

Amendment No. 02b (for drafter's use only)

	<u>Senate</u>	CHAMBER ACTION	<u>House</u>
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ORIGINAL STAMP BELOW

11 The Council for Ready Infrastructure offered the following:

13 **Amendment (with title amendment)**

14 On page 83, line 27 through page 101, line 24,
15 remove from the bill: all of said lines

17 and insert in lieu thereof:

18 Section 31. Effective July 1, 2001, and applying to
19 causes of action accruing on or after that date, section
20 400.429, Florida Statutes, is amended to read:

21 400.429 Civil actions to enforce rights.--

22 (1) Any person or resident whose rights as specified
23 in this part are violated shall have a cause of action for
24 long-term care facility negligence ~~against any facility owner,~~
25 ~~administrator, or staff responsible for the violation.~~ The
26 action may be brought by the resident or his or her guardian,
27 or by a person or organization acting on behalf of a resident
28 with the consent of the resident or his or her guardian, or by
29 the personal representative of the estate of a deceased
30 resident regardless of the cause of death ~~when the cause of~~
31 ~~death resulted from a violation of the decedent's rights, to~~

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1 ~~enforce such rights. If the action alleges a claim for the~~
2 ~~resident's rights or for negligence that caused the death of~~
3 ~~the resident, the claimant shall be required to elect either~~
4 ~~survival damages pursuant to s. 46.021 or wrongful death~~
5 ~~damages pursuant to s. 768.21. If the action alleges a claim~~
6 ~~for the resident's rights or for negligence that did not cause~~
7 ~~the death of the resident, the personal representative of the~~
8 ~~estate may recover damages for the negligence that caused~~
9 ~~injury to the resident. The action may be brought in any court~~
10 ~~of competent jurisdiction to enforce such rights and to~~
11 ~~recover actual damages, and punitive damages for any violation~~
12 ~~of the rights of a resident or negligence when malicious,~~
13 ~~wanton, or willful disregard of the rights of others can be~~
14 ~~shown. Any resident who prevails in seeking injunctive relief~~
15 ~~or a claim for an administrative remedy is entitled to recover~~
16 ~~the costs of the action and a reasonable attorney's fee~~
17 ~~assessed against the defendant not to exceed \$25,000. Fees~~
18 ~~shall be awarded solely for the injunctive or administrative~~
19 ~~relief and not for any claim or action for damages whether~~
20 ~~such claim or action is brought together with a request for an~~
21 ~~injunction or administrative relief or as a separate action,~~
22 ~~except as provided under s. 768.79 or the Florida Rules of~~
23 ~~Civil Procedure. Any plaintiff who prevails in any such action~~
24 ~~may be entitled to recover reasonable attorney's fees, costs~~
25 ~~of the action, and damages, unless the court finds that the~~
26 ~~plaintiff has acted in bad faith, with malicious purpose, and~~
27 ~~that there was a complete absence of a justiciable issue of~~
28 ~~either law or fact. A prevailing defendant may be entitled to~~
29 ~~recover reasonable attorney's fees pursuant to s. 57.105.~~
30 ~~Sections 400.429-400.4298 provide the exclusive remedy for a~~
31 ~~cause of action for recovery of damages for the personal~~

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1 injury or death of a nursing home resident arising out of
2 negligence or violation of rights specified in s. 400.022.
3 This section shall not be construed as precluding theories of
4 recovery not arising out of negligence or s. 400.022 that are
5 available to a resident or to the agency. The provisions of
6 chapter 766 do not apply to any cause of action brought under
7 ss. 400.429-400.4298.~~The remedies provided in this section~~
8 ~~are in addition to and cumulative with other legal and~~
9 ~~administrative remedies available to a resident or to the~~
10 ~~agency.~~

11 (2) In any claim for long-term care facility
12 negligence causing injury to or the death of a resident, the
13 claimant shall have the burden of proving, by a preponderance
14 of the evidence, that:

- 15 (a) The defendant owed a duty to the resident;
16 (b) The defendant breached the duty to the resident;
17 (c) The breach of the duty is a legal cause of loss,
18 injury, death or damage to the resident; and
19 (d) The resident sustained loss, injury, death, or
20 damage as a result of the breach.

21
22 Nothing in this part shall be interpreted to create strict
23 liability. A violation of the rights set forth in s. 400.428
24 or in any other standard or guidelines specified in this part
25 or in any applicable administrative standard or guidelines of
26 this state or a federal regulatory agency shall be evidence of
27 negligence but shall not be considered negligence per se.

