The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL: SB 1396

INTRODUCER: Senator Bogdanoff

SUBJECT: Nursing Home Litigation Reform

DATE: March 25, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Stovall	HR	**Pre-meeting**
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill amends statutory provisions relating to civil causes of action against nursing homes, punitive damages, and a nursing home's compliance or noncompliance with minimum staffing requirements as it relates to civil actions against the nursing home. The bill:

- Requires the court to hold an evidentiary hearing to determine if there is a reasonable basis to find that an officer, director, or owner of a nursing home acted outside the scope of duties in order for a lawsuit to proceed against an officer, director, or owner of a nursing home;
- Provides a cap of $250,000 on noneconomic damages in any claim for wrongful death in nursing home lawsuits, regardless of the number of claimants or defendants;
- Requires a claimant to bring a lawsuit pursuant to either the statute relating to nursing home civil enforcement or the statute relating to abuse of vulnerable adults;
- Requires a claimant to elect survival damages or wrongful death damages not later than 60 days before trial;
- Requires the court to hold an evidentiary hearing before allowing a claim for punitive damages to proceed;
- Changes the method for calculating attorney fees in punitive damage cases and provides more situations where the punitive damages claim will be split between the claimant and the state; and
- Limits the use of federal and state survey reports in nursing home litigation.

This bill substantially amends the following sections of the Florida Statutes: 400.023, 400.0237, 400.0238, and 400.23.

II. Present Situation:

"Nursing Homes and Related Health Care Facilities" is the subject of ch. 400, F.S. Part I of ch. 400, F.S., establishes the Office of State Long-Term Care Ombudsman, the State Long-Term Care Ombudsman Council, and the local long-term care ombudsman councils. Part II of ch. 400, F.S., provides for the regulation of nursing homes, and part III of ch. 400, F.S., provides for the regulation of home health agencies.

The Agency for Health Care Administration (AHCA) is charged with the responsibility of developing rules related to the operation of nursing homes. Section 400.023, F.S., creates a statutory cause of action against nursing homes that violate the rights of residents specified in s. 400.022, F.S. The action may be brought in any court to enforce the resident's rights and to recover actual and punitive damages for any violation of the rights of a resident or for negligence.[1] Prevailing plaintiffs may be entitled to recover reasonable attorney fees plus costs of the action, along with actual and punitive damages.[2]

Sections 400.023-400.0238, F.S., provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in s. 400.022, F.S. No claim for punitive damages may be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.[3] A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence as specified in s. 400.0237(2), F.S.[4]

In the case of an employer, principal, corporation, or other entity, punitive damages may be imposed for conduct of an employee or agent only if the conduct meets the criteria specified in s. 400.0237(2), F.S., and the employer actively and knowingly participated in the conduct, ratified or consented to the conduct, or engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.[5]

Named Defendants and Causes of Action in Nursing Home Cases

Section 400.023, F.S., provides that "any resident whose rights as specified in this part are violated shall have a cause of action." It does not indicate who may be named as a defendant. Current law in ss. 400.023 - 400.0238, F.S., provides the exclusive remedy for a cause of action for personal injury or death of a nursing home resident or a violation of the resident's rights statute. Current law further provides that s. 400.023, F.S., "does not preclude theories of recovery not arising out of negligence or s. 400.022, F.S., which are available to the resident or to the agency."

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[1] Sections 400.023 and 400.0237, F.S.
[2] *Id.*
[3] Section 400.0237(1), F.S.
[4] Section 400.0237(2), F.S.
[5] Section 400.0237(3), F.S.

Liability of Employees, Officers, Directors, or Owners

In *Estate of Canavan v. National Healthcare Corp.,* 889 So.2d 825 (Fla. 2d DCA 2004), the court considered whether the managing member of a limited liability company could be held personally liable for damages suffered by a resident in a nursing home. The claimant argued the managing member, Friedbauer, could be held liable:

> [Claimant] argues that the concept of piercing the corporate veil does not apply in the case of a tort and that it presented sufficient evidence of Friedbauer negligence, by act or omission, for the jury to reasonably conclude that Friedbauer caused harm to Canavan. [Claimant] argues that Friedbauer had the responsibility of approving the budget for the nursing home. He also functioned as the sole member of the "governing body" of the nursing home, and pursuant to federal regulation, the governing body is legally responsible for establishing and implementing policies regarding the management and operation of the facility and for appointing the administrator who is responsible for the management of the facility. Friedbauer was thus required by federal mandate to create, approve, and implement the facility's policies and procedures. Because he ignored complaints of inadequate staffing while cutting the operating expenses, and because the problems Canavan suffered, pressure sores, infections, poor hygiene, malnutrition and dehydration, were the direct result of understaffing, [claimant] argues that a reasonable jury could have found that Friedbauer's elevation of profit over patient care was negligent.[6]

