

Amendment No.

CHAMBER ACTION

Senate

House

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1 Representative Gaetz offered the following:

2
3 **Amendment (with title amendment)**

4 Between lines 4170 and 4171, insert:

5 Section 104. Section 400.023, Florida Statutes, is amended
6 to read:

7 400.023 Civil enforcement.—

8 (1) Any resident who alleges negligence or a violation of
9 whose rights as specified in this part ~~has~~ ~~are violated~~ ~~shall~~
10 have a cause of action against the licensee or its management
11 company, as specifically identified in the application for
12 nursing home licensure, and its direct caregiver employees.
13 Sections 400.023-400.0238 provide the exclusive remedy against a
14 licensee or management company for a cause of action for
15 recovery of damages for the personal injury or death of a

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16 nursing home resident arising out of negligence or a violation
17 of residents' rights specified in s. 400.022.

18 (2) A cause of action may not be asserted individually
19 against an officer, director, owner, including any designated as
20 having a "controlling interest" on the application for nursing
21 home licensure, or agent of a licensee or management company
22 under this part unless, following an evidentiary hearing, the
23 court determines there is sufficient evidence in the record or
24 proffered by the claimant that establishes a reasonable basis
25 for a finding that:

26 (a) The officer, director, owner, or agent breached,
27 failed to perform, or acted outside the scope of duties as an
28 officer, director, owner, or agent; and

29 (b) The breach, failure to perform, or conduct outside the
30 scope of duties is a legal cause of actual loss, injury, death,
31 or damage to the resident.

32 (3) In any claim for wrongful death brought under this
33 section, noneconomic damages may not exceed \$300,000 per
34 resident, regardless of the number of claimants or defendants.
35 ~~The action may be brought by the resident or his or her~~
36 ~~guardian, by a person or organization acting on behalf of a~~
37 ~~resident with the consent of the resident or his or her~~
38 ~~guardian, or by the personal representative of the estate of a~~
39 ~~deceased resident regardless of the cause of death. If the~~
40 ~~action alleges a claim for the resident's rights or for~~
41 ~~negligence that caused the death of the resident, the claimant~~
42 ~~shall be required to elect either survival damages pursuant to~~
43 ~~s. 46.021 or wrongful death damages pursuant to s. 768.21.~~

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44 (4) If the action alleges a claim for the resident's
45 rights or for negligence that did not cause the death of the
46 resident, the personal representative of the estate may recover
47 damages for the negligence that caused injury to the resident.
48 The action may be brought in any court of competent jurisdiction
49 to enforce such rights and to recover actual and punitive
50 damages for any violation of the rights of a resident or for
51 negligence.

52 (5) Any resident who prevails in seeking injunctive relief
53 or a claim for an administrative remedy may ~~is entitled to~~
54 recover the costs of the action, and a reasonable attorney's fee
55 assessed against the defendant not to exceed \$25,000. Fees shall
56 be awarded solely for the injunctive or administrative relief
57 and not for any claim or action for damages whether such claim
58 or action is brought ~~together~~ with a request for an injunction
59 or administrative relief or as a separate action, except as
60 provided under s. 768.79 or the Florida Rules of Civil
61 Procedure. ~~Sections 400.023-400.0238 provide the exclusive~~
62 ~~remedy for a cause of action for recovery of damages for the~~
63 ~~personal injury or death of a nursing home resident arising out~~
64 ~~of negligence or a violation of rights specified in s. 400.022.~~
65 This section does not preclude theories of recovery not arising
66 out of negligence or s. 400.022 which are available to a
67 resident or to the agency. The provisions of Chapter 766 does ~~do~~
68 not apply to any cause of action brought under ss. 400.023-
69 400.0238.

70 (6)~~(2)~~ In any claim brought under ~~pursuant to~~ this part
71 alleging a violation of resident's rights or negligence causing
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72 injury to or the death of a resident, the claimant has ~~shall~~
73 ~~have~~ the burden of proving, by a preponderance of the evidence,
74 that:

75 (a) The defendant breached the applicable standard of
76 care; and ~~owed a duty to the resident;~~

77 ~~(b) The defendant breached the duty to the resident;~~

78 (b)(e) The breach ~~of the duty~~ is a legal cause of actual
79 loss, injury, death, or damage to the resident; ~~and~~

80 ~~(d) The resident sustained loss, injury, death, or damage~~
81 ~~as a result of the breach.~~

82 (7) Nothing in this part shall be interpreted to create
83 strict liability. A violation of the rights set forth in s.
84 400.022 or in any other standard or guidelines specified in this
85 part or in any applicable administrative standard or guidelines
86 of this state or a federal regulatory agency shall be evidence
87 of negligence but shall not be considered negligence per se.

88 (8)(3) In any claim brought pursuant to this section, a
89 licensee, person, or entity shall have a duty to exercise
90 reasonable care. Reasonable care is that degree of care which a
91 reasonably careful licensee, person, or entity would use under
92 like circumstances.

93 (9)(4) In any claim for resident's rights violation or
94 negligence by a nurse licensed under part I of chapter 464, such
95 nurse shall have the duty to exercise care consistent with the
96 prevailing professional standard of care for a nurse. The
97 prevailing professional standard of care for a nurse shall be
98 that level of care, skill, and treatment which, in light of all

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99 relevant surrounding circumstances, is recognized as acceptable
100 and appropriate by reasonably prudent similar nurses.

