HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 869 Nursing Home Litigation Reform
SPONSOR(S): Hager
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1384

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	8 Y, 5 N	Bond	Bond
2) Health Innovation Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

This bill affects nursing home litigation. Specifically, this bill:

- Limits liability of individual managers consistent with the business judgment rule.
- Provides that the legal remedies provided by the nursing home law are the exclusive legal remedies that can be brought by a nursing home resident against the nursing home.
- Allows a defendant nursing home to challenge a preliminiary proffer of evidence related to a claim for punitive damages.
- Provides that punitive damages are generally only assessable against the person who committed the action (or inaction) that led to the injury.

This bill does not appear to have a fiscal impact on state or local governments.

This bill provides an effective date of July 1, 2013, and applies to all causes of action on or after that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A nursing home is a facility that provides "24-hour nursing care, personal care, or custodial care for three or more persons . . . who by reason of illness, physical infirmity, or advanced age require [nursing] services" outside of a hospital.[1] Florida nursing homes are regulated under Part II of ch. 400, F.S.

Section 400.022, F.S., sets forth various legal rights of nursing home residents. Included in those rights is the right to receive "adequate and appropriate health care and protective and support services." Section 400.023, F.S., provides that any resident whose rights are violated by a nursing home has a cause of action against the nursing home.[2] Sections 400.023-.0238, F.S., create a comprehensive framework for litigation and recovery against a nursing home, including provisions for presuit notice, mediation, availability of records, and punitive damages.

Named Defendants 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 limit who can be named as a defendant in the lawsuit.

In a 2004 appellate decision, the court ruled that the managing member of a limited liability company could be held personally liable for damages suffered by a resident in a nursing home.[3] There, the plaintiff alleged that the injuries to the nursing home resident were in part the result of management decisions.[4] The court opinion did not discuss, and appears inconsistent with, a concept of general business law known as the "business judgment rule." That rule provides that an individual acting in a management capacity of a business entity is generally not generally liable in tort for injuries that occur solely as a result of those business decisions.[5] The only exception is where the individual acted recklessly, in bad faith, or in wanton and willful disregard of human rights, safety or property. This 2004 opinion "is arguably an example of personal liability founded on business decisions normally protected by the 'business judgment rule,' which immunizes directors' business decisions from claims of simple negligence."[6]

This bill provides that only the nursing home licensee, a management company employed by the licensee, or a direct caregiver employee may be sued for a violation of a nursing home resident's rights.

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." The statute is cumulative to other types of lawsuits, that is, an aggrieved resident may sue under the statute and may sue under some other legal theory if appropriate.

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[1] See s. 400.021(7), F.S.

[2] The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident regardless of the cause of death. *See* s. 400.023(1), F.S.

[3] *Estate of Canavan v. National Healthcare Corp.*, 889 So.2d 825 (Fla. 2d DCA 2004).

[4] The allegations were that the manager "ignored complaints of inadequate staffing while cutting the operating expenses, and because the problems [the resident] suffered, pressure sores, infections, poor hygiene, malnutrition and dehydration, were the direct result of understaffing, the [plaintiff] argues that a reasonable jury could have found that [the manager's] elevation of profit over patient care was negligent." *Id.* at 826.

[5] See ss. 607.0831(1) and 608.4228(1), F.S., applicable to corporations and limited liability companies, respectively.

[6] Cazin, *Personal Liability Exposure for Nursing Home Operators: Canavan's Encroachment on the Business Judgment Rule*, Florida Bar Journal, May 2011, at 46.

In general, a statute creating a remedy is considered cumulative to all other remedies. A remedy created by statute may only supplant other statutory and common law remedies if the statute specifically states that it is an exclusive remedy.[7] Section 400.023, F.S., is not an exclusive remedy statute.[8]

This bill amends s. 400.023, F.S., to provide that the provisions of ss. 400.023-.0238, F.S., are the exclusive remedy against a licensee or management company for a cause of action for recovery of personal injury or death of a nursing home resident arising out of negligence or a violation of a resident's statutory rights.

Punitive Damages

Current law provides for recovery of punitive damages by a claimant suing a nursing home under s. 400.023, F.S. 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."[9] In general, punitive damages are limited to 3 times the amount of compensatory damages or $1 million, whichever is greater.[10] 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, punitive damages are limited to 4 times the amount of compensatory damages or $4 million, whichever is greater.[11] 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 no cap on punitive damages.[12]

Evidentiary Requirements to Bring a Punitive Damages Claims

Section 400.0237(1), F.S., requires that a nursing home resident claiming punitive damages must make a "reasonable showing" of the grounds supporting the claim. A court discussed how a claimant can make a proffer to assert a punitive damage claim:

> [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.[13]

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.

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[7] *St. Angelo v. Healthcare and Retirement Corp. of America*, 824 so.2d 997, 999 (Fla. 4th DCA 2002).
[8] *Id.* at 1000.
[9] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).
[10] *See* s. 400.0238(1)(a), F.S.
[11] *See* s. 400.0238(1)(b), F.S.
[12] *See* s. 400.0238(1)(c), F.S.
[13] *Estate of Despain v. Avante Group, Inc.*, 900 So.2d 637, 642 (Fla. 5th DCA 2005)(internal citations omitted). 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.