28 (3) In any claim for long-term care facility
29 negligence, a licensee, person or entity shall have a duty to
30 exercise reasonable care. Reasonable care is that degree of
31 care which a reasonably careful licensee, person or entity

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1 would use under like circumstances.

2 (4) In any claim for long-term care facility
3 negligence, a nurse licensed under part I of chapter 464 shall
4 have the duty to exercise care consistent with the prevailing
5 professional standard of care for a nurse. The prevailing
6 professional standard of care for a nurse shall be that level
7 of care, skill, and treatment which, in light of all relevant
8 surrounding circumstances is recognized as acceptable and
9 appropriate by reasonably prudent similar nurses.~~To recover~~
10 ~~attorney's fees under this section, the following conditions~~
11 ~~precedent must be met:~~

12 ~~(a) Within 120 days after the filing of a responsive~~
13 ~~pleading or defensive motion to a complaint brought under this~~
14 ~~section and before trial, the parties or their designated~~
15 ~~representatives shall meet in mediation to discuss the issues~~
16 ~~of liability and damages in accordance with this paragraph for~~
17 ~~the purpose of an early resolution of the matter.~~

18 ~~1. Within 60 days after the filing of the responsive~~
19 ~~pleading or defensive motion, the parties shall:~~

20 ~~a. Agree on a mediator. If the parties cannot agree on~~
21 ~~a mediator, the defendant shall immediately notify the court,~~
22 ~~which shall appoint a mediator within 10 days after such~~
23 ~~notice.~~

24 ~~b. Set a date for mediation.~~

25 ~~c. Prepare an order for the court that identifies the~~
26 ~~mediator, the scheduled date of the mediation, and other terms~~
27 ~~of the mediation. Absent any disagreement between the parties,~~
28 ~~the court may issue the order for the mediation submitted by~~
29 ~~the parties without a hearing.~~

30 ~~2. The mediation must be concluded within 120 days~~
31 ~~after the filing of a responsive pleading or defensive motion.~~

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

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1 support a claim for punitive damages.

2 ~~(6)(4)~~ In addition to any other standards for punitive
3 damages, any award of punitive damages must be reasonable in
4 light of the actual harm suffered by the resident and the
5 egregiousness of the conduct that caused the actual harm to
6 the resident.

7 (7) The resident or their legal representative shall
8 serve a copy of any complaint, alleging in whole or in part,
9 the violation of any rights specified in this part to the
10 Agency for Health Care Administration at the tim of filing the
11 initial complaint with the Clerk of th Court for the county in
12 which the action is pursued.

13 Section 32. Effective July 1, 2001, and applying to
14 causes of action accruing on or after that date, section
15 400.4293, Florida Statutes, is created to read:

16 400.4293 Presuit notice; investigation; notification
17 of violation of residents' rights or alleged negligence;
18 claims evaluation procedure; informal discovery; review.--

19 (1) As used in this section, the term:

20 (a) "Claim for long-term care facility negligence"
21 means a negligence claim alleging injury to or the death of a
22 resident arising out of an asserted violation of the rights of
23 a resident under s. 400.428 or an asserted deviation from the
24 applicable standard of care.

25 (b) "Insurer" means any self-insurer authorized under
26 s. 627.357, liability insurance carrier, Joint Underwriting
27 Association, or any uninsured prospective defendant.

28 (2) Prior to filing a claim for long-term care
29 facility negligence, a claimant alleging injury to or the
30 death of a resident shall notify each prospective defendant by
31 certified mail, return receipt requested, of an asserted

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1 violation of a resident's rights provided in s. 400.428 or
2 deviation from the standard of care. Such notification shall
3 include an identification of the rights the prospective
4 defendant has violated and the negligence alleged to have
5 caused the incident or incidents and a brief description of
6 the injuries sustained by the resident which are reasonably
7 identifiable at the time of notice. The notice shall contain a
8 certificate of counsel that counsel's reasonable investigation
9 gave rise to a good-faith belief that grounds exist for an
10 action against each prospective defendant.

11 (3)(a) No suit may be filed for a period of 75 days
12 after notice is mailed to any prospective defendant. During
13 the 75-day period, the prospective defendants or their
14 insurers shall conduct an evaluation of the claim to determine
15 the liability of each defendant and to evaluate the damages of
16 the claimants. Each defendant or insurer of the defendant
17 shall have a procedure for the prompt evaluation of claims
18 during the 75-day period. The procedure shall include one or
19 more of the following:

20 1. Internal review by a duly qualified facility risk
21 manager or claims adjuster;

22 2. Internal review by counsel for each prospective
23 defendant;

24 3. A quality assurance committee authorized under any
25 applicable state or federal statutes or regulations;

26 4. Any other similar procedure that fairly and
27 promptly evaluates the claims.

