

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Health Policy

BILL: SB 670

INTRODUCER: Senator Thrasher

SUBJECT: Nursing Home Litigation

DATE: February 8, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Stovall	HP	Pre-meeting
2.			JU	
3.			RC	

I. Summary:

SB 670 amends statutory provisions relating to civil causes of action against nursing homes. The bill:

- Limits the class of persons who may be sued for a violation of a nursing home resident's rights to only the nursing home licensee, a management company employed by a nursing home licensee, or a direct caregiver employee without a preliminary evidentiary hearing.
- Requires the court to hold an evidentiary hearing to determine if sufficient evidence or a reasonable basis exists to find that a person or entity other than the nursing home licensee, the management company for the nursing home, or a direct caregiver owed a specific legal duty to the resident, breached that duty, and the breach of that duty is the legal cause of actual loss, injury, damage, or death to the resident.
- Makes certain provisions of law the exclusive remedy against a nursing home licensee management company for a cause of action for the recovery damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of a resident's statutory rights.
- Requires the court to hold an evidentiary hearing before allowing a claim for punitive damages to proceed.
- Prohibits the use of a state or federal survey report of nursing facilities to establish an entitlement to punitive damages.

II. Present Situation:

"Nursing Homes and Related Health Care Facilities" is the subject of ch. 400, F.S. Part I of ch. 400, F.S., establishes the Office of State Long-Term Care Ombudsman, the State Long-Term Care Ombudsman Council, and the local long-term care ombudsman councils. Part II of ch. 400, F.S., provides for the regulation of nursing homes, and part III of ch. 400, F.S., provides for the regulation of home health agencies.

The Agency for Health Care Administration (AHCA) is charged with the responsibility of developing rules related to the operation of nursing homes. Section 400.022, F.S., specifies the rights and responsibilities of nursing home residents. Section 400.023, F.S., creates a statutory cause of action against nursing homes that violate the statutory rights of residents. The action may be brought in any court to enforce the resident's rights and to recover actual and punitive damages for any violation of a resident's statutory rights or for negligence.¹ Prevailing plaintiffs may be entitled to recover reasonable attorney fees plus costs of the action along with actual and punitive damages.²

Sections 400.023-400.0238, F.S., provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of a resident's statutory rights. A claim for punitive damages is not permitted 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.³ 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 misconduct or gross negligence as defined in s. 400.0237(2), F.S.⁴

In the case of an employer, principal, corporation, or other entity, punitive damages may be imposed for conduct of an employee or agent only for intentional misconduct or gross negligence which is proven by clear and convincing evidence, and if the employer actively and knowingly participated in the conduct, ratified or consented to the conduct, or engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.⁵

Named Defendants and Causes of Action in Nursing Home Cases

Section 400.023, F.S., provides that "any resident whose rights as specified in this part are violated shall have a cause of action." However, the section does not indicate who may be named as a defendant. Current law in ss. 400.023-400.0238, F.S., provides the exclusive remedy for a cause of action for personal injury or death of a nursing home resident or a violation of the resident's rights statute. Current law further provides that s. 400.023, F.S., "does not preclude theories of recovery not arising out of negligence or s. 400.022[, F.S.,] which are available to the resident or to the [Agency for Health Care Administration]."

Liability of Employees, Officers, Directors, or Owners

In *Estate of Canavan v. National Healthcare Corp.*, 889 So. 2d 825 (Fla. 2d DCA 2004), the court considered whether the managing member of a limited liability company could be held personally liable for damages suffered by a resident in a nursing home. The claimant argued the managing member, Friedbauer, could be held liable.

¹ Sections 400.023 and 400.0237, F.S.

² *Id.*

³ Section 400.0237(1), F.S.

⁴ Section 400.0237(2), F.S.

⁵ Section 400.0237(3), F.S.

