

HB 661

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1                   A bill to be entitled  
2           An act relating to nursing home litigation reform;  
3           amending s. 400.023, F.S.; specifying conditions under  
4           which a nursing home resident has a cause of action  
5           against a licensee or management company; requiring the  
6           trial judge to conduct an evidentiary hearing before a  
7           claimant can assert a claim against certain interested  
8           parties; providing a timeframe for a claimant to elect  
9           survival damages or wrongful death damages; providing a  
10          limitation on recovery; amending s. 400.0237, F.S.;  
11          requiring evidence of the basis for punitive damages;  
12          requiring the trial judge to conduct an evidentiary  
13          hearing before a claimant can assert a claim for punitive  
14          damages; permitting a licensee or management company to be  
15          held liable for punitive damages under certain  
16          circumstances; providing criteria for awarding of punitive  
17          damages in a case of vicarious liability of certain  
18          entities; amending s. 400.0238, F.S.; providing additional  
19          conditions for settlements involving claims for punitive  
20          damages; amending s. 400.23, F.S.; providing limitations  
21          for admissibility of survey and licensure reports and the  
22          presentation of testimony or other evidence of staffing  
23          deficiencies; providing applicability; providing an  
24          effective date.

25  
26   Be It Enacted by the Legislature of the State of Florida:  
27

28 Section 1. Section 400.023, Florida Statutes, is amended  
 29 to read:

30 400.023 Civil enforcement.—

31 (1) Any resident who alleges negligence or a violation of  
 32 ~~whose~~ rights as specified in this part has ~~are violated~~ shall  
 33 ~~have~~ a cause of action against the licensee or its management  
 34 company, as specifically identified in the application for  
 35 nursing home licensure, and its direct caregiver employees.

36 Sections 400.023-400.0238 provide the exclusive remedy against a  
 37 licensee or management company for a cause of action for  
 38 recovery of damages for the personal injury or death of a  
 39 nursing home resident arising out of negligence or a violation  
 40 of residents' rights specified in s. 400.022.

41 (2) A cause of action may not be asserted individually  
 42 against an employee, officer, director, owner, including any  
 43 designated as having a "controlling interest" on the application  
 44 for nursing home licensure, or agent of a licensee or management  
 45 company under this part unless, following an evidentiary  
 46 hearing, the court determines there is sufficient evidence in  
 47 the record or proffered by the claimant that establishes a  
 48 reasonable basis for a finding that:

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

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

55 (3) If an action is brought by or on behalf of a resident

56 under this part, a cause of action under s. 415.111 may not be  
 57 asserted against an employee, officer, director, owner, or agent  
 58 of a licensee or management company.

59 (4) The action may be brought by the resident or his or  
 60 her guardian, by a person or organization acting on behalf of a  
 61 resident with the consent of the resident or his or her  
 62 guardian, or by the personal representative of the estate of a  
 63 deceased resident regardless of the cause of death. If the  
 64 action alleges a claim for the resident's rights or for  
 65 negligence that caused the death of the resident, the claimant  
 66 shall be required to elect, at the end of discovery but not  
 67 later than 60 days before trial, either survival damages  
 68 pursuant to s. 46.021 or wrongful death damages pursuant to s.  
 69 768.21. In any claim for wrongful death brought under this  
 70 section, noneconomic damages may not exceed a total of \$250,000,  
 71 regardless of the number of claimants or defendants.

72 (5) If the action alleges a claim for the resident's  
 73 rights or for negligence that did not cause the death of the  
 74 resident, the personal representative of the estate may recover  
 75 damages for the negligence that caused injury to the resident.  
 76 The action may be brought in any court of competent jurisdiction  
 77 to enforce such rights and to recover actual and punitive  
 78 damages for any violation of the rights of a resident or for  
 79 negligence.

