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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
02/18/2014	.	
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	.	
	.	

The Committee on Health Policy (Bean) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

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

400.023 Civil enforcement.—

(1) An exclusive cause of action for negligence or a
violation of residents' ~~Any resident whose~~ rights as specified
under in this part which alleges direct or vicarious liability



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11 for the personal injury or death of a nursing home resident
12 arising from such negligence or violation of rights and which
13 seeks damages for such injury or death may be brought against
14 the licensee, the licensee's management or consulting company,
15 the licensee's managing employees, and any direct caregivers,
16 whether employees or contractors are violated shall have a cause
17 of action. A passive investor is not liable under this section.
18 An action against any other individual or entity may be brought
19 only pursuant to subsection (3).

20 (a) The action may be brought by the resident or his or her
21 guardian, by a person or organization acting on behalf of a
22 resident with the consent of the resident or his or her
23 guardian, or by the personal representative of the estate of a
24 deceased resident regardless of the cause of death.

25 (b) If the action alleges a claim for the resident's rights
26 or for negligence that caused the death of the resident, the
27 claimant shall, after the verdict, but before the judgment is
28 entered, be required to elect either survival damages pursuant
29 to s. 46.021 or wrongful death damages pursuant to s. 768.21. If
30 the action alleges a claim for the resident's rights or for
31 negligence that did not cause the death of the resident, the
32 personal representative of the estate may recover damages for
33 the negligence that caused injury to the resident.

34 (c) The action may be brought in any court of competent
35 jurisdiction to enforce such rights and to recover actual and
36 punitive damages for the any violation of the rights of a
37 resident or for negligence.

38 (d) A Any resident who prevails in seeking injunctive
39 relief or ~~a claim for~~ an administrative remedy is entitled to



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40 recover the costs of the action, and a reasonable attorney
41 ~~attorney's~~ fee assessed against the defendant of up to not to
42 ~~exceed~~ \$25,000. Fees shall be awarded solely for the injunctive
43 or administrative relief and not for any claim or action for
44 damages whether such claim or action is brought ~~together~~ with a
45 request for an injunction or administrative relief or as a
46 separate action, except as provided under s. 768.79 or the
47 Florida Rules of Civil Procedure. ~~Sections 400.023-400.0238~~
48 ~~provide the exclusive remedy for a cause of action for recovery~~
49 ~~of damages for the personal injury or death of a nursing home~~
50 ~~resident arising out of negligence or a violation of rights~~
51 ~~specified in s. 400.022.~~

52 (e) This section does not preclude theories of recovery not
53 arising out of negligence or s. 400.022 which are available to a
54 resident or to the agency. ~~The provisions of Chapter 766 does de~~
55 not apply to a any cause of action brought under ss. 400.023-
56 400.0238.

57 (2) As used in this section, the term:

58 (a) "Licensee" means an individual, corporation,
59 partnership, firm, association, governmental entity, or other
60 entity that is issued a permit, registration, certificate, or
61 license by the agency, and that is legally responsible for all
62 aspects of the operation of the nursing home facility.

63 (b) "Management or consulting company" means an individual
64 or entity who contracts with, or receives a fee from a licensee
65 to provide any of the following services for a nursing home
66 facility:

67 1. Hiring or firing of the administrator or director of
68 nursing;



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69 2. Controlling or having control over the staffing levels
70 at the facility;

71 3. Having control over the budget of the facility; or

72 4. Implementing and enforcing the policies and procedures
73 of the facility.

74 (c) "Passive investor" means an individual or entity that
75 does not participate in the decisionmaking or operations of a
76 facility.

77 (3) A cause of action may not be asserted against an
78 individual or entity, other than the licensee, the licensee's
79 management or consulting company, the licensee's managing
80 employees, and any direct caregivers, whether employees or
81 contractors, unless, after a motion for leave to amend hearing,
82 the court or an arbitration panel determines that there is
83 sufficient evidence in the record or proffered by the claimant
84 to establish a reasonable showing that:

85 (a) The individual or entity owed a duty of reasonable care
86 to the resident and the individual or entity breached that duty;
87 and

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

90
91 For purposes of this subsection, if, in a proposed amended
92 pleading, it is asserted that such cause of action arose out of
93 the conduct, transaction, or occurrence set forth or attempted
94 to be set forth in the original pleading, the proposed amendment
95 relates back to the original pleading.

