



799184

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
04/13/2011	.	
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	.	

The Committee on Health Regulation (Diaz de la Portilla)
recommended the following:

1 **Senate Amendment to Amendment (541928) (with title**
2 **amendment)**

3
4 Delete line 3
5 and insert:

6
7 Delete lines 28 - 338
8 and insert:

9
10 Section 1. Section 400.023, Florida Statutes, is reordered
11 and amended to read:
12 400.023 Civil enforcement.—



799184

13 (1) A Any resident who whose alleges negligence or a
14 violation of rights as specified in this part has are violated
15 shall have a cause of action against the licensee or its
16 management company, as identified in the state application for
17 nursing home licensure. However, the cause of action may not be
18 asserted individually against an officer, director, owner,
19 including an owner designated as having a controlling interest
20 on the state application for nursing home licensure, or agent of
21 a licensee or management company unless, following an
22 evidentiary hearing, the court determines there is sufficient
23 evidence in the record or proffered by the claimant which
24 establishes a reasonable basis for finding that the person or
25 entity breached, failed to perform, or acted outside the scope
26 of duties as an officer, director, owner, or agent, and that the
27 breach, failure to perform, or action outside the scope of
28 duties is a legal cause of actual loss, injury, death, or damage
29 to the resident.

30 (2) The action may be brought by the resident or his or her
31 guardian, by a person or organization acting on behalf of a
32 resident with the consent of the resident or his or her
33 guardian, or by the personal representative of the estate of a
34 deceased resident regardless of the cause of death.

35 (5) If the action alleges a claim for the resident's rights
36 or for negligence that:

37 (a) Caused the death of the resident, the claimant must
38 shall be required to elect either survival damages pursuant to
39 s. 46.021 or wrongful death damages pursuant to s. 768.21. If
40 the claimant elects wrongful death damages, total noneconomic
41 damages may not exceed \$300,000, regardless of the number of



799184

42 claimants.

43 ~~(b) If the action alleges a claim for the resident's rights~~
44 ~~or for negligence that~~ Did not cause the death of the resident,
45 the personal representative of the estate may recover damages
46 for the negligence that caused injury to the resident.

47 (3) The action may be brought in any court of competent
48 jurisdiction to enforce such rights and to recover actual and
49 punitive damages for any violation of the rights of a resident
50 or for negligence.

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

68 ~~(6)(2)~~ (6) ~~If the~~ ~~In any~~ claim brought pursuant to this part
69 alleges ~~alleging~~ a violation of resident's rights or negligence
70 causing injury to or the death of a resident, the claimant shall



799184

71 have the burden of proving, by a preponderance of the evidence,
72 that:

73 (a) The defendant owed a duty to the resident;

74 (b) The defendant breached the duty to the resident;

75 (c) The breach of the duty is a legal cause of loss,
76 injury, death, or damage to the resident; and

77 (d) The resident sustained loss, injury, death, or damage
78 as a result of the breach.

79 (12) ~~Nothing in~~ This part does not ~~shall be interpreted to~~
80 create strict liability. A violation of the rights set forth in
81 s. 400.022 or in any other standard or guidelines specified in
82 this part or in any applicable administrative standard or
83 guidelines of this state or a federal regulatory agency is ~~shall~~
84 ~~be~~ evidence of negligence but may ~~shall~~ not be considered
85 negligence per se.

86 (7)~~(3)~~ In any claim brought pursuant to this section, a
87 licensee, person, or entity has ~~shall have~~ a duty to exercise
88 reasonable care. Reasonable care is that degree of care which a
89 reasonably careful licensee, person, or entity would use under
90 like circumstances.

91 (9)~~(4)~~ In any claim for resident's rights violation or
92 negligence by a nurse licensed under part I of chapter 464, such
93 nurse has a ~~shall have the~~ duty to exercise care consistent with
94 the prevailing professional standard of care for a nurse. The
95 prevailing professional standard of care for a nurse is ~~shall be~~
96 that level of care, skill, and treatment which, in light of all
97 relevant surrounding circumstances, is recognized as acceptable
98 and appropriate by reasonably prudent similar nurses.

