

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	_____	(Y/N)
ADOPTED AS AMENDED	_____	(Y/N)
ADOPTED W/O OBJECTION	_____	(Y/N)
FAILED TO ADOPT	_____	(Y/N)
WITHDRAWN	_____	(Y/N)
OTHER		

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
 2 Representative Gaetz offered the following:

3
 4 **Amendment (with title amendment)**

5 Remove everything after the enacting clause and insert:
 6 Section 1. Section 400.021, Florida Statutes, is amended to
 7 read:

8 400.021 Definitions.—When used in this part, unless the
 9 context otherwise requires, the term:

10 (1) "Administrator" means the licensed individual who has
 11 the general administrative charge of a facility.

12 (2) "Agency" means the Agency for Health Care
 13 Administration, which is the licensing agency under this part.

14 (3) "Bed reservation policy" means the number of
 15 consecutive days and the number of days per year that a resident
 16 may leave the nursing home facility for overnight therapeutic
 17 visits with family or friends or for hospitalization for an

Amendment No. 1

18 acute condition before the licensee may discharge the resident
19 due to his or her absence from the facility.

20 (4) "Board" means the Board of Nursing Home Administrators.

21 (5) "Custodial service" means care for a person which
22 entails observation of diet and sleeping habits and maintenance
23 of a watchfulness over the general health, safety, and well-
24 being of the aged or infirm.

25 (6) "Department" means the Department of Children and
26 Family Services.

27 (7) "Facility" means any institution, building, residence,
28 private home, or other place, whether operated for profit or
29 not, including a place operated by a county or municipality,
30 which undertakes through its ownership or management to provide
31 for a period exceeding 24-hour nursing care, personal care, or
32 custodial care for three or more persons not related to the
33 owner or manager by blood or marriage, who by reason of illness,
34 physical infirmity, or advanced age require such services, but
35 does not include any place providing care and treatment
36 primarily for the acutely ill. A facility offering services for
37 fewer than three persons is within the meaning of this
38 definition if it holds itself out to the public to be an
39 establishment which regularly provides such services.

40 (8) "Geriatric outpatient clinic" means a site for
41 providing outpatient health care to persons 60 years of age or
42 older, which is staffed by a registered nurse, a physician
43 assistant, or a licensed practical nurse under the direct

Amendment No. 1

44 supervision of a registered nurse, advanced registered nurse
45 practitioner, physician assistant, or physician.

46 (9) "Geriatric patient" means any patient who is 60 years
47 of age or older.

48 (10) "Licensee" means an individual, corporation,
49 partnership, firm, association, governmental entity, or other
50 entity that is issued a permit, registration, certificate, or
51 license by the agency. The licensee is legally responsible for
52 all aspects of the provider operation.

53 (11)-~~(10)~~ "Local ombudsman council" means a local long-term
54 care ombudsman council established pursuant to s. 400.0069,
55 located within the Older Americans Act planning and service
56 areas.

57 (12) "Management or consulting company" means an
58 individual, person, or entity who is either contracted with, or
59 receives a fee from a licensee to provide services for any of
60 the following activities; the hiring and firing of the
61 administrator and director of nursing; controlling or having
62 control over the staffing levels at the facility; having control
63 over the budget of the facility; or implementing and enforcing
64 the policies and procedures of the facility.

65 (13)-~~(11)~~ "Nursing home bed" means an accommodation which is
66 ready for immediate occupancy, or is capable of being made ready
67 for occupancy within 48 hours, excluding provision of staffing;
68 and which conforms to minimum space requirements, including the
69 availability of appropriate equipment and furnishings within the

642985 - h0569-strike.docx

Published On: 2/10/2014 5:59:17 PM

Amendment No. 1

70 48 hours, as specified by rule of the agency, for the provision
71 of services specified in this part to a single resident.

72 ~~(14)-(12)~~ "Nursing home facility" means any facility which
73 provides nursing services as defined in part I of chapter 464
74 and which is licensed according to this part.

75 ~~(15)-(13)~~ "Nursing service" means such services or acts as
76 may be rendered, directly or indirectly, to and in behalf of a
77 person by individuals as defined in s. 464.003.