The trial court granted a directed verdict in favor of Freidbauer, finding that there was no basis upon which a corporate officer could be held liable. On appeal, the court reversed:

> We conclude that the trial court erred in granting the directed verdict because there was evidence by which the jury could have found that Friedbauer's negligence in ignoring the documented problems at the facility contributed to the harm suffered by Canavan. This was not a case in which the plaintiffs were required to pierce the corporate veil in order to establish individual liability because Friedbauer's alleged negligence constituted tortious conduct, which is not shielded from individual liability. We, therefore, reverse the order granting the directed verdict and remand for a new trial against Friedbauer.[7]

Limitations on Causes of Action for Violations of Criminal Statutes

Section 415.111, F.S., provides criminal penalties for failing to report abuse of a vulnerable adult, for making certain confidential information public, for refusing to grant access to certain records, and for filing false reports relating to abuse of a vulnerable adult. Section 415.111, F.S., does not specifically provide for a civil cause of action while s. 415.1111, F.S., provides for a civil cause of action in some situations.

[6] *Estate of Canavan v. National Healthcare Corp.*, 889 So.2d 825, 826 (Fla. 2d DCA 1994).
[7] *Estate of Canavan v. National Healthcare Corp.*, 889 So.2d 825, 826-827 (Fla. 2d DCA 1994)(citations omitted).

Section 415.1111, F.S., provides a cause of action where a vulnerable adult[8] who has been abused, neglected, or exploited has a cause of action and can recover damages, punitive damages, and attorney fees. However, any action brought against a licensee or entity that establishes, controls, manages, or operates a nursing home must be brought under s. 400.023, F.S.

One court has specifically held that no civil cause of action exists for failing to report abuse of vulnerable adult pursuant to s. 415.111, F.S. The court explained:

> It is evident that the legislature considered both civil and criminal penalties under this statute, but subjected only actual perpetrators of abuse to civil penalties. This is strong evidence of a legislative intent not to provide a civil cause of action for victims against those who fail to report the abuse as required by this act.[9]

Election of Damages

Section 400.023, F.S., requires that in cases where the action alleges a claim for resident's rights or for negligence that caused the death of the resident, a claimant must elect either survival damages[10] or wrongful death damages.[11] The statute does not provide a time certain for a claimant to make an election. In *In re Estate of Trollinger,* 9 So.3d 667 (Fla. 2d DCA 2009), the trial court forced a claimant to make an election at the time of the initial complaint and the appellate court held that certiorari review was not available because any error could be corrected by a subsequent appeal. The court noted that s. 400.023(1), F.S., is "silent as to whether the election of remedies must be made at the pleading stage or at the end of trial."[12]

Judge Altenbernd argued that the claimant should not have to make an election with the initial pleading:

> [The statute] requires the personal representative to elect to receive only one of the two different measures of damages that are available in such a case. The statute does not require the personal representative to choose to pursue only one of the two different causes of action available to the personal representative. It certainly does not state that the election must be made in the complaint...
>
> Even if one assumes that section 400.023(1) requires a plaintiff to elect one cause of action, this election of a claim would not logically occur at the pleading stage. If the plaintiff is required to elect one measure of damages, there is little reason why this

[8] "Vulnerable adult" means "means a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging." s. 415.102(27), F.S.

[9] *Mora v. South Broward Hosp. Dist.,* 710 So.2d 633, 634 (Fla. 4th DCA 1998).

[10] Section 46.021, F.S., provides that no cause of action dies with the person. Accordingly, if a resident brings a claim for a violation of resident's rights or negligence and dies during the pendency of the claim, the action may continue and the resident's estate may recover the damages that the resident could have recovered if the resident had lived until the end of the litigation.

[11] Section 768.21, F.S., provides for damages that may be recovered by the estate of a resident and the resident's family in a wrongful death action.

[12] *In re Estate of Trollinger*, 9 So.3d 667, 668 (Fla. 2d DCA 2009).

election cannot take place after the jury returns its verdict. Election of remedies is a somewhat complex theory, but it is generally designed to prevent a double recovery, which can be avoided in this case even if the jury is presented with a verdict form containing both theories.

