

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 limitation on recovery; amending s.
 9 400.0237, F.S.; requiring evidence of the basis for
 10 punitive damages; requiring the trial judge to conduct an
 11 evidentiary hearing before a claimant can assert a claim
 12 for punitive damages; permitting a licensee or management
 13 company to be held liable for punitive damages under
 14 certain circumstances; providing criteria for awarding of
 15 punitive damages in a case of vicarious liability of
 16 certain entities; providing applicability; providing for
 17 severability; providing an effective date.

18
 19 Be It Enacted by the Legislature of the State of Florida:

20
 21 Section 1. Section 400.023, Florida Statutes, is amended
 22 to read:

23 400.023 Civil enforcement.—

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

29 Sections 400.023-400.0238 provide the exclusive remedy against a
 30 licensee or management company for a cause of action for
 31 recovery of damages for the personal injury or death of a
 32 nursing home resident arising out of negligence or a violation
 33 of residents' rights specified in s. 400.022.

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

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

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

48 (3) The action may be brought by the resident or his or
 49 her guardian, by a person or organization acting on behalf of a
 50 resident with the consent of the resident or his or her
 51 guardian, or by the personal representative of the estate of a
 52 deceased resident regardless of the cause of death. If the
 53 action alleges a claim for the resident's rights or for
 54 negligence that caused the death of the resident, the claimant
 55 shall be required to elect either survival damages pursuant to
 56 s. 46.021 or wrongful death damages pursuant to s. 768.21. In

57 any claim for wrongful death brought under this section,
 58 noneconomic damages may not exceed \$300,000 per resident,
 59 regardless of the number of claimants or defendants.

60 (4) If the action alleges a claim for the resident's
 61 rights or for negligence that did not cause the death of the
 62 resident, the personal representative of the estate may recover
 63 damages for the negligence that caused injury to the resident.
 64 The action may be brought in any court of competent jurisdiction
 65 to enforce such rights and to recover actual and punitive
 66 damages for any violation of the rights of a resident or for
 67 negligence.

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

85 400.0238.

86 ~~(6)(2)~~ In any claim brought under ~~pursuant to~~ this part
 87 alleging a violation of resident's rights or negligence causing
 88 injury to or the death of a resident, the claimant has ~~shall~~
 89 ~~have~~ the burden of proving, by a preponderance of the evidence,
 90 that:

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

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

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

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

98 (7) Nothing in this part shall be interpreted to create
 99 strict liability. A violation of the rights set forth in s.
 100 400.022 or in any other standard or guidelines specified in this
 101 part or in any applicable administrative standard or guidelines
 102 of this state or a federal regulatory agency shall be evidence
 103 of negligence but shall not be considered negligence per se.

104 ~~(8)(3)~~ In any claim brought pursuant to this section, a
 105 licensee, person, or entity shall have a duty to exercise
 106 reasonable care. Reasonable care is that degree of care which a
 107 reasonably careful licensee, person, or entity would use under
 108 like circumstances.

109 ~~(9)(4)~~ In any claim for resident's rights violation or
 110 negligence by a nurse licensed under part I of chapter 464, such
 111 nurse shall have the duty to exercise care consistent with the
 112 prevailing professional standard of care for a nurse. The

113 prevailing professional standard of care for a nurse shall be
114 that level of care, skill, and treatment which, in light of all
115 relevant surrounding circumstances, is recognized as acceptable
116 and appropriate by reasonably prudent similar nurses.

117 (10)~~(5)~~ A licensee shall not be liable for the medical
118 negligence of any physician rendering care or treatment to the
119 resident except for the administrative services of a medical
120 director as required in this part. Nothing in this subsection
121 shall be construed to protect a licensee, person, or entity from
122 liability for failure to provide a resident with appropriate
123 observation, assessment, nursing diagnosis, planning,
124 intervention, and evaluation of care by nursing staff.