28
29 Each defendant or insurer of the defendant shall evaluate the
30 claim in good faith.

31 (b) At or before the end of the 75 days, the defendant

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1 or insurer of the defendant shall provide the claimant with a
2 written response:

- 3 1. Rejecting the claim; or
4 2. Making a settlement offer.

5 (c) The response shall be delivered to the claimant if
6 not represented by counsel or to the claimant's attorney, by
7 certified mail, return receipt requested. Failure of the
8 prospective defendant or insurer of the defendant to reply to
9 the notice within 75 days after receipt shall be deemed a
10 rejection of the claim for purposes of this section.

11 (4) The notification of a claim for long-term care
12 facility negligence shall be served within the applicable
13 statute of limitations period; however, during the 75-day
14 period, the statute of limitations is tolled as to all
15 prospective defendants. Upon stipulation by the parties, the
16 75-day period may be extended and the statute of limitations
17 is tolled during any such extension. Upon receiving written
18 notice by certified mail, return receipt requested, of
19 termination of negotiations in an extended period, the
20 claimant shall have 60 days or the remainder of the period of
21 the statute of limitations, whichever is greater, within which
22 to file suit.

23 (5) No statement, discussion, written document,
24 report, or other work product generated by presuit claims
25 evaluation procedures under this section is discoverable or
26 admissible in any civil action for any purpose by the opposing
27 party. All participants, including, but not limited to,
28 physicians, investigators, witnesses, and employees or
29 associates of the defendant, are immune from civil liability
30 arising from participation in the presuit claims evaluation
31 procedure. Any licensed physician or registered nurse may be

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1 retained by either party to provide an opinion regarding the
2 reasonable basis of the claim. The presuit opinions of the
3 expert are not discoverable or admissible in any civil action
4 for any purpose by the opposing party.

5 (6) Upon receipt by a prospective defendant of a
6 notice of claim, the parties shall make discoverable
7 information available without formal discovery as provided in
8 subsection (7).

9 (7) Informal discovery may be used by a party to
10 obtain unsworn statements and the production of documents or
11 things, as follows:

12 (a) Unsworn statements.--Any party may require other
13 parties to appear for the taking of an unsworn statement. Such
14 statements may be used only for the purpose of claims
15 evaluation and are not discoverable or admissible in any civil
16 action for any purpose by any party. A party seeking to take
17 the unsworn statement of any party must give reasonable notice
18 in writing to all parties. The notice must state the time and
19 place for taking the statement and the name and address of the
20 party to be examined. Unless otherwise impractical, the
21 examination of any party must be done at the same time by all
22 other parties. Any party may be represented by counsel at the
23 taking of an unsworn statement. An unsworn statement may be
24 recorded electronically, stenographically, or on videotape.
25 The taking of unsworn statements is subject to the provisions
26 of the Florida Rules of Civil Procedure and may be terminated
27 for abuses.

28 (b) Documents or things.--Any party may request
29 discovery of relevant documents or things. The documents or
30 things must be produced, at the expense of the requesting
31 party, within 20 days after the date of receipt of the

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1 request. A party is required to produce relevant and
2 discoverable documents or things within that party's
3 possession or control, if in good faith it can reasonably be
4 done within the timeframe of the claims evaluation process.

5 (8) Each request for and notice concerning informal
6 discovery pursuant to this section must be in writing, and a
7 copy thereof must be sent to all parties. Such a request or
8 notice must bear a certificate of service identifying the name
9 and address of the person to whom the request or notice is
10 served, the date of the request or notice, and the manner of
11 service thereof.

12 (9) If a prospective defendant makes a written
13 settlement offer, the claimant shall have 15 days from the
14 date of receipt to accept the offer. An offer shall be deemed
15 rejected unless accepted by delivery of a written notice of
16 acceptance.

17 (10) To the extent not inconsistent with this part,
18 the provisions of the Florida Mediation Code, Florida Rules of
19 Civil Procedure, shall be applicable to such proceedings.

20 (11) Within 30 days after the claimant's receipt of
21 defendant's response to the claim, the parties or their
22 designated representatives shall meet in mediation to discuss
23 the issues of liability and damages in accordance with the
24 mediation rules of practice and procedures adopted by the
25 Supreme Court. Upon stipulation of the parties, this 30-day
26 period may be extended and the statute of limitations is
27 tolled during the mediation and any such extension. At the
28 conclusion of mediation the claimant shall have 60 days or the
29 remainder of the period of the statute of limitations,
30 whichever is greater, within which to file suit.