The personal representative's two theories are factually and legally distinct. One theory requires proof that negligence caused only injury and the other theory requires proof that negligence caused death. In Florida, a standard verdict form asks the jury to decide whether there was negligence on the part of the defendant which was a legal cause of damage to the plaintiff. If the jury is instructed on only one of the causes of action and the damages appropriate under that theory, there is nothing in the verdict form to demonstrate that the verdict forecloses an action on the other theory for the damages available under the other theory. In other words, if a jury were to find that an act of negligence did not cause wrongful death damages, that verdict would not prevent another jury from finding that an act of negligence caused survivorship damages. Thus, whichever theory is tried first, the trial court is likely to be called upon to try the second theory later.[13] (internal citations omitted).

Cap on Noneconomic Damages

Current law provides no cap on the recovery of noneconomic damages in wrongful death actions brought under s. 400.023, F.S. "Economic" damages are damages such as loss of earnings, loss of net accumulations, medical expenses, and funeral expenses.[14] "Noneconomic damages" are damages for which there is no exact standard for fixing compensation such as mental pain and suffering and loss of companionship or protection.[15]

Attorney Fees in Actions for Injunctive Relief

A resident may bring an action seeking injunctive relief in court or bring an administrative action to force a licensee to take an action or cease taking some action. Current law provides that a resident is entitled to attorney fees not to exceed $25,000, plus costs, if the resident prevails when seeking injunctive relief.

Elements in a Civil Actions Under s. 400.023, F.S.

Section 400.023(2), F.S., provides that in any claim alleging a violation of resident's rights or alleging that negligence caused injury to or the death of a resident, the claimant must prove, by a preponderance of the evidence:

- The defendant owed a duty to the resident;
- The defendant breached the duty to the resident;
- The breach of the duty is a legal cause of loss, injury, death, or damage to the resident; and
- The resident sustained loss, injury, death, or damage as a result of the breach.

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[13] *In re Estate of Trollinger*, 9 So.3d 667, 669 (Fla. 2d DCA 2009)(Altenbernd, J., concurring).
[14] *See generally* Florida Standard Jury Instructions in Civil Cases, s. 502.2. (accessed at http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#500).
[15] *See generally* Florida Standard Jury Instructions in Civil Cases, s. 502.2. (accessed at http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#500).

The Florida Supreme Court has set forth the elements of a negligence action:

> 1. A duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
>
> 2. A failure on the [defendant's] part to conform to the standard required: a breach of the duty...
>
> 3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
>
> 4. **Actual loss** or damage...[16] (emphasis added).

Current law provides in any claim brought pursuant to s. 400.023, F.S., a licensee, person, or entity has the duty to exercise "reasonable care" and nurses have the duty to exercise care "consistent with the prevailing professional standard of care."[17] Standards of care are set forth in current law. Section 400.023(3), F.S., provides that a licensee, person, or entity shall have a duty to exercise reasonable care.[18] Nurses have the duty to "exercise care consistent with the prevailing professional standard of care for a nurse."[19]

Punitive Damages

Current law provides for recovery of punitive damages by a claimant. Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."[20] Punitive damages are generally limited to three times the amount of compensatory damages or $1 million, whichever is greater.[21] Damages can exceed $1 million if the jury finds that the wrongful conduct was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant.[22] If the jury finds that the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there is be no cap on punitive damages.[23]

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[16] *United States v. Stevens*, 994 So.2d 1062, 1066 (Fla. 2008).
[17] *See* s. 400.023(1), F.S.
[18] "Reasonable care" is defined as "that degree of care which a reasonably careful licensee, person, or entity would use under like circumstances." s. 400.023(3), F.S.
[19] "The prevailing professional standard of care for a nurse shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar nurses." s. 400.023(4), F.S.
[20] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).
[21] *See* s. 400.0238(1)(a), F.S.
[22] *See* s. 400.0238(1)(b), F.S.
[23] *See* s. 400.0238(1)(c), F.S.