96 (4)~~(2)~~ In a any claim brought pursuant to this part
97 alleging a violation of residents' ~~resident's~~ rights or



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98 negligence causing injury to or the death of a resident, the
99 claimant has ~~shall have~~ the burden of proving, by a
100 preponderance of the evidence, that:

- 101 (a) The defendant owed a duty to the resident;
- 102 (b) The defendant breached the duty to the resident;
- 103 (c) The breach of the duty is a legal cause of loss,
104 injury, death, or damage to the resident; and
- 105 (d) The resident sustained loss, injury, death, or damage
106 as a result of the breach.

107

108 ~~Nothing in~~ This part does not ~~shall be interpreted to~~ create
109 strict liability. A violation of the rights set forth in s.
110 400.022, ~~or~~ in any other standard or guidelines specified in
111 this part, or in any applicable administrative standard or
112 guidelines of this state or a federal regulatory agency is ~~shall~~
113 ~~be~~ evidence of negligence but is ~~shall~~ not ~~be~~ considered
114 negligence per se.

115 ~~(5)(3)~~ In a any claim brought pursuant to this section, a
116 licensee, individual person, or entity has ~~shall have~~ a duty to
117 exercise reasonable care. Reasonable care is that degree of care
118 which a reasonably careful licensee, individual person, or
119 entity would use under like circumstances.

120 ~~(6)(4)~~ In a any claim for a residents' ~~resident's~~ rights
121 violation or negligence by a nurse licensed under part I of
122 chapter 464, such nurse has ~~shall have~~ the duty to exercise care
123 consistent with the prevailing professional standard of care for
124 a nurse. The prevailing professional standard of care for a
125 nurse is ~~shall be~~ that level of care, skill, and treatment
126 which, in light of all relevant surrounding circumstances, is



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127 recognized as acceptable and appropriate by reasonably prudent
128 similar nurses.

129 ~~(7)(5)~~ A licensee is ~~shall~~ not ~~be~~ liable for the medical
130 negligence of a ~~any~~ physician rendering care or treatment to the
131 resident except for the administrative services of a medical
132 director as required under ~~in~~ this part. ~~Nothing in~~ This
133 subsection does not ~~shall be construed to~~ protect a licensee,
134 individual person, or entity from liability for failure to
135 provide a resident with appropriate observation, assessment,
136 nursing diagnosis, planning, intervention, and evaluation of
137 care by nursing staff.

138 ~~(8)(6)~~ The resident or the resident's legal representative
139 shall serve a copy of a ~~any~~ complaint alleging in whole or in
140 part a violation of any rights specified in this part to the
141 agency ~~for Health Care Administration~~ at the time of filing the
142 initial complaint with the clerk of the court for the county in
143 which the action is pursued. The requirement of providing a copy
144 of the complaint to the agency does not impair the resident's
145 legal rights or ability to seek relief for his or her claim.

146 ~~(9)(7)~~ An action under this part for a violation of rights
147 or negligence recognized herein is not a claim for medical
148 malpractice, and ~~the provisions of~~ s. 768.21(8) does ~~de~~ not
149 apply to a claim alleging death of the resident.

150 Section 2. Section 400.0237, Florida Statutes, is amended
151 to read:

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

153 (1) A ~~In any action for damages brought under this part, no~~
154 claim for punitive damages may not be brought under this part
155 ~~shall be permitted~~ unless there is a ~~reasonable~~ showing by



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156 admissible evidence in the record or proffered by the parties
157 which provides ~~claimant which would provide~~ a reasonable basis
158 for recovery of such damages when the criteria in this section
159 are applied.

160 (a) The claimant may move to amend her or his complaint to
161 assert a claim for punitive damages as allowed by the rules of
162 civil procedure in accordance with evidentiary requirements set
163 forth in this section.

164 (b) The court shall conduct a hearing to determine whether
165 there is sufficient admissible evidence submitted by the parties
166 to ensure that there is a reasonable basis to believe that the
167 claimant, at trial, will be able to demonstrate by clear and
168 convincing evidence that the recovery of such damages is
169 warranted under a claim for direct liability as specified in
170 subsection (2), or a claim for vicarious liability as specified
171 in subsection (3).

172 (c) The rules of civil procedure shall be liberally
173 construed so as to allow the claimant discovery of evidence
174 which appears reasonably calculated to lead to admissible
175 evidence on the issue of punitive damages. ~~Ne~~ Discovery of
176 financial worth may not shall proceed until ~~after~~ the pleading
177 on concerning punitive damages is approved by the court
178 permitted.

