

Amendment No. \_\_\_\_ (for drafter's use only)

	<u>Senate</u>	CHAMBER ACTION	<u>House</u>
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The Council for Healthy Communities offered the following:

**Substitute Amendment for Amendment (724613) (with title amendment)**

On page 83, line 27 through page 97, line 3  
remove from the bill: all said lines

and insert in lieu thereof:

Section 31. Effective July 1, 2001, and applicable to  
causes of action accruing on or after that date, section  
400.429, Florida Statutes, is amended to read:

400.429 Civil actions to enforce rights.--

(1) Any person or resident whose rights as specified  
in this part are violated shall have the right to pursue an  
administrative remedy or injunctive relief ~~a cause of action~~  
against any facility owner, administrator, or staff  
responsible for the violation. The action may be brought by  
the resident or his or her guardian, or 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 when the~~

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1 ~~cause of death resulted from a violation of the decedent's~~  
2 ~~rights, to enforce such rights. The action may be brought in~~  
3 ~~any court of competent jurisdiction to enforce such rights and~~  
4 ~~to recover actual damages, and punitive damages when~~  
5 ~~malicious, wanton, or willful disregard of the rights of~~  
6 ~~others can be shown. Any plaintiff who prevails in any such~~  
7 ~~action may be entitled to recover reasonable attorney's fees~~  
8 ~~and costs of the action, and damages, unless the court finds~~  
9 ~~that the plaintiff has acted in bad faith, with malicious~~  
10 ~~purpose, and that there was a complete absence of a~~  
11 ~~justiciable issue of either law or fact. A prevailing~~  
12 ~~defendant may be entitled to recover reasonable attorney's~~  
13 ~~fees pursuant to s. 57.105. The remedies provided in this~~  
14 ~~section are in addition to and cumulative with other legal and~~  
15 ~~administrative remedies available to a resident or to the~~  
16 ~~agency.~~

17 (2) Notwithstanding the remedies provided in (1), a  
18 resident, his or her guardian, or the personal representative  
19 of the estate of a deceased resident shall have a cause of  
20 action for recovery of damages for personal injury or death  
21 against a licensee which may be brought based upon negligence,  
22 breach of contract or any other applicable statute not  
23 included in chapter 400. Such a claim shall be governed by the  
24 following:

25 (a) In any claim for negligence, the claimant has the  
26 burden of proving by a preponderance of the evidence that:

- 27 1. Each defendant had an established duty to the  
28 resident;  
29 2. Each defendant breached that duty;  
30 3. The breach of that duty is the proximate cause of  
31 the personal injury to, or the death of, the resident; and

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1           4. The proximate cause of the personal injury or death  
2 resulted in damages.

3           (b) For purposes of (a), a licensee breaches its  
4 established duty to the resident when it fails to provide a  
5 standard of care that a reasonably prudent licensed assisted  
6 living facility would have provided to the resident under  
7 similar circumstances.

8           (c) Sections 768.16-768.26 apply to a claim in which  
9 the resident has died as a result of the facility's breach of  
10 an established duty to the resident. In addition to any other  
11 damages, the personal representative may recover on behalf of  
12 the estate pursuant to ss. 768.16-768.26. The personal  
13 representative may also recover on behalf of the estate  
14 noneconomic damages for the resident's pain and suffering from  
15 the time of injury until the time of death.

16           (d) An action for damages must be commenced within 2  
17 years after the date on which the incident giving rise to the  
18 action occurred or within 2 years after the date on which the  
19 incident is discovered, or should have been discovered with  
20 the exercise of due diligence. However, the action may not be  
21 commenced later than 4 years after the date of the incident or  
22 occurrence out of which the cause of action accrued. In any  
23 action covered by this subsection in which it is shown that  
24 fraud, concealment, or intentional misrepresentation of fact  
25 prevented the discovery of the injury, the period of  
26 limitation is extended forward 2 years from the time that the  
27 injury is discovered, or should have been discovered with the  
28 exercise of due diligence, but such period may not in any  
29 event exceed 7 years after the date that the incident giving  
30 rise to the injury occurred.

31           (3) In any civil action brought against any facility

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1 owner, administrator, or staff in which punitive damages are  
2 sought, the following provisions shall apply:~~(2) To recover~~  
3 ~~attorney's fees under this section, the following conditions~~  
4 ~~precedent must be met:~~  
5       ~~(a) Within 120 days after the filing of a responsive~~  
6 ~~pleading or defensive motion to a complaint brought under this~~  
7 ~~section and before trial, the parties or their designated~~  
8 ~~representatives shall meet in mediation to discuss the issues~~  
9 ~~of liability and damages in accordance with this paragraph for~~  
10 ~~the purpose of an early resolution of the matter.~~  
11       ~~1. Within 60 days after the filing of the responsive~~  
12 ~~pleading or defensive motion, the parties shall:~~  
13           ~~a. Agree on a mediator. If the parties cannot agree on~~  
14 ~~a mediator, the defendant shall immediately notify the court,~~  
15 ~~which shall appoint a mediator within 10 days after such~~  
16 ~~notice.~~  
17           ~~b. Set a date for mediation.~~  
18           ~~c. Prepare an order for the court that identifies the~~  
19 ~~mediator, the scheduled date of the mediation, and other terms~~  
20 ~~of the mediation. Absent any disagreement between the parties,~~  
21 ~~the court may issue the order for the mediation submitted by~~  
22 ~~the parties without a hearing.~~  
23       ~~2. The mediation must be concluded within 120 days~~  
24 ~~after the filing of a responsive pleading or defensive motion.~~  
25 ~~The date may be extended only by agreement of all parties~~  
26 ~~subject to mediation under this subsection.~~  
27       ~~3. The mediation shall be conducted in the following~~  
28 ~~manner:~~  
29           ~~a. Each party shall ensure that all persons necessary~~  
30 ~~for complete settlement authority are present at the~~  
31 ~~mediation.~~