Evidentiary Requirements to Bring a Punitive Damages Claims

Section 400.0237(1), F.S., provides:

> In any action for damages brought under this part, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

A court discussed how a claimant can make a proffer to assert a punitive damage claim:

> [A] a 'proffer' according to traditional notions of the term, connotes merely an 'offer' of evidence and neither the term standing alone nor the statute itself calls for an adjudication of the underlying veracity of that which is submitted, much less for countervailing evidentiary submissions. Therefore, a proffer is merely a representation of what evidence the defendant proposes to present and is not actual evidence. A reasonable showing by evidence in the record would typically include depositions, interrogatories, and requests for admissions that have been filed with the court. Hence, an evidentiary hearing where witnesses testify and evidence is offered and scrutinized under the pertinent evidentiary rules, as in a trial, is neither contemplated nor mandated by the statute in order to determine whether a reasonable basis has been established to plead punitive damages.[24],[25]

Punitive damages claims are often raised after the initial complaint has been filed. Once a claimant has discovered enough evidence that the claimant believes justifies a punitive damage claim, the claimant files a motion to amend the complaint to add a punitive damage action. The trial judge considers the evidence presented and proffered by the claimant to determine whether the claim should proceed.

Individual Liability for Punitive Damages

Section 400.0237(2), F.S., provides:

> A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct[26] or gross negligence.[27]

[24] *Estate of Despain v. Avante Group, Inc.*, 900 So.2d 637, 642 (Fla. 5th DCA 2005)(internal citations omitted).

[25] The *Despain* court was discussing a prior version of the punitive damages statute relating to nursing home litigation but the language in that statute is the same in that statute and current law.

[26] "Intentional misconduct" is actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant will result and, despite that knowledge, intentionally pursuing a course of conduct that results in injury or damage. *See* s. 400.0237(2)(a), F.S.

Vicarious Liability for Punitive Damages

Punitive damages claims are sometimes brought under a theory of vicarious liability where an employer is held responsible for the acts of an employee. Section 400.0273(3), F.S., provides:

> In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2)[28] and:
> (a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;
> (b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity condoned, ratified, or consented to such conduct; or
> (c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

Attorney Fees in Punitive Damages Actions

Current law provides that to the extent a claimant's attorney's fees are based on punitive damages, the attorney fees are calculated based on the final judgment for punitive damages.[29],[30] The amount of punitive damages awarded is divided equally between the Quality of Long-Term Care Facility Improvement Trust Fund[31] and the claimant.[32] The statute also provides for a split of any settlement by the parties that is reached after the verdict.[33]

Current law does require that any portion of a punitive damages settlement that is reached before a verdict to be divided with the Quality of Long-Term Care Facility Improvement Trust Fund. According to the AHCA, no money has been collected for the Fund pursuant to s. 400.0238, F.S.

Nursing Home Surveys

Section 400.23, F.S., requires the AHCA to promulgate and enforce rules relating to the safety and care of nursing home residents. The AHCA is required to evaluate all facilities at least every 15 months.[34] The AHCA is specifically required to adopt rules relating to minimum staffing requirements.[35] Such requirements include a minimum weekly average of certified nursing assistants and licensed nursing staff, a minimum daily staffing of certified nursing assistants, specified staffing ratios, and specific amounts of care per resident per day.[36]

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[27] "Gross negligence" is conduct that is reckless or wanting in care such that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct. *See* s. 400.0237(2)(b), F.S.
[28] Criteria are whether the defendant was personally guilty of intentional misconduct or gross negligence.
[29] Section 400.0238(2), F.S.
[30] A final judgment is an order entered by the trial judge after a jury verdict or a trial before the judge.
[31] Section 400.0239(1), F.S., creates the "Quality of Long-Term Care Facility Improvement Trust Fund." The Fund supports activities and programs directly related to improvement of the care of nursing home and assisted living facility residents.
[32] Section 400.0238(4), F.S.
[33] Section 400.0238(4)(b), F.S.
[34] Section 400.23(7), F.S.
[35] Section 400.23(3), F.S.
[36] Section 400.23(3), F.S.

