrate that the
392 recovery of punitive damages is warranted; requiring the trier
393 of fact to find that a specific person or corporate defendant
394 participated in or engaged in conduct that constituted gross
395 negligence and contributed to the damages or injury suffered by
396 the claimant before a defendant may be held liable for punitive
397 damages; requiring an officer, director, or manager of the
398 employer, corporation, or legal entity to condone, ratify, or
399 consent to specified conduct before holding such person or
400 entity vicariously liable for punitive damages; creating s.
401 400.024, F.S.; authorizing the Agency for Health Care
402 Administration to revoke the license or deny a license renewal

170533 - h0569-strike.docx

Published On: 3/20/2014 6:16:03 PM

Amendment No. 1

403 or change of ownership application of a nursing home facility
404 that fails to pay a judgment or settlement agreement; providing
405 for notification to the agency of such failure and for agency
406 notification to the licensee of disciplinary action; providing
407 licensee grounds for overcoming failure to pay; authorizing the
408 agency to issue an emergency order and notice of intent to
409 revoke or deny a license; authorizing the agency to deny a
410 license renewal and requiring the agency to deny a change of
411 ownership; amending s. 400.145, F.S.; revising procedures for
412 obtaining the records of a resident; specifying which records
413 may be obtained and who may obtain them; providing immunity from
414 liability to a facility that provides such records in good
415 faith; providing that the agency may not cite a facility that
416 does not meet these records requirements; providing
417 applicability; providing an effective date.