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1           ~~b. Each party shall mediate in good faith.~~  
2           ~~4. All aspects of the mediation which are not~~  
3 ~~specifically established by this subsection must be conducted~~  
4 ~~according to the rules of practice and procedure adopted by~~  
5 ~~the Supreme Court of this state.~~  
6           ~~(b) If the parties do not settle the case pursuant to~~  
7 ~~mediation, the last offer of the defendant made at mediation~~  
8 ~~shall be recorded by the mediator in a written report that~~  
9 ~~states the amount of the offer, the date the offer was made in~~  
10 ~~writing, and the date the offer was rejected. If the matter~~  
11 ~~subsequently proceeds to trial under this section and the~~  
12 ~~plaintiff prevails but is awarded an amount in damages,~~  
13 ~~exclusive of attorney's fees, which is equal to or less than~~  
14 ~~the last offer made by the defendant at mediation, the~~  
15 ~~plaintiff is not entitled to recover any attorney's fees.~~  
16           ~~(c) This subsection applies only to claims for~~  
17 ~~liability and damages and does not apply to actions for~~  
18 ~~injunctive relief.~~  
19           ~~(d) This subsection applies to all causes of action~~  
20 ~~that accrue on or after October 1, 1999.~~  
21           (a)(3) Discovery of financial information for the  
22 purpose of determining the value of punitive damages may not  
23 be had unless the plaintiff shows the court by proffer or  
24 evidence in the record that a reasonable basis exists to  
25 support a claim for punitive damages.  
26           (b)(4) In addition to any other standards for  
27 punitive damages, any award of punitive damages must be  
28 reasonable in light of the actual harm suffered by the  
29 resident and the egregiousness of the conduct that caused the  
30 actual harm to the resident.  
31           (c) The plaintiff may recover punitive damages when

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1 malicious, wanton, reckless or willful disregard of the rights  
2 of others can be shown.

3 (d) Notwithstanding any other law to the contrary,  
4 punitive damages may not exceed three times the amount of  
5 compensatory damages awarded to each person entitled thereto  
6 by the trier of fact and the amount shall be equally divided  
7 between the claimant and the Quality of Long-Term Care  
8 Facility Improvement Trust Fund, in accordance with the  
9 following provisions:

10 1. The clerk of the court shall transmit a copy of the  
11 jury verdict to the State Treasurer by certified mail. In the  
12 final judgment the court shall order the percentages of the  
13 award, payable as provided herein.

14 2. A settlement agreement entered into between the  
15 original parties to the action after a verdict has been  
16 returned must provide a proportionate share payable to the  
17 Quality of Long-Term Care Facility Improvement Trust Fund  
18 specified herein. For purposes of this paragraph, a  
19 proportionate share is a 50-percent share of that percentage  
20 of the settlement amount which the punitive damages portion of  
21 the verdict bore to the total of the compensatory and punitive  
22 damages in the verdict.

23 3. The Department of Banking and Finance shall collect  
24 or cause to be collected all payments due the state under this  
25 section. Such payments are made to the Comptroller and  
26 deposited in the appropriate fund specified in this  
27 subsection.

28 4. If the full amount of punitive damages awarded  
29 cannot be collected, the claimant and the other recipient  
30 designated pursuant to this subsection are each entitled to a  
31 proportionate share of the punitive damages collected.

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1           5. Claimant's attorney's fees, if payable from the  
2 judgment, are, to the extent that they are based on the  
3 punitive damages, calculated based only on the portion of the  
4 judgment payable to the claimant as provided in this  
5 subsection. Nothing herein limits the payment of attorney's  
6 fees based upon the award of damages other than punitive  
7 damages.

8           (e) The limitations contained in (d) may be exceeded  
9 if the claimant demonstrates to the court by clear and  
10 convincing evidence that the conduct found by the trier of  
11 fact for which punitive damages were awarded amounted to  
12 intentional misconduct as defined in s. 768.72(2)(a). Any  
13 amount above the limitations in (d) allowed by the court shall  
14 be divided as directed therein.

15           Section 32. Subsection (3) of section 400.4275,  
16 Florida Statutes, is amended to read:

17           400.4275 Business practice; personnel records;  
18 liability insurance.--The assisted living facility shall be  
19 administered on a sound financial basis that is consistent  
20 with good business practices.

21           (3) The administrator or owner of a facility shall  
22 maintain liability insurance coverage that is in force at all  
23 times. If for any reason the facility is unable to comply with  
24 this requirement, it shall immediately notify the agency. The  
25 agency may, upon the showing of good cause and subject to an  
26 agency approved corrective action plan, grant a temporary  
27 waiver from the requirement for liability insurance not to  
28 exceed twelve months.

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1 ===== T I T L E A M E N D M E N T =====  
2 And the title is amended as follows:  
3       On page 1, lines 16-18  
4 remove from the title of the bill: all said lines  
5  
6 and insert in lieu thereof:  
7       providing penalties; amending s. 400.023, F.S.;  
8       providing for civil actions to enforce nursing  
9       home rights;  
10       and on page 2, line 8, remove "and 400.430"  
11       and on page 5, line 28 after the semicolon insert:  
12 amending s. 400.429, F.S., providing procedures for civil  
13 causes of action and seeking punitive damages; amending s.  
14 400.4275, F.S.; providing for temporary waiver from insurance  
15 requirements;  
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