

By Representatives Melvin, Wise and Goode

1                                   A bill to be entitled  
2           An act relating to nursing homes; amending s.  
3           400.023, F.S.; specifying and limiting persons  
4           who may bring an action to enforce the rights  
5           of a resident; deleting authority for recovery  
6           of attorney's fees and costs; restricting  
7           liability for a physician's medical negligence  
8           to services rendered by a medical director  
9           acting in that capacity; specifying experience  
10          required by a physician or nurse who provides a  
11          statement verifying deprivation or infringement  
12          of adequate and appropriate health care;  
13          providing conditions for waiver of the verified  
14          statement requirement when the nursing home  
15          fails to provide records; revising conditions  
16          for award of punitive damages and limiting the  
17          amount of such awards; providing the claimant's  
18          burden of proving an injury was caused by the  
19          nursing home; providing a statute of  
20          limitation; specifying information required to  
21          be included in the complaint and providing for  
22          amendments thereto; prohibiting certain  
23          discovery or introduction of other evidence;  
24          providing for dismissal of complaints;  
25          providing for effect of an unintentional lack  
26          of documentation that at service was provided;  
27          providing an effective date.

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29   Be It Enacted by the Legislature of the State of Florida:  
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1 Section 1. Section 400.023, Florida Statutes, is  
2 amended to read:

3 400.023 Civil enforcement.--

4 (1)(a) Any resident whose rights as specified in this  
5 part are deprived or infringed upon shall have a cause of  
6 action against any licensee responsible for the violation.  
7 The action may be brought only by the resident or his or her  
8 guardian, by the state ombudsman council ~~a person or~~  
9 ~~organization~~ acting on behalf of a resident with the consent  
10 of the resident or his or her guardian, or by the personal  
11 representative of the estate of a deceased resident when the  
12 cause of death resulted from the deprivation or infringement  
13 of the decedent's rights, notwithstanding any other survival  
14 statute to the contrary.

15 (b) The action may be brought in any court of  
16 competent jurisdiction to enforce such rights and to recover  
17 actual, but not nominal, damages directly caused by ~~and~~  
18 ~~punitive damages for~~ any deprivation or infringement on the  
19 rights of a resident. ~~Any plaintiff who prevails in any such~~  
20 ~~action may be entitled to recover reasonable attorney's fees,~~  
21 ~~costs of the action, and damages, unless the court finds that~~  
22 ~~the plaintiff has acted in bad faith, with malicious purpose,~~  
23 ~~and that there was a complete absence of a justiciable issue~~  
24 ~~of either law or fact. Prevailing defendants may be entitled~~  
25 ~~to recover reasonable attorney's fees pursuant to s. 57.105.~~  
26 ~~The remedies provided in this section are in addition to and~~  
27 ~~cumulative with other legal and administrative remedies~~  
28 ~~available to a resident and to the agency.~~

29 (2) ~~Attorneys' fees shall be based on the following~~  
30 ~~criteria:~~

31 (a) ~~The time and labor required;~~

1           ~~(b) The novelty and difficulty of the questions;~~  
2           ~~(c) The skill requisite to perform the legal service~~  
3 ~~properly;~~  
4           ~~(d) The preclusion of other employment by the attorney~~  
5 ~~due to the acceptance of the case;~~  
6           ~~(e) The customary fee;~~  
7           ~~(f) Whether the fee is fixed or contingent;~~  
8           ~~(g) The amount involved or the results obtained;~~  
9           ~~(h) The experience, reputation, and ability of the~~  
10 ~~attorneys;~~  
11           ~~(i) The costs expended to prosecute the claim;~~  
12           ~~(j) The type of fee arrangement between the attorney~~  
13 ~~and the client;~~  
14           ~~(k) Whether the relevant market requires a contingency~~  
15 ~~fee multiplier to obtain competent counsel;~~  
16           ~~(l) Whether the attorney was able to mitigate the risk~~  
17 ~~of nonpayment in any way.~~  
18           (2)(3) A licensee shall not be liable for the medical  
19 negligence of any physician rendering care or treatment to the  
20 resident except for the services of a medical director, acting  
21 in the capacity of medical director and not as a private  
22 physician, as required in this part. Nothing in this  
23 ~~subsection shall be construed to protect a licensee from~~  
24 ~~liability for failure to provide a resident with appropriate~~  
25 ~~observation, assessment, nursing diagnosis, planning,~~  
26 ~~intervention, and evaluation of care by nursing staff.~~  
27           (3)(4) Claimants alleging a deprivation or  
28 infringement of adequate and appropriate health care pursuant  
29 to s. 400.022(1)(k) which resulted in personal injury to or  
30 the death of a resident shall conduct an investigation which  
31 shall include a review by a licensed physician or registered