125 (11)~~(6)~~ The resident or the resident's legal
126 representative shall serve a copy of any complaint alleging in
127 whole or in part a violation of any rights specified in this
128 part to the Agency for Health Care Administration at the time of
129 filing the initial complaint with the clerk of the court for the
130 county in which the action is pursued. The requirement of
131 providing a copy of the complaint to the agency does not impair
132 the resident's legal rights or ability to seek relief for his or
133 her claim.

134 (12)~~(7)~~ An action under this part for a violation of
135 rights or negligence recognized herein is not a claim for
136 medical malpractice, and ~~the provisions of~~ s. 768.21(8) does ~~de~~
137 not apply to a claim alleging death of the resident.

138 Section 2. Subsections (1), (2), and (3) of section
139 400.0237, Florida Statutes, are amended to read:

140 400.0237 Punitive damages; pleading; burden of proof.—

141 (1) In any action ~~for damages~~ brought under this part, a
 142 ~~no~~ claim for punitive damages may not be brought ~~shall be~~
 143 ~~permitted~~ unless there is a reasonable showing of admissible by
 144 evidence that has been in the record or proffered by the parties
 145 and provides claimant which would provide a reasonable basis for
 146 recovery of such damages when the criteria set forth in this
 147 section are applied. The claimant may move to amend her or his
 148 complaint to assert a claim for punitive damages as allowed by
 149 the rules of civil procedure. The trial judge shall conduct an
 150 evidentiary hearing and weigh the admissible evidence proffered
 151 by all parties to ensure that there is a reasonable basis to
 152 believe that the claimant, at trial, will be able to demonstrate
 153 by clear and convincing evidence that the recovery of such
 154 damages is warranted. ~~The rules of civil procedure shall be~~
 155 ~~liberally construed so as to allow the claimant discovery of~~
 156 ~~evidence which appears reasonably calculated to lead to~~
 157 ~~admissible evidence on the issue of punitive damages. No A~~
 158 discovery of financial worth may not ~~shall~~ proceed until ~~after~~
 159 the pleading on concerning punitive damages is approved
 160 permitted.

161 (2) A defendant, including the licensee or management
 162 company against whom punitive damages is sought, may be held
 163 liable for punitive damages only if the trier of fact, based on
 164 clear and convincing evidence, finds that a specific individual
 165 or corporate defendant actively and knowingly participated in
 166 intentional misconduct or engaged in conduct that constituted
 167 gross negligence and contributed to the loss, damages, or injury
 168 suffered by the claimant ~~the defendant was personally guilty of~~

169 ~~intentional misconduct or gross negligence.~~ As used in this
 170 section, the term:

171 (a) "Intentional misconduct" means that the defendant
 172 against whom punitive damages are sought had actual knowledge of
 173 the wrongfulness of the conduct and the high probability that
 174 injury or damage to the claimant would result and, despite that
 175 knowledge, intentionally pursued that course of conduct,
 176 resulting in injury or damage.

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

181 (3) In the case of vicarious liability of an employer,
 182 principal, corporation, or other legal entity, punitive damages
 183 may not be imposed for the conduct of an employee or agent
 184 unless only if the conduct of a specifically identified the
 185 employee or agent meets the criteria specified in subsection (2)
 186 and an officer, director, or manager of the actual employer,
 187 corporation, or legal entity condoned, ratified, or consented to
 188 the specific conduct as alleged in subsection (2).†

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

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

194 ~~(c) The employer, principal, corporation, or other legal~~
 195 ~~entity engaged in conduct that constituted gross negligence and~~
 196 ~~that contributed to the loss, damages, or injury suffered by the~~

197 ~~claimant.~~

198 Section 3. If any provision of this act or its application
199 to any person or circumstance is held invalid, the invalidity
200 does not affect other provisions or applications of this act
201 which can be given effect without the invalid provision or
202 application, and to this end the provisions of this act are
203 severable.

204 Section 4. This act shall take effect July 1, 2011, and
205 shall apply to all causes of action that accrue on or after that
206 date.