179 (2) A defendant may be held liable for punitive damages
180 only if the trier of fact, by based on clear and convincing
181 evidence, finds that a specific person or corporate defendant
182 actively and knowingly participated in intentional misconduct or
183 engaged in conduct that constitutes gross negligence and
184 contributed to the loss, damages, or injury suffered by the



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185 ~~claimant the defendant was personally guilty of intentional~~
186 ~~misconduct or gross negligence.~~ As used in this section, the
187 term:

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

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

198 (3) In the case of vicarious liability of an individual,
199 employer, principal, corporation, or other legal entity,
200 punitive damages may not be imposed for the conduct of an
201 employee or agent unless ~~only if~~ the conduct of the employee or
202 agent meets the criteria specified in subsection (2) and an
203 officer, director, or manager of the actual employer,
204 corporation, or legal entity condoned, ratified, or consented to
205 the specific conduct as provided in subsection (2):

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

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

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



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214 claimant.

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

219 ~~(5) This section is remedial in nature and shall take~~
220 ~~effect upon becoming a law.~~

221 Section 3. Section 400.024, Florida Statutes, is created to
222 read:

223 400.024 Failure to satisfy a judgment or settlement
224 agreement.-

225 (1) Upon the entry of an adverse final judgment arising
226 from an award, including an arbitration award, from a claim of
227 negligence or violation of residents' rights, in contract or
228 tort, or from noncompliance with the terms of a settlement
229 agreement arising from a claim pursuant to s. 400.023, as
230 determined by a court or arbitration panel, the licensee, as
231 defined in s. 400.023(2), shall pay the judgment creditor the
232 entire amount of the judgment and all accrued interest within 60
233 days after the date such judgment becomes final and subject to
234 execution, unless otherwise mutually agreed to in writing by the
235 parties. Failure to pay shall provide grounds for the agency to
236 suspend a nursing home facility license, deny a license renewal
237 application, or deny a change of ownership application as
238 provided in this section.

239 (2) Upon notification of the existence of an unsatisfied
240 judgment or settlement pursuant to subsection (1), the agency
241 shall notify the licensee by certified mail that it is subject
242 to disciplinary action unless, within 30 days after receipt of



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243 the notification, the licensee:

244 (a) Provides proof that the unsatisfied judgment or
245 settlement has been paid in the amount specified;

246 (b) Provides proof of the existence of a payment plan
247 mutually agreed upon by the parties in writing;

248 (c) Furnishes the agency with a copy of a timely filed
249 notice of appeal;

250 (d) Furnishes the agency with a copy of a court order
251 staying execution of the final judgment; or

252 (e) Provides written proof from a court or an arbitration
253 panel overseeing the action that it is seeking indemnification
254 from an insurance carrier or any other party that it believes is
255 required to pay the award.

256 (3) If, after 30 days, the licensee fails to demonstrate
257 compliance in accordance with subsection (2), the agency shall
258 issue an emergency order finding that the nursing home facility
259 lacks financial ability to operate and that the agency is in the
260 process of suspending the facility's license.

261 (4) Following or during the period of suspension, an
262 individual or entity identified as having a controlling interest
263 in the facility whose license is being suspended, as identified
264 on the facility's licensee application, may not file an
265 application for licensure of the facility at issue. Further, if
266 a judgment at trial or arbitration occurs, the agency may not
267 approve a change of ownership application to a related party
268 until the requirements of subsection (1) or subsection (2) are
269 met.

270 Section 4. Section 400.145, Florida Statutes, is amended to
271 read:



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272 (Substantial rewording of section. See
273 s. 400.145, F.S., for present text.)
274 400.145 Copies of records of care and treatment of
275 resident.—
276 (1) Upon receipt of a written request that complies with
277 the federal Health Insurance Portability and Accountability Act
278 of 1996 (HIPAA) and this section, a nursing home facility shall
279 furnish to a competent resident or to a representative of that
280 resident who is authorized to make requests for the resident's
281 records under HIPAA or subsection (2) copies of the resident's
282 paper and electronic records that are in possession of the
283 facility. Such records must include any medical records and
284 records concerning the care and treatment of the resident
285 performed by the facility, except for progress notes and
286 consultation report sections of a psychiatric nature. The
287 facility shall provide the requested records within 14 working
288 days after receipt of a request relating to a current resident
289 or within 30 working days after receipt of a request relating to
290 a former resident.
291 (2) Requests for a deceased resident's medical records
292 under this section may be made by:
293 (a) Any person appointed by a court to act as the personal
294 representative, executor, administrator, or temporary
295 administrator of the deceased resident's estate.
296 (b) If a judicial appointment has not been made as provided
297 in paragraph (a), any person designated by the resident to act
298 as his or her representative in a legally valid will; or
299 (c) If there is no judicially appointed representative or
300 person designated by the resident in a valid will, by only the



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301 following individuals:

302 1. A surviving spouse;

303 2. If there is no surviving spouse, a surviving child of
304 the resident;

305 3. If there is no surviving spouse or child, a parent of
306 the resident.