78 (16) "Passive investor" means an individual or entity that
79 does not participate in the decision-making or operations of a
80 nursing home facility.

81 ~~(17)-(14)~~ "Planning and service area" means the geographic
82 area in which the Older Americans Act programs are administered
83 and services are delivered by the Department of Elderly Affairs.

84 ~~(18)-(15)~~ "Respite care" means admission to a nursing home
85 for the purpose of providing a short period of rest or relief or
86 emergency alternative care for the primary caregiver of an
87 individual receiving care at home who, without home-based care,
88 would otherwise require institutional care.

89 ~~(19)-(16)~~ "Resident care plan" means a written plan
90 developed, maintained, and reviewed not less than quarterly by a
91 registered nurse, with participation from other facility staff
92 and the resident or his or her designee or legal representative,
93 which includes a comprehensive assessment of the needs of an
94 individual resident; the type and frequency of services required
95 to provide the necessary care for the resident to attain or

642985 - h0569-strike.docx

Published On: 2/10/2014 5:59:17 PM

Amendment No. 1

96 maintain the highest practicable physical, mental, and
97 psychosocial well-being; a listing of services provided within
98 or outside the facility to meet those needs; and an explanation
99 of service goals.

100 (20)~~(17)~~ "Resident designee" means a person, other than the
101 owner, administrator, or employee of the facility, designated in
102 writing by a resident or a resident's guardian, if the resident
103 is adjudicated incompetent, to be the resident's representative
104 for a specific, limited purpose.

105 (21)~~(18)~~ "State ombudsman council" means the State Long-
106 Term Care Ombudsman Council established pursuant to s. 400.0067.

107 (22)~~(19)~~ "Therapeutic spa services" means bathing, nail,
108 and hair care services and other similar services related to
109 personal hygiene.

110 Section 2. Section 400.023, Florida Statutes, is amended to
111 read:

112 400.023 Civil enforcement.—

113 (1) Any resident who alleges negligence or a violation of
114 ~~whose~~ rights as specified in this part ~~are violated~~ shall have
115 an exclusive a cause of action for the recovery of damages for
116 the personal injury or death of a nursing home resident arising
117 out of negligence or a violation of residents' rights specified
118 in s. 400.022, for direct or vicarious liability against the
119 licensee, as specifically defined by s. 400.021(10), the
120 licensee's management or consulting company, as specifically
121 defined by s. 400.021(12), the licensee's managing employees,

642985 - h0569-strike.docx

Published On: 2/10/2014 5:59:17 PM

Amendment No. 1

122 and any direct caregivers whether employees or contractors. An
123 action against any other individual, person or entity who is not
124 listed above may only be brought by or on behalf of a resident
125 pursuant to subsection (2) of this statute. A passive investor,
126 as defined by s. 400.021(16), shall not be liable under this
127 part.

128 (a) The action may be brought by the resident or his or her
129 guardian, by a person or organization acting on behalf of a
130 resident with the consent of the resident or his or her
131 guardian, or by the personal representative of the estate of a
132 deceased resident regardless of the cause of death.

133 (b) If the action alleges a claim for the resident's rights
134 or for negligence that caused the death of the resident, the
135 claimant shall ~~be required to~~ elect ~~either~~ survival damages
136 pursuant to s. 46.021 or wrongful death damages pursuant to s.
137 768.21 after verdict, but before a final judgment is entered. If
138 the action alleges a claim for the resident's rights or for
139 negligence that did not cause the death of the resident, the
140 personal representative of the estate may recover damages for
141 the negligence that caused injury to the resident.

142 (c) The action may be brought in any court of competent
143 jurisdiction to enforce such rights and to recover actual and
144 punitive damages for any violation of the rights of a resident
145 or for negligence.