[The claimant] argues that the concept of piercing the corporate veil does not apply in the case of a tort, and that it presented sufficient evidence of Friedbauer's negligence, by act or omission, for the jury to reasonably conclude that Friedbauer caused harm to Canavan. [The claimant] argues that Friedbauer had the responsibility of approving the budget for the nursing home. He also functioned as the sole member of the "governing body" of the nursing home, and pursuant to federal regulation 42 C.F.R. § 483.75(d) 2002, the governing body is legally responsible for establishing and implementing policies regarding the management and operation of the facility and for appointing the administrator who is responsible for the management of the facility. Friedbauer was thus required by federal mandate to create, approve, and implement the facility's policies and procedures. Because he ignored complaints of inadequate staffing while cutting the operating expenses, and because the problems Canavan suffered, pressure sores, infections, poor hygiene, malnutrition and dehydration, were the direct result of understaffing, [The claimant] argues that a reasonable jury could have found that Friedbauer's elevation of profit over patient care was negligent.⁶

The trial court granted a directed verdict in favor of Friedbauer, finding that there was no basis upon which a corporate officer could be held liable. On appeal, the district court reversed:

We conclude that the trial court erred in granting the directed verdict because there was evidence by which the jury could have found that Friedbauer's negligence in ignoring the documented problems at the facility contributed to the harm suffered by Canavan. This was not a case in which the plaintiffs were required to pierce the corporate veil in order to establish individual liability because Friedbauer's alleged negligence constituted tortious conduct, which is not shielded from individual liability. We, therefore, reverse the order granting the directed verdict and remand for a new trial against Friedbauer.⁷

Elements in a Civil Action Under s. 400.023, F.S.

Section 400.023(2), F.S., provides that in any claim alleging a violation of a resident's rights or alleging that negligence caused injury to or the death of a resident, the claimant must prove, by a preponderance of the evidence:

⁶ *Estate of Canavan v. National Healthcare Corp.*, 889 So. 2d 825, 826 (Fla. 2d DCA 1994).

⁷ *Estate of Canavan v. National Healthcare Corp.*, 889 So. 2d 825, 826-827 (Fla. 2d DCA 1994)(citations omitted). One author has criticized the *Canavan* decision as "arguably an example of personal liability founded on business decisions normally protected by the 'business judgment rule,' which immunizes directors' business decisions from claims founded on simple negligence." Christopher A. Cazin, *Personal Liability Exposure for Nursing Home Operators: Canavan's Encroachment on the Business Judgment Rule*, 85 FLA. B.J. 46, 46 (May 2011). "Under the [business judgment rule], a company's directors are given liberal discretion to make management and policy decisions, and a court should not substitute its judgment for that of the directors." *Id.* (citing *Lobato-Bleidt v. Lobato*, 668 So. 2d 431, 434 (Fla. 5th DCA 1997)).

- The defendant owed a duty to the resident;
- The defendant breached the duty to the resident;
- The breach of the duty 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.

The Florida Supreme Court has set forth the elements of a negligence action:

1. A duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the [defendant's] part to conform to the standard required: a breach of the duty....
3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
4. Actual loss or damage....⁸

Current law provides in any claim brought pursuant to s. 400.023, F.S., a licensee, person, or entity has the duty to exercise "reasonable care" and nurses⁹ have the duty to exercise care "consistent with the prevailing professional standard of care."¹⁰

Punitive Damages

Current law provides for recovery of punitive damages by a claimant. Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."¹¹ Punitive damages are generally limited to three times the amount of compensatory damages or \$1 million, whichever is greater.¹² Damages can exceed \$1 million if the jury finds that the wrongful conduct was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant.¹³ If the jury finds that the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there is no cap on punitive damages.¹⁴

⁸ *United States v. Stevens*, 994 So. 2d 1062, 1065-66 (Fla. 2008).

⁹ "The prevailing professional standard of care for a nurse shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar nurses." s. 400.023(4), F.S.

¹⁰ See s. 400.023(3) and (4), F.S.