307 (3) All requests for a deceased resident's records made by
308 a person authorized under:

309 (a) Paragraph (2) (a) must include a copy of the court order
310 appointing such person as the representative of the resident's
311 estate.

312 (b) Paragraph (2) (b) must include a copy of the will
313 designating the person as the resident's representative.

314 (c) Paragraph (2) (c) must be accompanied by a letter from
315 the person's attorney verifying the person's relationship to the
316 resident and the absence of a court-appointed representative and
317 will.

318 (4) A nursing home facility may charge a reasonable fee for
319 the copying of resident records. Such fee may not exceed \$1 per
320 page for the first 25 pages and 25 cents per page for each
321 additional page. The facility shall allow a person who is
322 authorized to act on behalf of the resident to examine the
323 original records, microfilms, or other suitable reproductions of
324 the records in its possession upon any reasonable terms imposed
325 by the facility to ensure that the records are not damaged,
326 destroyed, or altered.

327 (5) If a nursing home facility determines that disclosure
328 of the records to the resident would be detrimental to the
329 physical or mental health of the resident, the facility may



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330 refuse to furnish the record; however, upon such refusal, the
331 resident's record shall, upon written request by the resident,
332 be furnished to any other medical provider designated by the
333 resident.

334 (6) A nursing home facility that in good faith and in
335 reliance upon this section releases copies of records shall be
336 indemnified by the requesting party, and may not be found to
337 have violated any criminal or civil laws, and is not civilly
338 liable to the resident, the resident's estate, or any other
339 person for any damages resulting from such release.

340 (7) A nursing home facility is not required to provide
341 copies of a resident's records requested pursuant to this
342 section more than once per month, except that copies of
343 physician reports in the resident's records must be provided as
344 often as necessary to allow the effective monitoring of the
345 resident's condition.

346 (8) A nursing home facility may not be cited by the agency
347 through the survey process for any alleged or actual
348 noncompliance with any of the requirements of this section.

349 Section 5. The amendments to ss. 400.023 and 400.0237 made
350 by this act apply to causes of action accruing on or after the
351 effective date of this act.

352 Section 6. This act shall take effect upon becoming a law.

353
354 ===== T I T L E A M E N D M E N T =====

355 And the title is amended as follows:

356 Delete everything before the enacting clause
357 and insert:

358 A bill to be entitled



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359 An act relating to nursing home litigation; amending
360 s. 400.023, F.S.; specifying that a cause of action
361 for negligence or violation of residents' rights
362 alleging direct or vicarious liability for the injury
363 or death of nursing home resident may be brought
364 against a licensee, its management or consulting
365 company, its managing employees, and any direct
366 caregiver employees; providing that a cause of action
367 may not be asserted against other individuals or
368 entities except under certain circumstances; revising
369 related judicial procedures; defining terms; amending
370 s. 400.0237, F.S.; providing that a claim for punitive
371 damages may not be brought unless there is a showing
372 of evidence that provides a reasonable basis for
373 recovery of such damages when certain criteria are
374 applied; requiring the court to conduct a hearing to
375 determine whether there is sufficient evidence to
376 demonstrate that the recovery of punitive damages is
377 warranted; requiring the trier of fact to find that a
378 specific person or corporate defendant participated in
379 or engaged in conduct that constituted gross
380 negligence and contributed to the damages or injury
381 suffered by the claimant before a defendant may be
382 held liable for punitive damages; requiring an
383 officer, director, or manager of the employer,
384 corporation, or legal entity to condone, ratify, or
385 consent to certain specified conduct before holding
386 such person or entity vicariously liable for punitive
387 damages; creating s. 400.024, F.S.; authorizing the



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388 Agency for Health Care Administration to suspend the
389 license of a nursing home facility that fails to pay a
390 judgment or settlement agreement; providing
391 exceptions; providing agency procedures for
392 suspension; prohibiting certain parties from applying
393 for a license for an affected facility; amending s.
394 400.145, F.S.; revising procedures for obtaining the
395 records of a resident; specifying which records may be
396 obtained and who may obtain them; providing immunity
397 from liability to a facility that provides such
398 records in good faith; providing that the agency may
399 not cite a facility that does not meet these records
400 requirements; providing applicability; providing an
401 effective date.