

By Senator Fasano

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1                   A bill to be entitled  
 2           An act relating to nursing homes; amending s. 400.023,  
 3           F.S.; providing that a civil cause of action for the  
 4           abuse, neglect, or exploitation of a vulnerable adult  
 5           under ch. 415, F.S, is precluded if an action for  
 6           violation of resident rights is brought under part II  
 7           of ch. 400, F.S.; providing an exception for a  
 8           perpetrator; amending s. 400.0237, F.S.; requiring a  
 9           showing of admissible evidence and an evidentiary  
 10          hearing before a claim for punitive damages can be  
 11          brought; amending s. 400.191, F.S.; prohibiting agency  
 12          inspection records from being used in a civil action  
 13          against a facility; prohibiting persons who  
 14          participate in a licensure inspection process from  
 15          testifying about that participation; amending s.  
 16          400.23, F.S.; prohibiting a facility from being held  
 17          liable for failure to provide adequate staffing if the  
 18          facility has demonstrated compliance with staffing  
 19          requirements to the agency; amending s. 415.102, F.S.;  
 20          defining the term "perpetrator"; providing an  
 21          effective date.

22  
 23   Be It Enacted by the Legislature of the State of Florida:

24  
 25           Section 1. Subsection (1) of section 400.023, Florida  
 26   Statutes, is amended to read:

27           400.023 Civil enforcement.—

28           (1) Any resident whose rights as specified in this part are  
 29   violated shall have a cause of action, which. ~~The action~~ may be

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30 brought by the resident or the resident's ~~his or her~~ guardian,  
31 by a person or organization acting on behalf of a resident with  
32 the consent of the resident or his or her guardian, or by the  
33 personal representative of the estate of a deceased resident,  
34 regardless of the cause of death. If the action alleges a claim  
35 for the resident's rights or for negligence that caused the  
36 death of the resident, the claimant must ~~shall be required to~~  
37 elect ~~either~~ survival damages pursuant to s. 46.021 or wrongful  
38 death damages pursuant to s. 768.21. If the action alleges a  
39 claim for the resident's rights or for negligence that did not  
40 cause the death of the resident, the personal representative of  
41 the estate may recover damages for the negligence that caused  
42 injury to the resident. The action may be brought in any court  
43 of competent jurisdiction to enforce such rights and to recover  
44 actual and punitive damages for any violation of the rights of a  
45 resident or for negligence. A ~~Any~~ resident who prevails in  
46 seeking injunctive relief or a claim for an administrative  
47 remedy is entitled to recover the costs of the action, and a  
48 reasonable attorney's fee assessed against the defendant, not to  
49 exceed \$25,000. Fees shall be awarded solely for the injunctive  
50 or administrative relief and not for any claim or action for  
51 damages whether such claim or action is brought ~~together~~ with a  
52 request for an injunction or administrative relief or as a  
53 separate action, except as provided under s. 768.79 or the  
54 Florida Rules of Civil Procedure. Sections 400.023-400.0238  
55 provide the exclusive remedy for a cause of action for recovery  
56 of damages for the personal injury or death of a nursing home  
57 resident arising out of negligence or a violation of rights  
58 specified in s. 400.022 and preclude a cause of action under s.

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59 415.1111 as an alternative theory of recovery unless the person  
60 is a perpetrator as defined in s. 415.102. This section does not  
61 preclude theories of recovery not arising out of negligence or  
62 s. 400.022 which are available to a resident or to the agency.  
63 The provisions of chapter 766 do not apply to any cause of  
64 action brought under ss. 400.023-400.0238.

65 Section 2. Subsections (1) and (4) of section 400.0237,  
66 Florida Statutes, are amended to read:

67 400.0237 Punitive damages; pleading; burden of proof.—

68 (1) In any action for damages brought under this part, a ~~no~~  
69 claim for punitive damages may not be brought ~~shall be permitted~~  
70 unless there is a reasonable showing of admissible by evidence,  
71 which has been in the record or proffered by the parties, to  
72 claimant which would provide a reasonable basis for recovery of  
73 such damages when applying the criteria set forth in this  
74 section. The claimant may move to amend her or his complaint to  
75 assert a claim for punitive damages pursuant to ~~as allowed by~~  
76 the rules of civil procedure. The rules ~~of civil procedure~~ shall  
77 be liberally construed ~~so as~~ to allow the claimant discovery of  
78 evidence which appears reasonably calculated to lead to  
79 admissible evidence on the issue of punitive damages. The trial  
80 judge shall conduct an evidentiary hearing and weigh the  
81 admissible evidence proffered by all parties to ensure that  
82 there is a reasonable basis for the recovery of punitive  
83 damages. ~~No~~ Discovery of financial worth may not ~~shall~~ proceed  
84 until after the pleading on ~~concerning~~ punitive damages is  
85 approved ~~permitted~~.

86 (4) The plaintiff must demonstrate to the trial judge by  
87 clear and convincing evidence an entitlement to assert a claim

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88 for punitive damages, and establish at trial, by clear and  
89 convincing evidence, an ~~its~~ entitlement to an award of punitive  
90 damages. The "greater weight of the evidence" burden of proof  
91 applies to a determination of the amount of damages.

92 Section 3. Present subsection (6) of section 400.191,  
93 Florida Statutes, is renumbered as subsection (7), and a new  
94 subsection (6) is added to that section, to read:

95 400.191 Availability, distribution, and posting of reports  
96 and records.—

97 (6) Records generated pursuant to the agency's licensure  
98 inspection process are not subject to introduction in any civil  
99 proceeding against a facility. In addition, a person who  
100 participates in the licensure inspection process may not testify  
101 in any civil proceeding as to any findings, recommendations,  
102 evaluations, opinions, or other actions pursuant to the  
103 licensure inspection process. A person who provides information  
104 to a licensure inspector may testify as to matters within his or  
105 her knowledge but may not be asked about his or her  
106 participation in the licensure inspection process. This section  
107 may not be construed to mean that information, documents, or  
108 records otherwise available and obtained from original sources  
109 are immune from use in a civil action merely because they were  
110 presented during the licensure inspection process.

111 Section 4. Subsection (11) is added to section 400.23,  
112 Florida Statutes, to read:

113 400.23 Rules; evaluation and deficiencies; licensure  
114 status.—

115 (11) In any administrative, civil, or criminal action  
116 brought under this chapter, a facility that demonstrates,

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117 through its filings with the agency, compliance with the minimum  
118 staffing requirements set forth in this section and rules  
119 adopted pursuant to this section, may not be held liable for  
120 failure to provide adequate staffing.

121 Section 5. Present subsections (17) through (27) of section  
122 415.102, Florida Statutes, are renumbered as subsections (18)  
123 through (28), respectively, and a new subsection (17) is added  
124 to that section, to read:

125 415.102 Definitions of terms used in ss. 415.101-415.113.—  
126 As used in ss. 415.101-415.113, the term:

127 (17) "Perpetrator" means a person who has been found guilty  
128 of abuse, neglect, or exploitation of a vulnerable adult in an  
129 administrative or criminal proceeding.

130 Section 6. This act shall take effect July 1, 2009.