101 ~~(10)(5)~~ A licensee shall not be liable for the medical
102 negligence of any physician rendering care or treatment to the
103 resident except for the administrative services of a medical
104 director as required in this part. Nothing in this subsection
105 shall be construed to protect a licensee, person, or entity from
106 liability for failure to provide a resident with appropriate
107 observation, assessment, nursing diagnosis, planning,
108 intervention, and evaluation of care by nursing staff.

109 ~~(11)(6)~~ The resident or the resident's legal
110 representative shall serve a copy of any complaint alleging in
111 whole or in part a violation of any rights specified in this
112 part to the Agency for Health Care Administration at the time of
113 filing the initial complaint with the clerk of the court for the
114 county in which the action is pursued. The requirement of
115 providing a copy of the complaint to the agency does not impair
116 the resident's legal rights or ability to seek relief for his or
117 her claim.

118 ~~(12)(7)~~ An action under this part for a violation of
119 rights or negligence recognized herein is not a claim for
120 medical malpractice, and ~~the provisions of~~ s. 768.21(8) does ~~de~~
121 not apply to a claim alleging death of the resident.

122 Section 105. Subsections (1), (2), and (3) of section
123 400.0237, Florida Statutes, are amended to read:

124 400.0237 Punitive damages; pleading; burden of proof.—

125 (1) In any action ~~for damages~~ brought under this part, a
126 ~~ne~~ claim for punitive damages may not be brought ~~shall be~~

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127 ~~permitted~~ unless there is a ~~reasonable~~ showing of admissible by
128 evidence that has been in the record or proffered by the parties
129 and provides claimant which would provide a reasonable basis for
130 recovery of such damages when the criteria set forth in this
131 section are applied. The claimant may move to amend her or his
132 complaint to assert a claim for punitive damages as allowed by
133 the rules of civil procedure. The trial judge shall conduct an
134 evidentiary hearing and weigh the admissible evidence proffered
135 by all parties to ensure that there is a reasonable basis to
136 believe that the claimant, at trial, will be able to demonstrate
137 by clear and convincing evidence that the recovery of such
138 damages is warranted. ~~The rules of civil procedure shall be~~
139 ~~liberally construed so as to allow the claimant discovery of~~
140 ~~evidence which appears reasonably calculated to lead to~~
141 ~~admissible evidence on the issue of punitive damages. No A~~
142 discovery of financial worth may not shall proceed until after
143 the pleading on concerning punitive damages is approved
144 permitted.

145 (2) A defendant, including the licensee or management
146 company against whom punitive damages is sought, may be held
147 liable for punitive damages only if the trier of fact, based on
148 clear and convincing evidence, finds that a specific individual
149 or corporate defendant actively and knowingly participated in
150 intentional misconduct or engaged in conduct that constituted
151 gross negligence and contributed to the loss, damages, or injury
152 suffered by the claimant ~~the defendant was personally guilty of~~
153 ~~intentional misconduct or gross negligence~~. As used in this
154 section, the term:

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155 (a) "Intentional misconduct" means that the defendant
156 against whom punitive damages are sought had actual knowledge of
157 the wrongfulness of the conduct and the high probability that
158 injury or damage to the claimant would result and, despite that
159 knowledge, intentionally pursued that course of conduct,
160 resulting in injury or damage.

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

165 (3) In the case of vicarious liability of an employer,
166 principal, corporation, or other legal entity, punitive damages
167 may not be imposed for the conduct of an employee or agent
168 unless only if the conduct of a specifically identified the
169 employee or agent meets the criteria specified in subsection (2)
170 and an officer, director, or manager of the actual employer,
171 corporation, or legal entity condoned, ratified, or consented to
172 the specific conduct as alleged in subsection (2).‡

173 ~~(a) The employer, principal, corporation, or other legal~~
174 ~~entity actively and knowingly participated in such conduct;~~

175 ~~(b) The officers, directors, or managers of the employer,~~
176 ~~principal, corporation, or other legal entity condoned,~~
177 ~~ratified, or consented to such conduct; or~~

178 ~~(c) The employer, principal, corporation, or other legal~~
179 ~~entity engaged in conduct that constituted gross negligence and~~
180 ~~that contributed to the loss, damages, or injury suffered by the~~
181 ~~claimant.~~

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182 Section 106. If any provision of this act or its
 183 application to any person or circumstance is held invalid, the
 184 invalidity does not affect other provisions or applications of
 185 this act which can be given effect without the invalid provision
 186 or application, and to this end the provisions of this act are
 187 severable.

188 Section 107. This act shall take effect July 1, 2011, and
 189 shall apply to all causes of action that accrue on or after that
 190 date.

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

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Remove line 311 and insert:

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are not intended to be reset by this act; amending s.

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400.023, F.S.; specifying conditions under which a nursing

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home resident has a cause of action against a licensee or

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management company; requiring the trial judge to conduct

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an evidentiary hearing before a claimant can assert a

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claim against certain interested parties; providing a

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limitation on recovery; amending s. 400.0237, F.S.;

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requiring evidence of the basis for punitive damages;

203

requiring the trial judge to conduct an evidentiary

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hearing before a claimant can assert a claim for punitive

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damages; permitting a licensee or management company to be

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held liable for punitive damages under certain

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circumstances; providing criteria for awarding of punitive

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damages in a case of vicarious liability of certain

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209 entities; providing applicability; providing for
210 severability; providing an