1 nurse familiar with the standard of nursing care for nursing  
2 home residents pursuant to this part. Such physician or nurse  
3 shall have a minimum of 5 years' experience within the last 10  
4 years as a medical director or nurse in a facility licensed as  
5 a nursing home by this part. Any complaint alleging such a  
6 deprivation or infringement shall be accompanied by a verified  
7 statement from such physician or nurse ~~the reviewer~~ that there  
8 exists reason to believe that a deprivation or infringement  
9 occurred during the resident's stay at the nursing home. Such  
10 opinion shall be based on records or other information  
11 available at the time that suit is filed. Failure of the  
12 nursing home to provide records in accordance with the  
13 requirements of this chapter after reasonable notice and the  
14 receipt of a properly executed records release shall waive the  
15 requirement of the verified statement.

16 ~~(4)(5)~~ For the purpose of this section, punitive  
17 damages may be awarded for intentional misconduct ~~conduct~~  
18 which is a willful, wanton, gross, or flagrant violation of,  
19 ~~reckless, or consciously indifferent to~~ the rights of the  
20 resident. Notwithstanding any other provision of law, the  
21 amount of punitive damages awarded shall not exceed three  
22 times the amount of actual damages recovered.

23 (5) The existence of an injury shall not create any  
24 inference or presumption of negligence against a licensee.  
25 The claimant must maintain the burden of proving that an  
26 injury was proximately caused by the licensee.

27 (6) Actions brought under this chapter shall be  
28 considered medical malpractice actions for statute of  
29 limitation purposes.

30 (7) The plaintiff shall include in the complaint filed  
31 in the action a detailed specification and factual description

1 of each act and omission alleged by plaintiff to render the  
2 licensee liable to the plaintiff. The plaintiff shall timely  
3 amend his or her complaint upon determination of new or  
4 different acts or omissions upon which his or her claim is  
5 based. However, any such amendment must be made at least 90  
6 days before trial. The plaintiff shall be prohibited from  
7 conducting discovery with regard to any other act or omission  
8 or from introducing at trial evidence of any other act or  
9 omission. Any complaint which fails to include such detailed  
10 specification and factual description of each act and omission  
11 shall be subject to dismissal for failure to state a claim  
12 upon which relief can be granted.

13 (8) In cases brought under this chapter, unintentional  
14 lack of documentation that a service was provided by a  
15 licensee shall not create a presumption that the service was  
16 not rendered. A plaintiff shall not prevail in an action  
17 brought under this chapter if the sole basis for the action is  
18 the unintentional lack of documentation.

19 Section 2. This act shall take effect October 1, 1997.  
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HOUSE SUMMARY

Specifies and limits the persons who may bring actions to enforce the rights of a nursing home resident. Deletes authority for recovery of attorney's fees and costs. Restricts the nursing home's liability for a physician's medical negligence to services rendered by a medical director acting in that capacity. Specifies the experience required by a physician or registered nurse who provides a statement verifying that there is reason to believe deprivation or infringement of adequate and appropriate health care occurred. Permits waiver of requirement for such statement for failure of the nursing home to provide records, provided the nursing home received reasonable notice and a properly executed release to provide records. Revises conditions for award of punitive damages. Limits amount of such damages to three times the amount of actual damages recovered. Provides the claimant's burden of proving that an injury was caused by the nursing home. Provides that the statute of limitations for actions against nursing home is that for medical malpractice actions. Specifies the information required to be included in a complaint, provides for amendments thereto, and provides for dismissal of complaints that fail to include the required information. Prohibits discovery or the introduction of other evidence. Provides that the unintentional lack of documentation that a service was provided by a nursing home does not create a presumption that the service was not rendered.