31 Section 33. Effective July 1, 2001, and applying to

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1 causes of action accruing on or after that date, section
2 400.4294, Florida Statutes, is created to read:

3 400.4294 Availability of facility records for
4 investigation of resident's rights violations and defenses;
5 penalty.--

6 (1) Failure to provide complete copies of a resident's
7 records including, but not limited to, all medical records and
8 the resident's chart, within the control or possession of the
9 facility within 10 days, in accordance with the provisions of
10 s. 400.145, shall constitute evidence of failure of that party
11 to comply with good-faith discovery requirements and shall
12 waive the good-faith certificate and presuit notice
13 requirements under this part by the requesting party.

14 (2) No facility shall be held liable for any civil
15 damages as a result of complying with this section.

16 Section 34. Effective July 1, 2001, section 400.4295,
17 Florida Statutes, is created to read:

18 400.4295 Certain provisions not applicable to claims
19 for long-term care facility negligence.--A claim for long-term
20 care facility negligence is not a claim for medical
21 malpractice, and the provisions of s. 768.21(8) do not apply
22 to a claim alleging death of the resident.

23 Section 35. Effective July 1, 2001, section 400.4296,
24 Florida Statutes, is created to read:

25 400.4296 Statute of limitations.--

26 (1) Any claim for long-term care facility negligence
27 shall be commenced within 2 years from the time the incident
28 giving rise to the action occurred or within 2 years from the
29 time the incident is discovered, or should have been
30 discovered with the exercise of due diligence; however, in no
31 event shall the action be commenced later than 4 years from

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1 the date of the incident or occurrence out of which the cause
2 of action accrued.

3 (2) In those actions covered by this subsection in
4 which it can be shown that fraudulent concealment or
5 intentional misrepresentation of fact prevented the discovery
6 of the injury, the period of limitations is extended forward 2
7 years from the time that the injury is discovered with the
8 exercise of due diligence, but in no event not more than 6
9 years from the date the incident giving rise to the injury
10 occurred.

11 (3) This section shall apply to causes of action that
12 have accrued prior to the effective date of this section;
13 however, any such cause of action that would not have been
14 barred under prior law may be brought within the time allowed
15 by prior law or within 2 years after the effective date of
16 this section, whichever is earlier, and will be barred
17 thereafter. In actions where it can be shown that fraudulent
18 concealment or intentional misrepresentation of fact prevented
19 the discovery of the injury, the period of limitations is
20 extended forward 2 years from the time that the injury is
21 discovered with the exercise of due diligence but in no event
22 more than 4 years from the effective date of this section.

23 Section 36. Section 400.4297, Florida Statutes, is
24 created to read:

25 400.4297 Punitive damages; pleading; burden of
26 proof.--

27 (1) In any claim for long-term care facility
28 negligence, no claim for punitive damages shall be permitted
29 unless there is a reasonable showing by evidence in the record
30 or proffered by the claimant which would provide a reasonable
31 basis for recovery of such damages. The claimant may move to

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1 amend her or his complaint to assert a claim for punitive
2 damages as allowed by the rules of civil procedure. The rules
3 of civil procedure shall be liberally construed so as to allow
4 the claimant discovery of evidence which appears reasonably
5 calculated to lead to admissible evidence on the issue of
6 punitive damages. No discovery of financial worth shall
7 proceed until after the pleading concerning punitive damages
8 is permitted.

9 (2) A defendant may be held liable for punitive
10 damages only if the trier of fact, based on clear and
11 convincing evidence, finds that the defendant was personally
12 guilty of intentional misconduct or gross negligence. As used
13 in this section, the term:

14 (a) "Intentional misconduct" means that the defendant
15 had actual knowledge of the wrongfulness of the conduct and
16 the high probability that injury or damage to the claimant
17 would result and, despite that knowledge, intentionally
18 pursued that course of conduct, resulting in injury or damage.

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

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

28 (a) The employer, principal, corporation, or other
29 legal entity actively and knowingly participated in such
30 conduct;

31 (b) The officers, directors, or managers of the

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1 employer, principal, corporation, or other legal entity
2 knowingly condoned, ratified, or consented to such conduct; or

3 (c) The employer, principal, corporation, or other
4 legal entity engaged in conduct that constituted gross
5 negligence and that contributed to the loss, damages, or
6 injury suffered by the claimant.

