

By the Committee on Health Regulation; and Senator Bogdanoff

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A bill to be entitled

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

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

Section 1. Section 400.023, Florida Statutes, is reordered and amended to read:

400.023 Civil enforcement.—

(1) A ~~Any~~ resident who alleges negligence or a violation of whose rights as specified in this part ~~has~~ ~~are violated~~ ~~shall have~~ a cause of action against the licensee or its management company, as identified in the state application for nursing home licensure. However, the cause of action may not be asserted

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30 individually against an officer, director, owner, including an
31 owner designated as having a controlling interest on the state
32 application for nursing home licensure, or agent of a licensee
33 or management company unless, following an evidentiary hearing,
34 the court determines there is sufficient evidence in the record
35 or proffered by the claimant which establishes a reasonable
36 basis for finding that the person or entity breached, failed to
37 perform, or acted outside the scope of duties as an officer,
38 director, owner, or agent, and that the breach, failure to
39 perform, or action outside the scope of duties is a legal cause
40 of actual loss, injury, death, or damage to the resident.

41 (2) The action may be brought by the resident or his or her
42 guardian, by a person or organization acting on behalf of a
43 resident with the consent of the resident or his or her
44 guardian, or by the personal representative of the estate of a
45 deceased resident regardless of the cause of death.

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

48 (a) Caused the death of the resident, the claimant must
49 ~~shall be required to~~ elect either survival damages pursuant to
50 s. 46.021 or wrongful death damages pursuant to s. 768.21. If
51 the claimant elects wrongful death damages, total noneconomic
52 damages may not exceed \$300,000, regardless of the number of
53 claimants.

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

58 (3) The action may be brought in any court of competent

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59 jurisdiction to enforce such rights and to recover actual and
60 punitive damages for any violation of the rights of a resident
61 or for negligence.

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

79 (6) ~~(2)~~ ~~If the In any~~ claim brought pursuant to this part
80 alleges ~~alleging~~ a violation of resident's rights or negligence
81 causing injury to or the death of a resident, the claimant shall
82 have the burden of proving, by a preponderance of the evidence,
83 that:

- 84 (a) The defendant owed a duty to the resident;
85 (b) The defendant breached the duty to the resident;
86 (c) The breach of the duty is a legal cause of loss,
87 injury, death, or damage to the resident; and

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

90 (12) ~~Nothing in~~ This part does not ~~shall be interpreted to~~
91 create strict liability. A violation of the rights set forth in
92 s. 400.022 or in any other standard or guidelines specified in
93 this part or in any applicable administrative standard or
94 guidelines of this state or a federal regulatory agency is ~~shall~~
95 ~~be~~ evidence of negligence but may ~~shall~~ not be considered
96 negligence per se.

97 (7) ~~(3)~~ In any claim brought pursuant to this section, a
98 licensee, person, or entity has ~~shall have~~ a duty to exercise
99 reasonable care. Reasonable care is that degree of care which a
100 reasonably careful licensee, person, or entity would use under
101 like circumstances.

102 (9) ~~(4)~~ In any claim for resident's rights violation or
103 negligence by a nurse licensed under part I of chapter 464, such
104 nurse has a ~~shall have the~~ duty to exercise care consistent with
105 the prevailing professional standard of care for a nurse. The
106 prevailing professional standard of care for a nurse is ~~shall be~~
107 that level of care, skill, and treatment which, in light of all
108 relevant surrounding circumstances, is recognized as acceptable
109 and appropriate by reasonably prudent similar nurses.

110 (8) ~~(5)~~ A licensee is ~~shall~~ not ~~be~~ liable for the medical
111 negligence of any physician rendering care or treatment to the
112 resident except for the administrative services of a medical
113 director as required in this part. ~~Nothing in~~ This subsection
114 does not ~~shall be construed to~~ protect a licensee, person, or
115 entity from liability for failure to provide a resident with
116 appropriate observation, assessment, nursing diagnosis,

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117 planning, intervention, and evaluation of care by nursing staff.