80 (6) Any resident who prevails in seeking injunctive relief  
 81 or a claim for an administrative remedy may ~~is entitled to~~  
 82 recover the costs of the action, and a reasonable attorney's fee  
 83 assessed against the defendant not to exceed \$25,000. Fees shall

84 be awarded solely for the injunctive or administrative relief  
 85 and not for any claim or action for damages whether such claim  
 86 or action is brought ~~together~~ with a request for an injunction  
 87 or administrative relief or as a separate action, except as  
 88 provided under s. 768.79 or the Florida Rules of Civil  
 89 Procedure. ~~Sections 400.023-400.0238 provide the exclusive~~  
 90 ~~remedy for a cause of action for recovery of damages for the~~  
 91 ~~personal injury or death of a nursing home resident arising out~~  
 92 ~~of negligence or a violation of rights specified in s. 400.022.~~  
 93 ~~This section does not preclude theories of recovery not arising~~  
 94 ~~out of negligence or s. 400.022 which are available to a~~  
 95 ~~resident or to the agency. The provisions of Chapter 766 does ~~de~~~~  
 96 ~~not apply to any cause of action brought under ss. 400.023-~~  
 97 ~~400.0238.~~

98 ~~(7)(2)~~ In any claim brought under ~~pursuant to~~ this part  
 99 alleging a violation of resident's rights or negligence causing  
 100 injury to or the death of a resident, the claimant has ~~shall~~  
 101 ~~have~~ the burden of proving, by a preponderance of the evidence,  
 102 that:

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

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

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

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

110 (8) Nothing in this part shall be interpreted to create  
 111 strict liability. A violation of the rights set forth in s.

112 400.022 or in any other standard or guidelines specified in this  
 113 part or in any applicable administrative standard or guidelines  
 114 of this state or a federal regulatory agency shall be evidence  
 115 of negligence but shall not be considered negligence per se.

116 (9)~~(3)~~ In any claim brought pursuant to this section, a  
 117 licensee, person, or entity shall have a duty to exercise  
 118 reasonable care. Reasonable care is that degree of care which a  
 119 reasonably careful licensee, person, or entity would use under  
 120 like circumstances.

121 (10)~~(4)~~ In any claim for resident's rights violation or  
 122 negligence by a nurse licensed under part I of chapter 464, such  
 123 nurse shall have the duty to exercise care consistent with the  
 124 prevailing professional standard of care for a nurse. The  
 125 prevailing professional standard of care for a nurse shall be  
 126 that level of care, skill, and treatment which, in light of all  
 127 relevant surrounding circumstances, is recognized as acceptable  
 128 and appropriate by reasonably prudent similar nurses.

129 (11)~~(5)~~ A licensee shall not be liable for the medical  
 130 negligence of any physician rendering care or treatment to the  
 131 resident except for the administrative services of a medical  
 132 director as required in this part. Nothing in this subsection  
 133 shall be construed to protect a licensee, person, or entity from  
 134 liability for failure to provide a resident with appropriate  
 135 observation, assessment, nursing diagnosis, planning,  
 136 intervention, and evaluation of care by nursing staff.

137 (12)~~(6)~~ The resident or the resident's legal  
 138 representative shall serve a copy of any complaint alleging in  
 139 whole or in part a violation of any rights specified in this

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140 part to the Agency for Health Care Administration at the time of  
 141 filing the initial complaint with the clerk of the court for the  
 142 county in which the action is pursued. The requirement of  
 143 providing a copy of the complaint to the agency does not impair  
 144 the resident's legal rights or ability to seek relief for his or  
 145 her claim.

146 (13)~~(7)~~ An action under this part for a violation of  
 147 rights or negligence recognized herein is not a claim for  
 148 medical malpractice, and ~~the provisions of s. 768.21(8)~~ does ~~de~~  
 149 not apply to a claim alleging death of the resident.

150 Section 2. Subsections (1), (2), and (3) of section  
 151 400.0237, Florida Statutes, are amended to read:

152 400.0237 Punitive damages; pleading; burden of proof.—

153 (1) In any action ~~for damages~~ brought under this part, a  
 154 ~~no~~ claim for punitive damages may not be brought ~~shall be~~  
 155 ~~permitted~~ unless there is a reasonable showing of admissible by  
 156 evidence that has been in the record or proffered by the parties  
 157 and provides claimant which would provide a reasonable basis for  
 158 recovery of such damages when the criteria set forth in this  
 159 section are applied. The claimant may move to amend her or his  
 160 complaint to assert a claim for punitive damages as allowed by  
 161 the rules of civil procedure. The trial judge shall conduct an  
 162 evidentiary hearing and weigh the admissible evidence proffered  
 163 by all parties to ensure that there is a reasonable basis to  
 164 believe that the claimant, at trial, will be able to demonstrate  
 165 by clear and convincing evidence that the recovery of such  
 166 damages is warranted. ~~The rules of civil procedure shall be~~  
 167 ~~liberally construed so as to allow the claimant discovery of~~