¹¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

¹² See s. 400.0238(1)(a), F.S.

¹³ See s. 400.0238(1)(b), F.S.

¹⁴ See s. 400.0238(1)(c), F.S.

Evidentiary Requirements to Bring a Punitive Damages Claim

Section 400.0237(1), F.S., provides:

In any action for damages brought under this part, no claim for punitive damages shall be permitted 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. 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. The rules of civil procedure shall 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. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

A court discussed how a claimant can make a proffer to assert a punitive damages claim:

[A] ‘proffer’ according to traditional notions of the term, connotes merely an ‘offer’ of evidence and neither the term standing alone nor the statute itself calls for an adjudication of the underlying veracity of that which is submitted, much less for countervailing evidentiary submissions. Therefore, a proffer is merely a representation of what evidence the defendant proposes to present and is not actual evidence. A reasonable showing by evidence in the record would typically include depositions, interrogatories, and requests for admissions that have been filed with the court. Hence, an evidentiary hearing where witnesses testify and evidence is offered and scrutinized under the pertinent evidentiary rules, as in a trial, is neither contemplated nor mandated by the statute in order to determine whether a reasonable basis has been established to plead punitive damages.^{15, 16}

Punitive damages claims are often raised after the initial complaint has been filed. Once a claimant discovers enough evidence that the claimant believes justifies a punitive damages claim, the claimant files a motion to amend the complaint to add a punitive damages action. The trial judge considers the evidence presented and proffered by the claimant to determine whether the claim should proceed.

Individual Liability for Punitive Damages

Section 400.0237(2), F.S., provides:

¹⁵ *Estate of Despain v. Avante Group, Inc.*, 900 So. 2d 637, 642 (Fla. 5th DCA 2005)(internal citations omitted).

¹⁶ The *Despain* court was discussing a prior version of the punitive damages statute relating to nursing home litigation, but the language on proffering in that statute is the same as that in current law.

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 misconduct¹⁷ or gross negligence.¹⁸

Vicarious Liability for Punitive Damages

Punitive damages claims are sometimes brought under a theory of vicarious liability where an employer is held responsible for the acts of an employee. Section 400.0273(3), F.S., provides:

In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2)¹⁹ and:

- (a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;
- (b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity condoned, ratified, or consented to such conduct; or
- (c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

III. Effect of Proposed Changes:

Section 1 amends s. 400.023, F.S., as follows:

Named Defendants in Nursing Home Cases

The bill provides that any resident who alleges negligence or a violation of nursing home resident's rights has a cause of action against the licensee, the licensee's management company, or the licensee's direct caregiver employees. In effect, the bill limits the persons who may be sued to only the nursing home licensee, the management company for the nursing home licensee, or a direct caregiver employee, without a preliminary evidentiary hearing.

Liability of those Other than a Nursing Home Licensee, a Management Company Employed by the Nursing Home Licensee, or a Direct Caregiver Employee

The bill places limitations on a cause of action that may be asserted against a person or entity that is not the nursing home licensee, a management company employed by the nursing home licensee, or a direct caregiver employee. As a prerequisite to asserting such actions, after sufficient notice and opportunity to defend, the court must determine there is sufficient evidence in the record or a reasonable basis for the finding that person or entity owed a specific legal duty

¹⁷ "Intentional misconduct" is actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant will result and, despite that knowledge, intentionally pursuing a course of conduct that results in injury or damage. *See* s. 400.0237(2)(a), F.S.

¹⁸ "Gross negligence" is conduct that is so reckless or wanting in care such that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct. *See* s. 400.0237(2)(b), F.S.

¹⁹ Criteria are whether the defendant was personally guilty of intentional misconduct or gross negligence.

to the resident. The court must also find that the duty to that person or entity was breached and that the breach of that duty is the legal cause of actual loss, damage, or death to the resident.

The court must make this finding at an evidentiary hearing after considering evidence in the record and proffered by the claimant.