146 (d) Any resident who prevails in seeking injunctive relief
147 or a claim for an administrative remedy is entitled to recover

Amendment No. 1

148 the costs of the action, and a reasonable attorney's fee
149 assessed against the defendant not to exceed \$25,000. Fees shall
150 be awarded solely for the injunctive or administrative relief
151 and not for any claim or action for damages whether such claim
152 or action is brought together with a request for an injunction
153 or administrative relief or as a separate action, except as
154 provided under s. 768.79 or the Florida Rules of Civil
155 Procedure. ~~Sections 400.023-400.0238 provide the exclusive~~
156 ~~remedy for a cause of action for recovery of damages for the~~
157 ~~personal injury or death of a nursing home resident arising out~~
158 ~~of negligence or a violation of rights specified in s. 400.022.~~

159 (e) This section does not preclude theories of recovery not
160 arising out of negligence or s. 400.022 which are available to a
161 resident or to the agency. The provisions of chapter 766 do not
162 apply to any cause of action brought under ss. 400.023-400.0238.

163 (2) A cause of action may not be asserted against a person
164 or entity other than those identified in subsection (1) unless
165 the court or arbitration panel determines, after a hearing on a
166 motion for leave to amend the complaint, that there is
167 sufficient evidence in the record or proffered by the claimant
168 to establish there is a reasonable showing that:

169 (a) The person or entity owed a duty of reasonable care to
170 the resident, and the person or entity breached that duty; and

171 (b) The breach of that duty is a legal cause of loss,
172 injury, damage, or death to the resident.
173

Amendment No. 1

174 For purposes of this subsection, when such cause of action is
175 asserted, in any proposed amended pleading, alleging that it
176 arose out of the conduct, transaction or occurrence set forth or
177 attempted to be set forth in the original pleading, any proposed
178 amendment shall relate back to the original pleading.

179 (3)~~(2)~~ In a ~~any~~ claim brought pursuant to this part
180 alleging a violation of resident's rights or negligence causing
181 injury to or the death of a resident, the claimant has ~~shall~~
182 ~~have~~ the burden of proving, by a preponderance of the evidence,
183 that:

184 (a) The defendant owed a duty to the resident;

185 (b) The defendant breached the duty to the resident;

186 (c) The breach of the duty is a legal cause of loss,
187 injury, death, or damage to the resident; and

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

190

191 ~~Nothing in~~ This part does not ~~shall be interpreted to~~ create
192 strict liability. A violation of the rights set forth in s.
193 400.022 or in any other standard or guidelines specified in this
194 part or in any applicable administrative standard or guidelines
195 of this state or a federal regulatory agency is ~~shall be~~
196 evidence of negligence but is ~~shall~~ not ~~be~~ considered negligence
197 per se.

198 (4)~~(3)~~ In a ~~any~~ claim brought pursuant to this section, a
199 licensee, person, or entity has ~~shall have~~ a duty to exercise

Amendment No. 1

200 reasonable care. Reasonable care is that degree of care which a
201 reasonably careful licensee, person, or entity would use under
202 like circumstances.

203 ~~(5)~~(4) In a ~~any~~ claim for resident's rights violation or
204 negligence by a nurse licensed under part I of chapter 464, such
205 nurse has ~~shall have~~ the duty to exercise care consistent with
206 the prevailing professional standard of care for a nurse. The
207 prevailing professional standard of care for a nurse is ~~shall be~~
208 that level of care, skill, and treatment which, in light of all
209 relevant surrounding circumstances, is recognized as acceptable
210 and appropriate by reasonably prudent similar nurses.

211 ~~(6)~~(5) A licensee is ~~shall~~ not be liable for the medical
212 negligence of any physician rendering care or treatment to the
213 resident except for the administrative services of a medical
214 director as required in this part. ~~Nothing in~~ This subsection
215 does not ~~shall be construed to~~ protect a licensee, person, or
216 entity from liability for failure to provide a resident with
217 appropriate observation, assessment, nursing diagnosis,
218 planning, intervention, and evaluation of care by nursing staff.

219 ~~(7)~~(6) The resident or the resident's legal representative
220 shall serve a copy of any complaint alleging in whole or in part
221 a violation of any rights specified in this part to the Agency
222 for Health Care Administration at the time of filing the initial
223 complaint with the clerk of the court for the county in which
224 the action is pursued. The requirement of providing a copy of
225 the complaint to the agency does not impair the resident's legal

Amendment No. 1

226 rights or ability to seek relief for his or her claim.