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168 ~~evidence which appears reasonably calculated to lead to~~  
169 ~~admissible evidence on the issue of punitive damages. No A~~  
170 ~~discovery of financial worth may not shall proceed until after~~  
171 ~~the pleading on concerning punitive damages is approved~~  
172 ~~permitted.~~

173 (2) A defendant, including the licensee or management  
174 company against whom punitive damages is sought, may be held  
175 liable for punitive damages only if the trier of fact, based on  
176 clear and convincing evidence, finds that a specific individual  
177 or corporate defendant actively and knowingly participated in  
178 intentional misconduct or engaged in conduct that constituted  
179 gross negligence and contributed to the loss, damages, or injury  
180 suffered by the claimant ~~the defendant was personally guilty of~~  
181 ~~intentional misconduct or gross negligence.~~ As used in this  
182 section, the term:

183 (a) "Intentional misconduct" means that the defendant  
184 against whom punitive damages are sought had actual knowledge of  
185 the wrongfulness of the conduct and the high probability that  
186 injury or damage to the claimant would result and, despite that  
187 knowledge, intentionally pursued that course of conduct,  
188 resulting in injury or damage.

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

193 (3) In the case of vicarious liability of an employer,  
194 principal, corporation, or other legal entity, punitive damages  
195 may not be imposed for the conduct of an employee or agent

196 unless only if the conduct of a specifically identified the  
 197 employee or agent meets the criteria specified in subsection (2)  
 198 and an officer, director, or manager of the actual employer,  
 199 corporation, or legal entity condoned, ratified, or consented to  
 200 the specific conduct as alleged in subsection (2). A state or  
 201 federal survey report of nursing facilities may not be used to  
 202 establish an entitlement to punitive damages under this  
 203 section.÷

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

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

209 ~~(c) The employer, principal, corporation, or other legal~~  
 210 ~~entity engaged in conduct that constituted gross negligence and~~  
 211 ~~that contributed to the loss, damages, or injury suffered by the~~  
 212 ~~claimant.~~

213 Section 3. Subsections (2) and (4) of section 400.0238,  
 214 Florida Statutes, are amended to read:

215 400.0238 Punitive damages; limitation.—

216 (2) The claimant's attorney's fees, if payable from the  
 217 judgment, are, to the extent that the fees are based on the  
 218 punitive damages, calculated based on the claimant's share of  
 219 ~~final judgment for~~ punitive damages. This subsection does not  
 220 limit the payment of attorney's fees based upon an award of  
 221 damages other than punitive damages.

222 (4) Notwithstanding any other law to the contrary, if a  
 223 claimant has received a final judgment for ~~the amount of~~



224 punitive damages or there is a settlement of a case in which the  
 225 claimant was granted leave to amend his or her complaint to add  
 226 a claim for punitive damages, the punitive award awarded  
 227 ~~pursuant to this section~~ shall be equally divided, before any  
 228 distribution to the claimant's counsel for fees or costs,  
 229 between the claimant and the Quality of Long-Term Care Facility  
 230 Improvement Trust Fund, in accordance with the following  
 231 ~~provisions:~~

232 (a) In the event of a judgment, the clerk of the court  
 233 shall transmit a copy of the jury verdict to the Chief Financial  
 234 Officer by certified mail. In the final judgment, the court  
 235 shall order the percentages of the award, payable as provided  
 236 herein. In the event of a settlement, the parties shall transmit  
 237 by certified mail to the Chief Financial Officer a statement of  
 238 the proportionate share due to the Quality of Long-Term Care  
 239 Facility Improvement Trust Fund.

240 (b) A settlement agreement entered into between the  
 241 original parties to the action after a verdict has been returned  
 242 must provide a proportionate share payable to the Quality of  
 243 Long-Term Care Facility Improvement Trust Fund specified herein.  
 244 For purposes of this paragraph, a proportionate share is a 50-  
 245 percent share of that percentage of the settlement amount which  
 246 the punitive damages portion of the verdict bore to the total of  
 247 the compensatory and punitive damages in the verdict.