Causes of Action in Nursing Home Cases

Section 400.023, F.S., states that “any resident whose rights as specified in this part are violated shall have a cause of action.” An aggrieved nursing home resident may sue under the statute,²⁰ and may sue under other appropriate legal theories. A remedy created by statute may only supplant other statutory and common law remedies if the statute specifically states that it is an exclusive remedy.²¹ Section 400.023, F.S., is not an exclusive remedy statute.²²

The bill amends s. 400.023, F.S., to provide that the provisions of ss. 400.023 – 400.0238, F.S., are the exclusive remedy against a nursing home licensee or management company for a cause of action for recovery of personal injury or death of a nursing home resident arising out of negligence or a violation of a resident’s statutory rights.

Section 2 amends s. 400.0237, F.S.

Evidentiary Requirements to Bring a Punitive Damages Claim

The bill provides that a claimant may not bring a claim for punitive damages unless admissible evidence submitted by the parties provides a reasonable basis for the recovery of punitive damages. The bill requires the court to conduct an evidentiary hearing where both sides present evidence. The judge must find that a reasonable basis exists to believe that the claimant will be able to demonstrate, by clear and convincing evidence, that the recovery of punitive damages is warranted. These requirements limit a judge to considering only admissible evidence.

Current law does not require a showing of admissibility at this stage of the proceedings or authorize the claimant and defendant to present evidence before a judge authorizes a claim for punitive damages. Current law contemplates that the claimant will proffer evidence and the court, considering the proffer in the light most favorable to the claimant, will determine whether reasonable basis exists to allow the claimant’s punitive damages case to proceed.²³ Under the bill, the claimant may not proceed with discovery on the defendant’s net worth until after the trial judge approves the pleading on punitive damages.

Current law provides that the rules of civil procedure are to be liberally construed to allow the claimant discovery of admissible evidence on the issue of punitive damages. The bill removes that provision from statute. Discovery in civil cases is governed by the Florida Rules of Civil

²⁰ Section 400.023, F.S.

²¹ *St. Angelo v. Healthcare and Retirement Corp. of America*, 824 So. 2d 997, 999 (Fla. 4th DCA 2002).

²²“Appellant has sufficiently alleged violations of right which are guaranteed him under section 400.022[, F.S.]. Nothing in the statute precludes this lawsuit or requires appellant to first bring a simple negligence action.” *Id.* at 1000.

²³ See *Estate of Despain*, *supra*, note 16.

Procedure. Because the rules govern discovery, the effect of removing the provision, if any, is not clear.

Individual Liability for Punitive Damages

The bill provides that a defendant, including the licensee or management company against whom punitive damages is sought, may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that “a specific person or corporate defendant actively and knowingly participated in intentional misconduct or engaged in conduct that constitutes gross negligence and contributed to the loss, damages, or injury suffered by the claimant.”

The current standard jury instructions provide for punitive damages if the defendant was “personally guilty of intentional misconduct.”²⁴ The bill requires that the defendant “actively and knowingly participated in intentional misconduct.”

Vicarious Liability for Punitive Damages

The bill provides that in the case of vicarious liability of an employer, principal, corporation, or other legal entity, punitive damages may not be imposed for the conduct of an employee or agent unless:

- An identified employee or agent actively and knowingly participated in intentional misconduct, or engaged in conduct that constituted gross negligence, and that conduct contributed to the loss, damages, or injury suffered by the claimant; and,
- An officer, director, or manager of the actual employer corporation or legal entity condoned, ratified, or consented to the specific conduct alleged.

The bill provides that a state or federal survey report of nursing facilities may not be used to establish an entitlement to punitive damages.

Effective Date

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

²⁴ Standard Jury Instructions in Civil Cases, 503.1, Punitive Damages - Bifurcated Procedure *available at* http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#500 (last visited Mar. 9, 2013).

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 400.023 and 400.0237.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.