227 ~~(8)(7)~~ An action under this part for a violation of rights
228 or negligence recognized herein is not a claim for medical
229 malpractice, and the provisions of s. 768.21(8) do not apply to
230 a claim alleging death of the resident.

231 Section 3. Section 400.0237, Florida Statutes, is amended
232 to read:

233 400.0237 Punitive damages; pleading; burden of proof.—

234 (1)(a) In any action ~~for damages~~ brought under this part, a
235 ~~no~~ claim for punitive damages may not be brought shall be
236 permitted unless there is a ~~reasonable~~ showing by admissible
237 evidence that has been submitted in the record or proffered by
238 the claimant and provides claimant which would provide a
239 reasonable basis for recovery of such damages when the criteria
240 in this section are applied. The claimant may move to amend her
241 or his complaint to assert a claim for punitive damages as
242 allowed by the rules of civil procedure in accordance with
243 evidentiary requirements set forth in this section.

244 (b) The court shall conduct a hearing to determine whether
245 there is sufficient admissible evidence submitted by the parties
246 to ensure that there is a reasonable basis to believe that the
247 claimant, at trial, will be able to demonstrate by clear and
248 convincing evidence that the recovery of such damages is
249 warranted under a claim for direct liability as specified in
250 subsection (2), or a claim for vicarious liability as specified
251 in subsection (3). The rules of civil procedure shall be

Amendment No. 1

252 | liberally construed so as to allow the claimant discovery of
253 | evidence which appears reasonably calculated to lead to
254 | admissible evidence on the issue of punitive damages. ~~No~~
255 | Discovery of financial worth may not ~~shall~~ proceed until ~~after~~
256 | the pleading on concerning punitive damages is approved by the
257 | court permitted.

258 | (2) A defendant may be held liable for punitive damages
259 | only if the trier of fact, by ~~based on~~ clear and convincing
260 | evidence, finds that a defendant actively and knowingly
261 | participated in intentional misconduct or engaged in conduct
262 | that constitutes gross negligence and that such misconduct or
263 | negligence contributed to the loss, damages, or injury suffered
264 | by the claimant ~~the defendant was personally guilty of~~
265 | ~~intentional misconduct or gross negligence~~. As used in this
266 | section, the term:

267 | (a) "Intentional misconduct" means that a ~~the~~ defendant
268 | against whom punitive damages are sought had actual knowledge of
269 | the wrongfulness of the conduct and the high probability that
270 | injury or damage to the claimant would result and, despite that
271 | knowledge, intentionally pursued that course of conduct,
272 | resulting in injury or damage.

273 | (b) "Gross negligence" means that a ~~the~~ defendant's conduct
274 | was so reckless or wanting in care that it constituted a
275 | conscious disregard or indifference to the life, safety, or
276 | rights of persons exposed to such conduct.

277 | (3) In the case of vicarious liability of an individual,

Amendment No. 1

278 employer, principal, corporation, or other legal entity,
279 punitive damages may not be imposed for the conduct of an
280 employee or agent unless ~~only if~~ the conduct of an ~~the~~ employee
281 or agent meets the criteria specified in subsection (2) and an
282 officer, director, or manager of the actual employer,
283 corporation, or legal entity condoned, ratified, or consented to
284 the specific conduct as alleged in subsection (2).÷

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

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

290 ~~(c) The employer, principal, corporation, or other legal~~
291 ~~entity engaged in conduct that constituted gross negligence and~~
292 ~~that contributed to the loss, damages, or injury suffered by the~~
293 ~~claimant.~~

294 (4) The plaintiff shall ~~must~~ establish at trial, by clear
295 and convincing evidence, its entitlement to an award of punitive
296 damages. The "greater weight of the evidence" burden of proof
297 applies to a determination of the amount of damages.

298 (5) This section is remedial in nature and takes ~~shall take~~
299 effect upon becoming a law.