When the AHCA does a survey to determine whether a nursing home is violating statutes or rules, it is required to classify the deficiencies according to the nature and scope of the deficiency.[37] The classifications are as follows:

- A class I deficiency is a deficiency that the agency determines presents a situation in which immediate corrective action is necessary because the facility's noncompliance has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident receiving care in a facility.
- A class II deficiency is a deficiency that the agency determines has compromised the resident's ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services.
- A class III deficiency is a deficiency that the agency determines will result in no more than minimal physical, mental, or psychosocial discomfort to a resident or has the potential to compromise a resident's ability to maintain or reach his or her highest practical physical, mental, or psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services.
- A class IV deficiency is a deficiency that the agency determines has the potential for causing no more than a minor negative impact on the resident. If the class IV deficiency is isolated, no plan of correction is required.[38]

The AHCA can cite violators and impose penalties including fines or revocation of licenses for violations. Evidence of understaffing is sometimes used to show negligence and show an entitlement to punitive damages.[39]

III. Effect of Proposed Changes:

Section 1 amends s. 400.023, F.S., as follows:

Named Defendants and Causes of Action in Nursing Home Cases

The bill provides that any resident who alleges negligence or a violation of rights has a cause of action against the "licensee or its management company, as specifically identified in the application for nursing home licensure" and its direct caregiver employees.

Current law in ss. 400.023 - 400.0238, F.S., provides the exclusive remedy for a cause of action for personal injury or death of a nursing home resident or a violation of the resident's rights statute. Current law further provides that s. 400.023, F.S., "does not preclude theories of recovery not arising out of negligence or s. 400.022, F.S., which are available to the resident or

[37] Section 400.023(8), F.S.
[38] Section 400.023(8), F.S.
[39] *See e.g. Estate of Despain v. Avante Group, Inc.,* 900 So.2d 637, 645 (Fla. 5th DCA 2005) ("As to the vicarious liability of the corporate entities, the record evidence and proffer shows that the facility was not adequately staffed, which contributed to the inability to provide the decedent with proper care, and that numerous records regarding the decedent's care were incomplete, missing, or had been fabricated, which made assessment, treatment, and referrals of the decedent much more difficult. We believe that this showing established a reasonable basis to conclude that the corporate entities were negligent." Accordingly, Despain established a reasonable basis to plead a claim for punitive damages based on the theory of vicarious liability).

to the agency." The bill removes that provision. The bill provides that ss. 400.023 - 400.0238, F.S., set forth the exclusive remedy in resident rights cases and cases involving the personal injury or wrongful death of resident. Any other claims would have to be brought outside of ss. 400.023 - 400.0238, F.S.

Liability of Employees, Officers, Directors, or Owners

The bill provides that a cause of action cannot be asserted against an "employee, officer, director, owner, including any designated as having a 'controlling interest'[40] on the application for nursing home licensure, or agent of licensee or management company" unless the court determines there is a reasonable basis that:

- The officer, director, owner, or agent breached, failed to perform, or acted outside the scope of duties as an officer, director, owner, or agent; and
- The breach, failure to perform, or conduct outside the scope of duties is a legal cause of the damage.

The court must make this finding at an evidentiary hearing after considering evidence in the record and evidence proffered by the claimant.

"Scope of duties as an officer, director, owner, or agent" is not defined by The bill. The parties would have to present evidence on what the "scope of duties" as an officer, director, owner, or agent are in each case and the trial judge would have to determine whether there is a reasonable basis for the jury to conclude that there was a breach of duty and damage to the claimant.

Limitations on Causes of Action for Violations of Criminal Statutes

The bill provides that if a cause of action is brought by or on behalf of a resident under Part II of ch. 400, F.S., then a cause of action may not be asserted under s. 415.111, F.S., against an employee, officer, director, owner, or agent of the licensee or management company.

Election of Damages

The bill amends s. 400.023(1), F.S., to require the claimant to choose between survival damages under s. 46.021, F.S., or wrongful death damages under s. 768.21, F.S., at the end of discovery but not later than 60 days before trial. As *Trollinger* indicates, current law is unclear. It might allow such an election to be made at the end of trial or might allow the trial court to require an election be made with the complaint.[41] The bill requires that the election be made by a time certain before trial.

[40] Section 400.071, F.S., governs applications for licensure for nursing homes. It references s. 408.803, F.S., where "controlling interest" is defined. "Controlling interest" means: "(a) The applicant or licensee; (b) A person or entity that serves as an officer of, is on the board of directors of, or has a 5-percent or greater ownership interest in the applicant or licensee; or (c) A person or entity that serves as an officer of, is on the board of directors of, or has a 5-percent or greater ownership interest in the management company or other entity, related or unrelated, with which the applicant or licensee contracts to manage the provider. The term does not include a voluntary board member." s. 408.803(7), F.S.

[41] The *Trollinger* court did not hold that the election must be made at the pleading stage. It held that certiorari review, a high standard, was not available. There is no subsequent appellate court decision resolving the issue left open in *Trollinger*.