7 (4) The plaintiff must establish at trial, by clear
8 and convincing evidence, its entitlement to an award of
9 punitive damages. The "greater weight of the evidence" burden
10 of proof applies to a determination of the amount of damages.

11 (5) This section is remedial in nature and shall take
12 effect upon becoming a law.

13 Section 37. Section 400.4298, Florida Statutes, is
14 created to read:

15 400.4298 Punitive damages; limitation.--

16 (1)(a) Except as provided in paragraph (b), an award
17 of punitive damages may not exceed the greater of:

18 1. Three times the amount of compensatory damages
19 awarded to each claimant entitled thereto, consistent with the
20 remaining provisions of this section; or

21 2. The sum of \$1 million.

22 (b) Where the fact finder determines beyond a
23 reasonable doubt that at the time of injury the wrongful
24 conduct proven under this section was motivated primarily by
25 unreasonable financial gain and determines that the
26 unreasonably dangerous nature of the conduct, together with
27 the high likelihood of injury resulting from the conduct, was
28 actually known by the managing agent, director, officer, or
29 other person responsible for making policy decisions on behalf
30 of the defendant, or at the time of injury the defendant had a
31 specific intent to harm the claimant and the finder of fact

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1 determines by clear and convincing evidence that the
2 defendant's conduct did in fact harm the claimant, there shall
3 be no cap on punitive damages.

4 (c) This subsection is not intended to prohibit an
5 appropriate court from exercising its jurisdiction under s.
6 768.74 in determining the reasonableness of an award of
7 punitive damages that is less than three times the amount of
8 compensatory damages.

9 (2) The claimant's attorney's fees, if payable from
10 the judgment, are, to the extent that the fees are based on
11 the punitive damages, calculated based on the final judgment
12 for punitive damages. This subsection does not limit the
13 payment of attorney's fees based upon an award of damages
14 other than punitive damages.

15 (3) The jury may neither be instructed nor informed as
16 to the provisions of this section.

17 (4) This section is remedial in nature and shall take
18 effect upon becoming a law.

19
20

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

22 And the title is amended as follows:

23 On page 3, line 11

24
25

26 after the semicolon, insert:

27 amending s. 400.429, F.S.; providing for
28 election of survival damages, wrongful death
29 damages, or recovery for negligence; providing
30 for attorney's fees for injunctive relief or
31 administrative remedy; providing that ch. 766,

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1 F.S., does not apply to actions under this
2 section; prescribing the burden of proof;
3 providing that a violation of a right is not
4 negligence per se; prescribing the duty of
5 care; prescribing a nurse's duty of care;
6 eliminating presuit provisions; eliminating the
7 requirement for presuit mediation; requiring a
8 copy of complaint to be served on Agency;
9 creating s. 400.4293, F.S; providing for
10 presuit notice; prohibiting the filing of suit
11 for a specified time; requiring a response to
12 the notice; tolling the statute of limitations;
13 limiting the discovery of presuit investigation
14 documents; limiting liability of presuit
15 investigation participants; authorizing the
16 obtaining of opinions from a nurse or doctor;
17 authorizing the obtaining of unsworn
18 statements; authorizing discovery of relevant
19 documents; prescribing a time for acceptance of
20 settlement offers; requiring mediation;
21 prescribing the time to file suit; creating s.
22 400.4294, F.S.; requiring the availability of
23 facility records for presuit investigation;
24 specifying the records to be made available;
25 specifying what constitutes evidence of failure
26 to make records available in good faith;
27 specifying the consequences of such failure;
28 creating s. 400.4295, F.S.; providing that the
29 provisions of s. 768.21(8), F.S., do not apply
30 to actions under part III of ch. 400, F.S.;

31 creating s. 400.4296, F.S.; providing a statute

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1 of limitations; providing a statute of
2 limitations when there is fraudulent
3 concealment or intentional misrepresentation of
4 fact; providing for application of the statute
5 of limitation to accrued actions; creating s.
6 400.4297, F.S.; requiring evidence of the basis
7 for punitive damages; prohibiting discovery
8 relating to financial worth; providing for
9 proof of punitive damages; defining the terms
10 "intentional misconduct" and "gross
11 negligence"; prescribing criteria governing
12 employers' liability for punitive damages;
13 providing for the remedial nature of
14 provisions; creating s. 400.4298, F.S.;
15 providing limits on the amount of punitive
16 damages; providing for the calculation of
17 attorney's fees; amending s. 768.735, F.S.;
18 providing that the section is inapplicable to
19 actions brought under ch. 400, F.S.;

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