300 Section 4. Section 400.145, Florida Statutes, is repealed.

301 Section 5. Section 400.1451, Florida Statutes, is created
302 to read:

303 400.1451 Records of care and treatment of resident; copies

Amendment No. 1

304 to be furnished.-

305 (1) Upon receipt of a written request that complies with
306 the requirements of the Health Insurance Portability and
307 Accountability Act of 1996 (HIPAA), 42 U.S.C. Section 1320(d)-2,
308 et seq, any nursing home licensed pursuant to this part shall
309 furnish to a competent resident or a representative of that
310 resident authorized to make requests for the resident's records
311 under HIPAA or subsection (2), copies of the resident's paper
312 and electronic records that are in possession of the nursing
313 home. Such records shall include medical records and any records
314 concerning the care and treatment of the resident performed by
315 the facility, except progress notes and consultation report
316 sections of a psychiatric nature. The nursing home shall provide
317 the requested records within 14 working days of receipt of a
318 request for a current resident or within 30 working days of
319 receipt of a request for a former resident.

320 (2) Requests for a deceased resident's medical records
321 under this section may be made by:

322 (a) Any person duly appointed by a court of competent
323 jurisdiction to act as the personal representative, executor,
324 administrator or temporary administrator of the deceased
325 resident's estate.

326 (b) In the event no such judicial appointment has been
327 made, any person designated by the resident to act as his
328 representative in a legally valid will; or,

329 (c) If there is no judicially appointed representative or

Amendment No. 1

330 person designated by the resident in a valid will, by only the
331 following:

332 1. A surviving spouse:

333 2. If there is no surviving spouse, by any surviving child
334 of the resident;

335 3. If there is no surviving spouse or child, by any parent
336 of the resident.

337 (3) All requests for records of a deceased resident must be
338 in writing and comply with the requirements of this section and
339 HIPAA. Furthermore, all requests for a deceased resident's
340 records made by a person authorized under paragraph (2) (a) must
341 include a copy of the court order appointing such person as the
342 representative of the resident's estate.

343 (4) All requests for a deceased person's records made by a
344 person authorized under paragraph (2) (b) must include a copy of
345 the will designating the person as the resident's
346 representative.

347 (5) All requests for a deceased person's records made by a
348 person authorized under paragraph (2) (c) must be accompanied by
349 a letter from the person's attorney verifying the person's
350 relationship to the resident and the absence of a court
351 appointed representative and will.

352 (6) A facility may charge a reasonable fee for the copying
353 of resident records. Such fee shall not exceed \$1 per page for
354 the first 25 pages and 25 cents per page for each page in excess
355 of 25 pages. The facility shall further allow any whom are

642985 - h0569-strike.docx

Published On: 2/10/2014 5:59:17 PM

Amendment No. 1

356 deemed authorized to act on behalf of the resident to examine
357 the original records in its possession, or microfilms or other
358 suitable reproductions of the records, upon such reasonable
359 terms as shall be imposed, to help assure that the records are
360 not damaged, destroyed, or altered.

361 (7) If any nursing home licensed pursuant to this part
362 determines that disclosure of the records to the resident will
363 be detrimental to the physical or mental health of the resident,
364 the provider may refuse to furnish the record; however, upon
365 such refusal, the resident's record shall, upon written request
366 by the resident, be furnished to any other medical provider
367 designated by the resident.

368 (8) Any nursing home licensed pursuant to this part who, in
369 good faith and in reliance upon this section, releases copies of
370 records shall be indemnified by the requesting party, and not be
371 found to have violated any criminal, or civil laws, and will not
372 be civilly liable to the resident, the resident's estate, or any
373 other person.

374 (9) No person shall be allowed to obtain copies of
375 residents' records pursuant to this section more often than once
376 per month, except that physician's reports in the residents'
377 records may be obtained as often as necessary to effectively
378 monitor the residents' condition.

379 (10) A facility may not be cited by the agency through the
380 survey process for any alleged or actual noncompliance with any
381 of the requirements of this section.