Cap on Noneconomic Damages

The bill provides a cap of $250,000 on noneconomic damages in any claim for wrongful death brought under s. 400.023, F.S., regardless of the number of claimants or defendants. The bill does not cap noneconomic damages in negligence cases that do not involve a wrongful death brought under s. 400.023, F.S.

Attorney Fees in Actions for Injunctive Relief

The bill provides that a resident "may" recover attorney fees and costs if the resident prevails.

Elements in a Civil Actions Under s. 400.023, F.S.

The bill provides that in any claim brought pursuant to this part alleging a violation of resident's rights or negligence causing injury to or the death of a resident, the claimant shall have the burden of proving, by a preponderance of the evidence, that:

- The defendant breached the applicable standard of care; and
- The breach is a legal cause of actual loss, injury, death, or damage to the resident. (emphasis added).

The bill provides that a claimant bringing a claim pursuant to ch. 400, F.S., must show the defendant breached the applicable standard of care and that the breach is the legal cause of actual loss, injury, death, or damage. The "actual" loss addition to the statute is from Florida Supreme Court case law.

Section 2 amends s. 400.0237, F.S., as follows:

Evidentiary Requirements to Bring a Punitive Damages Claims

The bill provides that a claimant may not bring a claim for punitive damages unless there is a showing of admissible evidence proffered by the parties that provides a reasonable basis for recovery of punitive damages. The bill requires the trial judge to conduct an evidentiary hearing where both sides present evidence. The trial judge must find there is reasonable basis to believe the claimant will be able to demonstrate, by clear and convincing evidence, that the recovery of punitive damages is warranted. The effect of these requirements is: (1) to limit the trial judge's consideration to admissible evidence. Current law does not require a showing of admissibility at this stage of the proceedings; and (2) to provide that the claimant and defendant may present evidence and have the trial judge weigh the evidence to make its determination. Current law contemplates that the claimant will proffer evidence and the court, considering the proffer in the light most favorable to the claimant, will determine whether there is a reasonable basis to allow the claimant's punitive damages case to proceed.[42]

Current law provides that the rules of civil procedure are to be liberally construed to allow the claimant discovery of admissible evidence on the issue of punitive damages. The bill removes that provision from statute. Discovery in civil cases is governed by the Florida Rules of Civil

[42] *See Estate of Despain v.Avante Group, Inc.*, 900 So.2d 637, 644 (Fla. 5th DCA 2005).

Procedure. Since the rules govern discovery, it is not clear what effect, if any, removing this provision from statute would have on current practice.

Individual Liability for Punitive Damages

The bill provides that a defendant, including the licensee or management company against whom punitive damages is sought, may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that "a specific individual or corporate defendant actively and knowingly participated in intentional misconduct or engaged in conduct that constituted gross negligence and contributed to the loss, damages, or injury" suffered by the claimant.

The current standard jury instructions provide for punitive damages if the defendant was "personally guilty of intentional misconduct."[43] The bill requires that the defendant "actively and knowingly participated in intentional misconduct."

Vicarious Liability for Punitive Damages

The bill provides that in the case of vicarious liability of an employer, principal, corporation, or other legal entity, punitive damages may not be imposed for the conduct of an employee or agent unless:

- A specifically identified employee or agent actively and knowingly participated in intentional misconduct or engaged in conduct that constituted gross negligence and contributed to the loss, damages, or injury suffered by the claimant; and
- An officer, director, or manager of the actual employer, corporation, or legal entity condoned, ratified, or consented to the specific conduct alleged.

Use of Survey Reports in Punitive Damages Actions

The bill provides that state or federal survey reports may not be used to establish an entitlement to punitive damages.

Section 3 amends s. 400.0238, F.S., as follows:

Attorney Fees in Punitive Damages Actions

The bill changes how attorney fees are calculated in punitive damages actions. It requires that attorney fees be calculated based on the claimant's share of punitive damages rather than the final judgment for punitive damages. The bill provides that if a claimant receives a final judgment for punitive damages or settles a case in which the claimant was granted leave to amend the complaint to add a punitive damages claim, the punitive award is divided equally between the claimant and the Quality of Long-Term Care Facility Improvement Trust Fund. The award is divided before any distribution to the claimant or claimant's counsel.

[43] Standard Jury Instructions in Civil Cases, 503.1, Punitive Damages - Bifurcated Procedure.

