

By Senator Thrasher

6-00672-14

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1 A bill to be entitled
2 An act relating to nursing home litigation; amending
3 s. 400.023, F.S.; providing that a nursing home
4 resident who alleges negligence or a violation of
5 residents' rights has a cause of action against the
6 nursing home licensee or its management company and
7 the licensee's direct caregiver employees; declaring
8 that ss. 400.023-400.0238, F.S., provide the exclusive
9 remedy against a nursing home licensee or its
10 management company for a cause of action for recovery
11 of damages arising out of negligence or a violation of
12 residents' rights; providing that a cause of action
13 may not be asserted against certain specified persons
14 or entities; providing exceptions; amending s.
15 400.0237, F.S.; providing that a claim for punitive
16 damages may not be brought unless there is a showing
17 of admissible evidence submitted by the parties which
18 provides a reasonable basis for recovery of punitive
19 damages when certain criteria are applied; requiring
20 the court to conduct a hearing to determine whether
21 there is sufficient admissible evidence to ensure that
22 there is a reasonable basis to believe that the
23 claimant will be able to demonstrate by clear and
24 convincing evidence that the recovery of punitive
25 damages is warranted; requiring the trier of fact to
26 find by clear and convincing evidence that a specific
27 person or corporate defendant actively and knowingly
28 participated in intentional misconduct or engaged in
29 conduct that constituted gross negligence and

6-00672-14

2014670__

30 contributed to the loss, damages, or injury suffered
31 by the claimant before a defendant may be held liable
32 for punitive damages; requiring an officer, director,
33 or manager of the employer, corporation, or legal
34 entity to condone, ratify, or consent to certain
35 specified conduct before holding the licensee
36 vicariously liable for punitive damages; providing an
37 effective date.

38
39 Be It Enacted by the Legislature of the State of Florida:

40
41 Section 1. Section 400.023, Florida Statutes, is amended to
42 read:

43 400.023 Civil enforcement.—

44 (1) A Any resident who alleges negligence or a violation of
45 whose rights as specified under in this part has are violated
46 shall have a cause of action against the licensee or its
47 management company, as specifically identified in the nursing
48 home's application for licensure, and the licensee's direct
49 caregiver employees.

50 (a) Sections 400.023-400.0238 provide the exclusive remedy
51 against a licensee or its management company for a cause of
52 action for the recovery of damages for the personal injury or
53 death of a nursing home resident arising out of negligence or a
54 violation of residents' rights specified in s. 400.022. The
55 action may be brought by the resident or his or her guardian, by
56 a person or organization acting on behalf of a resident with the
57 consent of the resident or his or her guardian, or by the
58 personal representative of the estate of a deceased resident

6-00672-14

2014670__

59 regardless of the cause of death.

60 (b) If the action alleges a violation of residents' claim
61 ~~for the resident's~~ rights or ~~for~~ negligence that caused the
62 death of the resident, the claimant shall ~~be required to~~ elect
63 ~~either~~ survival damages pursuant to s. 46.021 or wrongful death
64 damages pursuant to s. 768.21. If the action alleges a violation
65 of residents' claim ~~for the resident's~~ rights or ~~for~~ negligence
66 that did not cause the death of the resident, the personal
67 representative of the estate may recover damages for the
68 negligence that caused injury to the resident.

69 (c) The action may be brought in any court of competent
70 jurisdiction to enforce such rights and to recover actual and
71 punitive damages for the ~~any~~ violation of the rights of a
72 resident or for negligence.

73 (d) Any resident who prevails in seeking injunctive relief
74 or ~~a claim for~~ an administrative remedy is entitled to recover
75 the costs of the action, and a reasonable attorney ~~attorney's~~
76 fee assessed against the defendant of up to ~~not to exceed~~
77 \$25,000. Fees shall be awarded solely for the injunctive or
78 administrative relief and not for any claim or action for
79 damages whether such claim or action is brought ~~together~~ with a
80 request for an injunction or administrative relief or as a
81 separate action, except as provided under s. 768.79 or the
82 Florida Rules of Civil Procedure. ~~Sections 400.023-400.0238~~
83 ~~provide the exclusive remedy for a cause of action for recovery~~
84 ~~of damages for the personal injury or death of a nursing home~~
85 ~~resident arising out of negligence or a violation of rights~~
86 ~~specified in s. 400.022.~~

87 (e) This section does not preclude theories of recovery not

6-00672-14

2014670__

88 arising out of negligence or s. 400.022 which are available to a
89 resident or to the agency. ~~The provisions of Chapter 766 does de~~
90 not apply to a any cause of action brought under ss. 400.023-
91 400.0238.

92 (2) A cause of action may not be asserted against a person
93 or entity other than those identified in subsection (1) unless,
94 following an evidentiary hearing at which such person or entity
95 has been given sufficient notice and an opportunity to defend,
96 the court determines there is sufficient evidence in the record
97 or proffered by the claimant to establish a reasonable basis for
98 finding that:

99 (a) The person or entity owed a specific legal duty to the
100 resident and the person or entity breached that duty; and

101 (b) The breach of that duty is the legal cause of actual
102 loss, injury, damage, or death to the resident.

