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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 for a
21 rebuttable presumption in certain actions brought against
22 a licensee; providing limitations for admissibility of
23 survey and licensure reports and the presentation of
24 testimony or other evidence of staffing deficiencies;
25 providing applicability; providing an effective date.

26
27 Be It Enacted by the Legislature of the State of Florida:
28

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

31 400.023 Civil enforcement.—

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

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

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

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

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

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

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57 | under this part, a cause of action under s. 415.1111 may not be
58 | asserted against an employee, officer, director, owner, or agent
59 | of a licensee or management company.

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

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

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

85 be awarded solely for the injunctive or administrative relief
 86 and not for any claim or action for damages whether such claim
 87 or action is brought ~~together~~ with a request for an injunction
 88 or administrative relief or as a separate action, except as
 89 provided under s. 768.79 or the Florida Rules of Civil
 90 Procedure. ~~Sections 400.023-400.0238 provide the exclusive~~
 91 ~~remedy for a cause of action for recovery of damages for the~~
 92 ~~personal injury or death of a nursing home resident arising out~~
 93 ~~of negligence or a violation of rights specified in s. 400.022.~~
 94 ~~This section does not preclude theories of recovery not arising~~
 95 ~~out of negligence or s. 400.022 which are available to a~~
 96 ~~resident or to the agency. The provisions of Chapter 766 does ~~do~~~~
 97 ~~not apply to any cause of action brought under ss. 400.023-~~
 98 ~~400.0238.~~

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

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

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

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

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

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

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

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

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

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

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

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

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

151 Section 2. Subsections (1), (2), and (3) of section
 152 400.0237, Florida Statutes, are amended to read:

153 400.0237 Punitive damages; pleading; burden of proof.—

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

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

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

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

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

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

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

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

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

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

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

216 400.0238 Punitive damages; limitation.—

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

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

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

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

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

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

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

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

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.—

280 (3)

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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 rebuttable presumption that appropriate staffing was provided.

285 (8) The agency shall adopt rules pursuant to this part and
286 part II of chapter 408 to provide that, when the criteria
287 established under subsection (2) are not met, such deficiencies
288 shall be classified according to the nature and the scope of the
289 deficiency. The scope shall be cited as isolated, patterned, or
290 widespread. An isolated deficiency is a deficiency affecting one
291 or a very limited number of residents, or involving one or a
292 very limited number of staff, or a situation that occurred only
293 occasionally or in a very limited number of locations. A
294 patterned deficiency is a deficiency where more than a very
295 limited number of residents are affected, or more than a very
296 limited number of staff are involved, or the situation has
297 occurred in several locations, or the same resident or residents
298 have been affected by repeated occurrences of the same deficient
299 practice but the effect of the deficient practice is not found
300 to be pervasive throughout the facility. A widespread deficiency
301 is a deficiency in which the problems causing the deficiency are
302 pervasive in the facility or represent systemic failure that has
303 affected or has the potential to affect a large portion of the
304 facility's residents. The agency shall indicate the
305 classification on the face of the notice of deficiencies as
306 follows:

307 (e) A deficiency identified by the agency in a nursing
308 home survey is not admissible for any purpose in an action under

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309 ss. 400.023–400.0238. However, a survey deficiency citing a
310 resident on whose behalf the action is brought may be introduced
311 as evidence of negligence if the agency has determined that the
312 resident sustained actual harm as a result thereof. If a
313 claimant in an action under ss. 400.023–400.0238 was a member of
314 a survey resident roster or otherwise was the subject of any
315 survey by the agency and the agency did not allege or determine
316 that any deficiency occurred with respect to that claimant
317 during that survey, the licensee may introduce the absence of a
318 deficiency citation to refute an allegation of neglect or
319 noncompliance with regulatory standards.

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