The bill further provides that if the parties enter into a settlement agreement at any point after the claimant is allowed to amend the agreement to add a count for punitive damages, 50 percent of the total settlement amount is considered to be the punitive award. The bill provides that the punitive award is divided equally between the claimant and the Quality of Long-Term Care Facility Improvement Trust Fund before any distribution for attorney fees and costs. The bill prohibits the parties from altering the allocation by agreement.

The bill provides that settlement of a claim after the claimant has been allowed to amend the complaint to add a punitive damages count is not an admission of liability and is not governed by s. 400.0238, F.S.

Section 4 amends s. 400.23, F.S., as follows:

Evidence of Relating to Compliance with Staffing Requirements

The bill provides that if the licensee demonstrates compliance with the minimum staffing requirements, the licensee is entitled to a presumption that appropriate staffing was provided and the claimant is not permitted to present any testimony or other evidence of understaffing. The testimony or other evidence is only permissible for days which it can be demonstrated that the licensee was not in compliance with the minimum staffing requirements.

The bill further provides that evidence that the licensee was staffed by an insufficient number of nursing assistants or licensed nurses may not be qualified or admitted on behalf of a resident who makes a claim, unless the licensee received a class I, class II, or uncorrected class III deficiency from AHCA for failure to comply with the minimum staffing requirements and the claimant resident was identified by AHCA as having suffered actual harm because of that failure.

Deficiencies Found in Nursing Home Surveys

The bill provides that a deficiency identified by the agency in a nursing home survey is generally not admissible in nursing home negligence litigation. However, the bill also provides two exceptions and allows the introduction of a survey if:

- The survey cites the resident on whose behalf the action is brought and AHCA determines the resident sustained actual harm as a result of the deficiency, or
- After an evidentiary hearing to determine its relevance, if the deficiency is found to have caused actual harm to residents and was widespread or if the deficiency is determined by the AHCA to be an uncorrected pattern of activity related to the injury sustained by the claimant.

The bill also provides that a survey may be admitted by the defendant if a claimant was a member of a survey resident roster or otherwise was the subject of any survey by AHCA and AHCA did not allege or determine that any deficiency occurred with respect to that claimant during that survey. The absence of a deficiency may be used by the licensee to refute an allegation of neglect or noncompliance with regulatory standards.

Section 5 provides an effective date for the bill of July 1, 2011.

<u>Other Potential Implications</u>:

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

Section 4 of the bill contains provisions related the admissibility of evidence such as evidence of understaffing and evidence of survey deficiencies. The Florida Supreme Court has held that portions of the Florida Evidence Code are substantive and portions are procedural. To the extent the exclusion of evidence in this bill is procedural, a court could hold that the restriction violates Art. V, s. 2(a) of the Florida Constitution.

Lines 69-71 of the bill provide a cap on noneconomic damages in wrongful death actions brought under section 400.023, F.S. Caps on noneconomic damages are subject to review under Art. I, s. 21 of the Florida Constitution. The constitution provides that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. In *Kluger v. White,* 281 So.2d 1 (Fla. 1973), the Florida Supreme Court held that:

> [w]here a right of access to the courts for redress for a particular injury has been provided…the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[44]

The Florida Supreme Court in *Kluger* invalidated a statute that required a minimum of $550 in property damages arising from an automobile accident before a lawsuit could be brought. Based upon the *Kluger* test, the Florida Supreme Court has also invalidated a portion of a tort reform statute that placed a cap on all noneconomic damages because the statute did not provide claimants with a commensurate benefit.[45] Thus, the Legislature

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[44] *Kluger v. White,* 281 So2d 1, 4 (Fla. 1973).
[45] *See Smith v. Dept. of Insurance,* 507 So.2d 1080 (Fla. 1987).

cannot restrict damages by either enacting a minimum damage amount or a monetary cap on damages without meeting the *Kluger* test.

The caps on noneconomic damages in medical malpractice cases, found in ss. 766.207 and 766.209, F.S., have been found by the Florida Supreme Court to meet the *Kluger* test and are not violative of the access to courts provision in the Florida Constitution. In *University of Miami v. Echarte,* 618 So.2d 189 (Fla. 1993), the court ruled that the arbitration scheme met both prongs of the *Kluger* test. First, the court held that the arbitration scheme provided claimants with a commensurate benefit for the loss of the right to fully recover noneconomic damages as the claimant has the opportunity to receive prompt recovery without the risk and uncertainty of litigation or having to prove fault in a civil trial. Additionally, the claimant benefits from: reduced costs of attorney and expert witness fees which would be required to prove liability; joint and several liability of multiple defendants; prompt payment of damages after determination by the arbitration panel; interest penalties against the defendant for failure to promptly pay the arbitration award; and limited appellate review of the arbitration award.