99 (8)~~(5)~~ A licensee is ~~shall~~ not ~~be~~ liable for the medical



799184

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

107 ~~(4)(6)~~ The resident or the resident's legal representative
108 shall serve a copy of any complaint alleging in whole or in part
109 a violation of any rights specified in this part to the agency
110 ~~for Health Care Administration~~ at the time of filing the initial
111 complaint with the clerk of the court for the county in which
112 the action is pursued. ~~The requirement of~~ Providing a copy of
113 the complaint to the agency does not impair the resident's legal
114 rights or ability to seek relief for his or her claim.

115 ~~(11)(7)~~ An action under this part for a violation of rights
116 or negligence ~~recognized herein~~ is not a claim for medical
117 malpractice, and the provisions of s. 768.21(8) do not apply to
118 a claim alleging death of the resident.

119 Section 2. Subsections (1), (2), and (3) of section
120 400.0237, Florida Statutes, are amended to read:

121 400.0237 Punitive damages; pleading; burden of proof.—

122 (1) In any action ~~for damages~~ brought under this part, ~~a~~ no
123 claim for punitive damages is not shall be permitted unless,
124 based on admissible there is a reasonable showing by evidence in
125 the record or proffered by the claimant, ~~which would provide a~~
126 reasonable basis for recovery of such damages is demonstrated
127 upon applying the criteria set forth in this section. The
128 defendant may proffer admissible evidence to refute the



799184

129 claimant's proffer of evidence to recover punitive damages. The
130 trial judge shall conduct an evidentiary hearing and weigh the
131 admissible evidence proffered by the claimant and the defendant
132 to ensure that there is a reasonable basis to believe that the
133 claimant, at trial, will be able to demonstrate by clear and
134 convincing evidence that the recovery of such damages is
135 warranted. The claimant may move to amend her or his complaint
136 to assert a claim for punitive damages as allowed by the rules
137 of civil procedure. The rules of civil procedure shall be
138 liberally construed so as to allow the claimant discovery of
139 evidence which appears reasonably calculated to lead to
140 admissible evidence on the issue of punitive damages. No
141 Discovery of financial worth may not shall proceed until after
142 the trial judge approves the pleading on concerning punitive
143 damages is permitted.

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

153 As used in this section, the term:

154 (a) "Intentional misconduct" means that the defendant
155 against whom a claim for punitive damages is sought had actual
156 knowledge of the wrongfulness of the conduct and the high
157 probability that injury or damage to the claimant would result



799184

158 and, despite that knowledge, intentionally pursued that course
159 of conduct, resulting in injury or damage.

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

164 (3) In the case of vicarious liability of an employer,
165 principal, corporation, or other legal entity, punitive damages
166 may not be imposed for the conduct of an identified employee or
167 agent unless only if the conduct of the employee or agent meets
168 the criteria specified in subsection (2) and officers,
169 directors, or managers of the actual employer corporation or
170 legal entity condoned, ratified, or consented to the specific
171 conduct as alleged by the claimant in subsection (2).÷

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

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

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

181 Section 3. This act shall take effect July 1, 2011.

182
183 ===== T I T L E A M E N D M E N T =====

184 And the title is amended as follows:

185
186 Delete lines 7 - 10



799184

187 and insert:

188

189 Delete lines 2 - 24,

190 and insert:

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192 An act relating to nursing homes; amending s. 400.023,
193 F.S.; requiring the trial judge to conduct an
194 evidentiary hearing to determine the sufficiency of
195 evidence for claims against certain persons relating
196 to a nursing home; limiting noneconomic damages in a
197 wrongful death action against the nursing home;
198 amending s. 400.0237, F.S.; revising provisions
199 relating to punitive damages against a nursing home;
200 authorizing a defendant to proffer admissible evidence
201 to refute a claimant's proffer of evidence for
202 punitive damages; requiring the trial judge to conduct
203 an evidentiary hearing and the plaintiff to
204 demonstrate that a reasonable basis exists for the
205 recovery of punitive damages; prohibiting discovery of
206 the defendant's financial worth until the judge
207 approves the pleading on punitive damages; revising
208 definitions; providing an effective date.