642985 - h0569-strike.docx

Published On: 2/10/2014 5:59:17 PM

Amendment No. 1

382 Section 6. Section 400.1795, Florida Statutes, is created
383 to read:

384 400.1795 License suspension, renewal application denial or
385 change of ownership application denial for failure to pay a
386 judgment.-

387 (1) Upon the entry of an adverse final judgment arising
388 from an award pursuant to s. 400.023, including an arbitration
389 award, from a claim of negligence or violation of residents
390 rights, either in contract or tort, or from noncompliance with
391 the terms of a settlement agreement, as determined by a court of
392 competent jurisdiction or arbitration panel, arising from a
393 claim pursuant to s. 400.023, the licensee shall pay the
394 judgment creditor the entire amount of the judgment, award or
395 settlement with all accrued interest within 60 days after the
396 date such judgment, award or settlement became final and subject
397 to execution, unless otherwise mutually agreed to in writing by
398 the parties. Failure shall result in additional grounds that may
399 be used by the agency for suspending a license or denying a
400 renewal application or a change of ownership application as
401 provided in this section:

402 (2) Upon notification of the existence of an unsatisfied
403 judgment or settlement pursuant to subsection (1), the agency
404 shall notify the licensee by certified mail that it shall be
405 subject to disciplinary action unless, within 30 days from the
406 date of mailing, that either:

407 (a) Shows proof that the unsatisfied judgment or settlement

Amendment No. 1

408 has been paid in the amount specified; or

409 (b) Shows proof that of the existence of a payment plan
410 mutually agreed upon by the parties in writing; or

411 (c) Furnishes the agency with a copy of a timely filed
412 notice of appeal; or

413 (d) Furnishes the agency with a copy of an order from a
414 court of competent jurisdiction staying execution of the final
415 judgment.

416 (e) Shows proof by submitting an order from any court of
417 competent jurisdiction or arbitration overseeing any action
418 seeking indemnification from an insurance carrier or any other
419 party that it believes was required to pay the award.

420 (3) If the agency determines that the factual requirements
421 of subsection (1) are met, and no proof pursuant to subsection
422 (2) is provided by the licensee, the agency shall issue an
423 emergency order determining that the facility lacks financial
424 ability to operate and shall suspend the license pending
425 revocation of any licensee who, after 30 days following receipt
426 of a notice from the agency, has failed to satisfy the claim as
427 identified in subsection (1) or to reach a written settlement of
428 the claim. In the event the claim is not satisfied or no
429 settlement is reached, the emergency order shall indicate that
430 the agency will begin the license revocation process.

431 (4) Following or during the period of revocation, no
432 licensee, person or entity identified as having a controlling
433 interest in the suspended licensee, as identified on the

642985 - h0569-strike.docx

Published On: 2/10/2014 5:59:17 PM

Amendment No. 1

434 licensee application, will be allowed to file an application for
435 a license at the facility at issue. In the event that a judgment
436 at trial or arbitration occurs, the agency shall not approve a
437 change in license to a related party until the requirements of
438 subsection (1) or (2) are met.

439 Section 7. This act shall take effect upon becoming a law.

440

441

442 -----

443 **T I T L E A M E N D M E N T**

444 Remove everything before the enacting clause and insert:

445 An act relating to nursing home litigation reform; amending
446 s. 400.021, F.S.; creating definitions; amending s. 400.023,
447 F.S.; limiting which persons may be named in a lawsuit alleging
448 nursing home negligence; creating means for court to review who
449 is a named defendant; amending s. 400.0237, F.S.; requiring a
450 pretrial hearing on whether punitive damages are allowed;
451 limiting punitive damages; repealing s. 400.145, F.S.; repealing
452 statute relating to records of care and treatment of a nursing
453 home resident; creating s. 400.1451, F.S.; requiring a nursing
454 home to provide records of patient care to a patient or a
455 patient's representative; authorizing a representative to obtain
456 records of a deceased patient; limiting fees charged for a copy
457 of patient records; limiting access to records in certain
458 circumstances; providing that issues relating to patient records
459 is not an offense against a nursing home license through the

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 569 (2014)

Amendment No. 1

460 survey process; creating s. 400.1795, F.S.; providing for
461 suspension or revocation of a nursing home license for failure
462 to pay an a settlement, claim or judgment relating to nursing
463 home negligence; providing an effective date.