Second, the court in *Echarte* ruled that, even if the medical malpractice arbitration statutes did not provide a commensurate benefit, the statutes satisfied the second prong of *Kluger* which requires a legislative finding that an overpowering public necessity exists, and further that no alternative method of meeting such public necessity can be shown. The court found that the Legislature's factual and policy findings of a medical malpractice crisis constituted an overpowering public necessity. The court also ruled that the record supported the conclusion that no alternative or less onerous method existed for meeting the public necessity of ending the medical malpractice crisis. The court explained, "…it is clear that both the arbitration statute, with its conditional limits on recovery of noneconomic damages, and the strengthened regulation of the medical profession are necessary to meet the medical malpractice insurance crisis."[46]

The bill limits the recovery of noneconomic damages. If the cap is challenged, the court would scrutinize this limitation based on the rulings in *Kluger* and its progeny. Accordingly, the court would have to determine whether this bill provided a claimant with a reasonable alternative to the right to recover full noneconomic damages. If not, the courts would look to see whether this bill was a response to an overpowering public necessity and that no alternative method of meeting such public necessity could have been shown.

Article I, s. 22 of the Florida Constitution provides for right to a trial by jury. The bill contains provisions that limit the admissibility of certain evidence unless AHCA has made certain findings. Specifically, lines 292 and 293 provide that evidence of understaffing cannot be admitted unless AHCA makes a finding that the claimant suffered harm due to a deficiency and lines 321 and 322 provide that certain evidence cannot be admitted unless AHCA finds that the claimant suffered actual harm. In *National Airlines, Inc. v. Florida Equipment Co. of Miami,* 71 So.2d 741, 744 (Fla. 1954), the Florida Supreme Court warned that it is "peculiarly within the province of the

[46] *University of Miami v. Echarte*, 618 So.2d 189, 195-197 (Fla. 1993).

jury" to draw inferences from facts and determine the ultimate facts. It could be argued that these provisions make AHCA, rather than the jury, the ultimate finder of fact if the issue in the case is whether the claimant suffered actual harm.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Due to the greater portion of settlements in punitive damages cases being distributed to the Quality of Long-Term Care Facility Improvement Trust Fund, claimants could see smaller awards in settlements. Attorneys could see lower attorney fees in such punitive damage cases.

C. Government Sector Impact:

The AHCA advises:
The fiscal impact to the Agency will arise out of the use of survey deficiencies to prove adequate staffing issues (see pages 10-11, lines 278-293 of bill) and the use of survey results to prove or rebute negligence (see pages 11-12, lines 316-337). Currently, the Agency already experiences complaints filed to bolster claims. Under this bill, Agency findings are a prerequisite to staffing claims and evidence for or against other negligence. It can be easily anticipated that complaints requiring surveyor time and expense will be filed for litigation purposes. It is also certain that in the case where such deficiencies might be settled by the Agency without formal hearing, litigating parties will require discovery and testimony in the civil actions from Agency surveyors to substantiate the survey findings. Additionally, virtually all presuit investigation will include a public records request. These will result in expense to the Agency. The fiscal impact cannot be determined at this time. If the bill were amended to require that the agency's survey findings must be accepted as written and prohibit the ability to depose agency staff, the impact to the agency would be reduced.[47]

VI. Technical Deficiencies:

None.

VII. Related Issues:

In Section 1 of the bill, lines 41-54 indicate that a cause of action may not be asserted individually against an "employee" unless the "officer, director, owner, or agent breached, failed to perform, or acted outside the scope of duties as an officer, director, owner, or agent," and when such behavior is the legal cause of loss, injury, death, or damage to the resident. This

[47] Agency for Health Care Administration, "2011 Bill Analysis and Economic Impact Statement: SB 1396," on file with Senate Health Regulation Committee staff.

seems to limit causes of action against an employee to situations in which another party has caused the harm.

In Section 3 of the bill, lines 258-262 provide that the settlement of a claim before a verdict is not an admission of liability and "is not governed" by s. 400.0238, F.S. Much of Section 3 of the bill provides for allocation of punitive damages in cases that settle before a verdict. The intent and effect of lines 261-262 are unclear.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.