This 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. This bill requires the trial judge to conduct an evidentiary hearing. The trial judge must find there is a 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 to limit the trial judge's consideration to admissible evidence and to give the defendant an opportunity to rebut the proffer.

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. This bill removes that provision from statute. Discovery in civil cases is governed by the Florida Rules of Civil 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

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[14] or gross negligence.[15]

This 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.

Vicarious Liability for Punitive Damages

In general, punitive damages are assessed against the individual wrongdoer. Punitive damages claims are sometimes, however, pursued under the legal theory of vicarious liability. Under vicarious liability, an employer is held responsible for the acts of an employee. Section 400.0273(3), F.S., limits such vicarious claims for punitive damages against the employer (or principal, corporation or other legal entity) to situations where the employer actively and knowingly participated in such conduct; condoned, ratified, or consented to such conduct; or where the employer engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

This 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 punitive damages are warranted against the employee and an officer, director, or manager of the actual employer, corporation, or legal entity condoned, ratified, or consented to the specific conduct alleged

Severability

This bill provides a severability clause. If a portion of the bill is found to be invalid, the remaining valid portions of the bill retain full applicability.

Effective Date

This bill takes effect on July 1, 2013, and applies to causes of action arising on or after that date.

[14] "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.

[15] "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.

B. SECTION DIRECTORY:

Section 1 amends s. 400.023, F.S., relating to civil enforcement of laws regarding nursing homes.

Section 2 amends s. 400.0237, F.S., relating to punitive damages, pleadings, and burden of proof in lawsuits alleging a breach of rights by a nursing home.

Section 3 creates an unnumbered section of law providing for severability.

Section 4 provides that this bill takes effect on July 1, 2013, and applies to causes of action accruing on or after that date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The state 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.[16]

A portion of this bill provides that the remedies of ss. 400.023-.0238, F.S., are exclusive remedies, thereby foreclosing use of other remedies. The courts may review this limitation under *Kluger* to determine whether the statutory remedies are a "reasonable alternative."

However, the *Kluger* decision was 4-3 and was based only on citation to a position in a legal encyclopedia that today does not support the broad restriction created in *Kluger*. Indeed, that encyclopedia today includes the following statements:

> A fundamental right to full legal redress is not guaranteed [by an access to courts provision in a state constitution].
>
> [T]he right to a remedy is relative and does not prohibit all impairments of the right of access.
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> [The right to a remedy], while not guaranteeing all persons full compensation for their injuries . . . is not violated by legislative limitations on the amount of recovery in various actions. Such provisions do not mandate that a remedy be provided in any specific form, or that the nature of the proof necessary to the award of a judgment or decree continue without modification.[17]

The dissent in *Kluger* noted the problem with the broad holding, saying:

> Obviously, a literal and dogmatic construction of said provision would deny both the Legislature and the Court the power to impose reasonable and logical limitations on the constitutional right to use the courts of Florida.[18]

Kluger implies, by its reference to the adoption of the 1968 Constitution, that something changed in constitutional analysis between the prior state constitution and the substantial revision in 1968. However, a leading scholar assisting the committee in drafting that constitution said that the change in language creating the current version of the Access to Courts provision was merely "condensed without change in substance."[19] The subcommittee that adopted the change in language did so without comment.[20] The lead analyst for the revision commission said that the clause "probably creates no new rights of action."[21]

Scholarly papers have criticized the idea that the courts have the authority to nullify legislative action under an access to courts theory. For instance, see:

- Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, Oregon Law Review, Winter 1995, at 1279 ("Although several contemporary commentators have argued that this provision should be treated as a 'remedies' clause, there is no indication that such an interpretation was ever intended by its earliest drafters.").

- Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, Rutgers Law Journal, Summer 2001, at 1005 ("Had the court examined

[16] *Kluger v. White,* 281 So2d 1, 4 (Fla. 1973).
[17] See C.J.S. Constitutional Law, s. 2151
[18] *Kluger* at 6.
[19] Handbook by Justice Sturgis, in Florida State Archives, Series 726, Box 2, Folder 8.
[20] Records of the Committee on Human Rights, meeting of February 11, 1966, at page 4, on file with the Florida State Archives.
[21] *The Florida Declaration of Rights and Human Rights Provisions of State Constitutions*, prepared by Professor David Dickson, June 1966, at 12, on file at the Florida Archives.

the sources of the Maxim, it would have discovered that, whatever its source, the Maxim was historically applied to *effectuate* legislative policy, not thwart it.")(emphasis in original).

- Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, Wake Forest Law Review, Vol. 26 at 237 ("No serious analysis of either part of the test was attempted [by the Florida Supreme Court in creating the Kluger test].")("The substantive use of the remedies provision ignores the language of these statutes and enshrines the common law beyond legislative modification.").

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a