118 ~~(4)(6)~~ The resident or the resident's legal representative
119 shall serve a copy of any complaint alleging in whole or in part
120 a violation of any rights specified in this part to the agency
121 ~~for Health Care Administration~~ at the time of filing the initial
122 complaint with the clerk of the court for the county in which
123 the action is pursued. ~~The requirement of~~ Providing a copy of
124 the complaint to the agency does not impair the resident's legal
125 rights or ability to seek relief for his or her claim.

126 ~~(11)(7)~~ An action under this part for a violation of rights
127 or negligence ~~recognized herein~~ is not a claim for medical
128 malpractice, and the provisions of s. 768.21(8) do not apply to
129 a claim alleging death of the resident.

130 Section 2. Subsections (1), (2), and (3) of section
131 400.0237, Florida Statutes, are amended to read:

132 400.0237 Punitive damages; pleading; burden of proof.—

133 (1) In any action ~~for damages~~ brought under this part, a ~~no~~
134 claim for punitive damages is not ~~shall be~~ permitted unless,
135 based on admissible ~~there is a reasonable showing by~~ evidence in
136 ~~the record or~~ proffered by the claimant, which would provide a
137 reasonable basis for recovery of such damages is demonstrated
138 upon applying the criteria set forth in this section. The
139 defendant may proffer admissible evidence to refute the
140 claimant's proffer of evidence to recover punitive damages. The
141 trial judge shall conduct an evidentiary hearing and weigh the
142 admissible evidence proffered by the claimant and the defendant
143 to ensure that there is a reasonable basis to believe that the
144 claimant, at trial, will be able to demonstrate by clear and
145 convincing evidence that the recovery of such damages is

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146 warranted. The claimant may move to amend her or his complaint
147 to assert a claim for punitive damages as allowed by the rules
148 of civil procedure. ~~The rules of civil procedure shall be~~
149 ~~liberally construed so as to allow the claimant discovery of~~
150 ~~evidence which appears reasonably calculated to lead to~~
151 ~~admissible evidence on the issue of punitive damages. No~~
152 Discovery of financial worth may not ~~shall~~ proceed until after
153 the trial judge approves the pleading on ~~concerning~~ punitive
154 damages ~~is permitted.~~

155 (2) A defendant, including the licensee or management
156 company, against whom punitive damages is sought, may be held
157 liable for punitive damages only if the trier of fact, based on
158 clear and convincing evidence, finds that a specific individual
159 or corporate defendant actively and knowingly participated in
160 intentional misconduct, or engaged in conduct that constituted
161 gross negligence, and that conduct contributed to the loss,
162 damages, or injury suffered by the claimant ~~the defendant was~~
163 ~~personally guilty of intentional misconduct or gross negligence.~~
164 As used in this section, the term:

165 (a) "Intentional misconduct" means that the defendant
166 against whom a claim for punitive damages is sought had actual
167 knowledge of the wrongfulness of the conduct and the high
168 probability that injury or damage to the claimant would result
169 and, despite that knowledge, intentionally pursued that course
170 of conduct, resulting in injury or damage.

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

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175 (3) In the case of vicarious liability of an employer,
176 principal, corporation, or other legal entity, punitive damages
177 may not be imposed for the conduct of an identified employee or
178 agent unless ~~only if~~ the conduct of the employee or agent meets
179 the criteria specified in subsection (2) and officers,
180 directors, or managers of the actual employer corporation or
181 legal entity condoned, ratified, or consented to the specific
182 conduct as alleged by the claimant in subsection (2).÷

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

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

188 ~~(c) The employer, principal, corporation, or other legal~~
189 ~~entity engaged in conduct that constituted gross negligence and~~
190 ~~that contributed to the loss, damages, or injury suffered by the~~
191 ~~claimant.~~

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