103 (3)~~(2)~~ In a any claim brought pursuant to this part
104 alleging a violation of residents' ~~resident's~~ rights or
105 negligence causing injury to or the death of a resident, the
106 claimant has ~~shall have~~ the burden of proving, by a
107 preponderance of the evidence, that:

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

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

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

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

114

115 ~~Nothing in~~ This part does not ~~shall be interpreted to create~~
116 strict liability. A violation of the rights set forth in s.

6-00672-14

2014670__

117 400.022, ~~or~~ in any other standard or guidelines specified in
118 this part, or in any applicable administrative standard or
119 guidelines of this state or a federal regulatory agency is ~~shall~~
120 ~~be~~ evidence of negligence but is ~~shall~~ not ~~be~~ considered
121 negligence per se.

122 (4)~~(3)~~ In a ~~any~~ claim brought pursuant to this section, a
123 licensee, person, or entity has ~~shall have~~ a duty to exercise
124 reasonable care. Reasonable care is that degree of care which a
125 reasonably careful licensee, person, or entity would use under
126 like circumstances.

127 (5)~~(4)~~ In a ~~any~~ claim for a residents' ~~resident's~~ rights
128 violation or negligence by a nurse licensed under part I of
129 chapter 464, such nurse has ~~shall have~~ the duty to exercise care
130 consistent with the prevailing professional standard of care for
131 a nurse. The prevailing professional standard of care for a
132 nurse is ~~shall be~~ that level of care, skill, and treatment
133 which, in light of all relevant surrounding circumstances, is
134 recognized as acceptable and appropriate by reasonably prudent
135 similar nurses.

136 (6)~~(5)~~ A licensee is ~~shall~~ not ~~be~~ liable for the medical
137 negligence of any physician rendering care or treatment to the
138 resident except for the administrative services of a medical
139 director as required under ~~in~~ this part. ~~Nothing in~~ This
140 subsection does not ~~shall be construed to~~ protect a licensee,
141 person, or entity from liability for failure to provide a
142 resident with appropriate observation, assessment, nursing
143 diagnosis, planning, intervention, and evaluation of care by
144 nursing staff.

145 (7)~~(6)~~ The resident or the resident's legal representative

6-00672-14

2014670__

146 shall serve a copy of a ~~any~~ complaint alleging in whole or in
147 part a violation of any rights specified in this part to the
148 agency ~~for Health Care Administration~~ at the time of filing the
149 initial complaint with the clerk of the court for the county in
150 which the action is pursued. The requirement of providing a copy
151 of the complaint to the agency does not impair the resident's
152 legal rights or ability to seek relief for his or her claim.

153 (8) ~~(7)~~ An action under this part for a violation of rights
154 or negligence recognized herein is not a claim for medical
155 malpractice, and ~~the provisions of s. 768.21(8)~~ does ~~de~~ not
156 apply to a claim alleging death of the resident.

157 Section 2. Section 400.0237, Florida Statutes, is amended
158 to read:

159 400.0237 Punitive damages; pleading; burden of proof.-

160 (1) ~~A In any action for damages brought under this part, no~~
161 claim for punitive damages may not be brought under this part
162 ~~shall be permitted~~ unless there is a reasonable showing of
163 admissible ~~by~~ evidence submitted ~~in the record or proffered~~ by
164 the parties which provides ~~claimant which would provide~~ a
165 reasonable basis for recovery of such damages when the criteria
166 in this section are applied.

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

171 (b) The court shall conduct a hearing to determine whether
172 there is sufficient admissible evidence submitted by the parties
173 to ensure that there is a reasonable basis to believe that the
174 claimant, at trial, will be able to demonstrate by clear and

6-00672-14

2014670__

175 convincing evidence that the recovery of such damages is
176 warranted.

177 (c) A ~~The rules of civil procedure shall be liberally~~
178 ~~construed so as to allow the claimant discovery of evidence~~
179 ~~which appears reasonably calculated to lead to admissible~~
180 ~~evidence on the issue of punitive damages. No discovery of~~
181 ~~financial worth~~ may not shall proceed until after the pleading
182 on concerning punitive damages is approved by the court
183 permitted.

184 (2) A defendant may be held liable for punitive damages
185 only if the trier of fact, by ~~based on~~ clear and convincing
186 evidence, finds that a specific person or corporate defendant
187 actively and knowingly participated in intentional misconduct or
188 engaged in conduct that constitutes gross negligence and
189 contributed to the loss, damages, or injury suffered by the
190 claimant ~~the defendant was personally guilty of intentional~~
191 ~~misconduct or gross negligence.~~ As used in this section, the
192 term:

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

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

203 (3) In the case of vicarious liability of an employer,

6-00672-14

2014670__

204 principal, corporation, or other legal entity, punitive damages
205 may not be imposed for the conduct of an employee or agent
206 unless only if the conduct of a specifically identified the
207 employee or agent meets the criteria specified in subsection (2)
208 and an officer, director, or manager of the actual employer,
209 corporation, or legal entity condoned, ratified, or consented to
210 the specific conduct as provided in subsection (2). A state or
211 federal survey report of nursing facilities may not be used to
212 establish an entitlement to punitive damages under this section.

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

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

218 ~~(c) The employer, principal, corporation, or other legal~~
219 ~~entity engaged in conduct that constituted gross negligence and~~
220 ~~that contributed to the loss, damages, or injury suffered by the~~
221 ~~claimant.~~

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

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

228 Section 3. This act shall take effect upon becoming a law.