248 (c) For a settlement agreement entered into between the  
 249 parties to the action, at any time after a claimant is permitted  
 250 by the court to amend the agreement to add a count for punitive  
 251 damages, but before a final judgment on the issue, 50 percent of

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252 the total settlement amount shall be the punitive award. The  
 253 punitive award shall be equally divided, before any distribution  
 254 to the claimant's counsel for fees or costs, between the  
 255 claimant and the Quality of Long-Term Care Facility Improvement  
 256 Trust Fund. The amount of the punitive award and the allocation  
 257 of that award provided for in this subsection may not be altered  
 258 in any way by agreement of the parties after the claimant has  
 259 been granted leave to amend his or her complaint to include a  
 260 claim for punitive damages.

261 (d) Settlement of a claim before a verdict by a defendant  
 262 in which a claimant was permitted at any time to amend the claim  
 263 to add a count for punitive damages is not an admission of  
 264 liability for conduct described in subsection (2) and is not  
 265 governed by this section.

266 (e)-(e) The Department of Financial Services shall collect  
 267 or cause to be collected all payments due the state under this  
 268 section. Such payments are made to the Chief Financial Officer  
 269 and deposited in the appropriate fund specified in this  
 270 subsection.

271 (f)-(d) If the full amount of punitive damages awarded  
 272 cannot be collected, the claimant and the other recipient  
 273 designated pursuant to this subsection are each entitled to a  
 274 proportionate share of the punitive damages collected.

275 Section 4. Paragraph (d) is added to subsection (3) and  
 276 paragraph (e) is added to subsection (8) of section 400.23,  
 277 Florida Statutes, to read:

278 400.23 Rules; evaluation and deficiencies; licensure  
 279 status.—

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280 (3)

281 (d) In any action brought under ss. 400.023-400.0238, if  
282 the licensee demonstrates compliance with the minimum staffing  
283 requirements under this part, the licensee is entitled to a  
284 presumption that appropriate staffing was provided and the  
285 claimant may not be permitted to present any testimony or other  
286 evidence of understaffing. The testimony or other evidence is  
287 only permissible for days on which it can be demonstrated that  
288 the licensee was not in compliance with the minimum staffing  
289 requirements under this part. Evidence that the licensee was  
290 staffed by an insufficient number of nursing assistants or  
291 licensed nurses may not be qualified or admitted on behalf of a  
292 resident who makes a claim, unless the licensee received a class  
293 I, class II, or uncorrected class III deficiency for failure to  
294 comply with the minimum staffing requirements under this part  
295 and the claimant resident was identified by the agency as having  
296 suffered actual harm because of that failure.

297 (8) The agency shall adopt rules pursuant to this part and  
298 part II of chapter 408 to provide that, when the criteria  
299 established under subsection (2) are not met, such deficiencies  
300 shall be classified according to the nature and the scope of the  
301 deficiency. The scope shall be cited as isolated, patterned, or  
302 widespread. An isolated deficiency is a deficiency affecting one  
303 or a very limited number of residents, or involving one or a  
304 very limited number of staff, or a situation that occurred only  
305 occasionally or in a very limited number of locations. A  
306 patterned deficiency is a deficiency where more than a very  
307 limited number of residents are affected, or more than a very

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308 limited number of staff are involved, or the situation has  
309 occurred in several locations, or the same resident or residents  
310 have been affected by repeated occurrences of the same deficient  
311 practice but the effect of the deficient practice is not found  
312 to be pervasive throughout the facility. A widespread deficiency  
313 is a deficiency in which the problems causing the deficiency are  
314 pervasive in the facility or represent systemic failure that has  
315 affected or has the potential to affect a large portion of the  
316 facility's residents. The agency shall indicate the  
317 classification on the face of the notice of deficiencies as  
318 follows:

319 (e) A deficiency identified by the agency in a nursing  
320 home survey is not admissible for any purpose in an action under  
321 ss. 400.023-400.0238. However, a survey deficiency citing a  
322 resident on whose behalf the action is brought may be introduced  
323 as evidence of negligence if the agency has determined that the  
324 resident sustained actual harm as a result thereof. If a  
325 claimant in an action under ss. 400.023-400.0238 was a member of  
326 a survey resident roster or otherwise was the subject of any  
327 survey by the agency and the agency did not allege or determine  
328 that any deficiency occurred with respect to that claimant  
329 during that survey, the licensee may introduce the absence of a  
330 deficiency citation to refute an allegation of neglect or  
331 noncompliance with regulatory standards.

332 Section 5. This act shall take effect July 1, 2011, and  
333 shall apply to all causes of action that accrue on or after that  
334 date.