

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Health Policy

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BILL: CS/SB 238

INTRODUCER: Judiciary Committee and Senator Burton

SUBJECT: Claims Against Assisted Living Facilities

DATE: February 5, 2024

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Collazo</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Brown</u>	<u>HP</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 238 amends the Assisted Living Facilities Act to extend assisted living facilities (ALFs) the same substantive and procedural protections that apply to nursing homes.

The bill amends s. 429.29, F.S., which authorizes civil actions to enforce ALF residents' rights, to provide that actions brought for a residents' rights violation or for negligence, which allege direct or vicarious liability for the personal injury or death of a resident, and which seek damages for such injury or death, may be brought only against:

- The licensee.
- The licensee's management or active participant.
- The licensee's managing employees.
- Any direct caregivers, whether employees or contractors.

Passive investors, as defined in the bill, may no longer be found liable. The bill also amends the statute allowing legal actions resulting from the death of an ALF resident to specify the point in the proceedings when the plaintiff must elect survival damages or wrongful death damages. As specified, the election must occur between the rendition of the verdict and the rendition of the judgment.

The bill also amends s. 429.297, F.S., which currently authorizes the award of punitive damages under certain circumstances, to require courts to hold a hearing to determine whether there is sufficient admissible evidence to ensure there is a reasonable basis for a punitive damages award.

The bill defines the terms “licensee,” “management company or active participant,” and “passive investor.” The bill’s provisions only apply to causes of action that accrue on or after July 1, 2024.

The bill provides an effective date of July 1, 2024.

## II. Present Situation:

### Assisted Living Facilities

According to the Assisted Living Facilities Act (the Act),<sup>1</sup> an assisted living facility (ALF) is a residential establishment, or part of a residential establishment, providing housing, meals, and one or more personal services, for periods exceeding 24 hours, to one or more adults who are not relatives of the owner or the administrator.<sup>2</sup> “Personal service” means direct physical assistance with, or supervision of, the activities of daily living and the self-administration of medication.<sup>3</sup> “Activities of daily living” include ambulation, bathing, dressing, eating, grooming, toileting, and other similar tasks.<sup>4</sup>

There are approximately 3,000 licensed ALFs in the state, having more than 106,000 beds. In contrast, there are only about 700 licensed nursing homes in the state, having 84,000 beds.<sup>5</sup> ALFs must have a standard license issued by the Agency for Health Care Administration (AHCA) under part I of chapter 429, F.S., and part II of chapter 408, F.S. In addition to the standard license, ALFs may have one or more specialty licenses allowing them to provide additional care. Specialty licenses include limited nursing services,<sup>6</sup> limited mental health,<sup>7</sup> and extended congregate care licenses.<sup>8</sup>

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<sup>1</sup> Chapter 429, part II, F.S. According to s. 429.01(2), F.S., the purpose of the Act is to:

- Promote the availability of appropriate services for elderly persons and adults with disabilities in the least restrictive and most homelike environment.
- Encourage the development of facilities that promote the dignity, individuality, privacy, and decisionmaking ability of such persons.
- Provide for the health, safety, and welfare of residents of assisted living facilities in the state.
- Promote continued improvement of such facilities.
- Encourage the development of innovative and affordable facilities, particularly for persons with low to moderate incomes.
- Ensure that all agencies of the state cooperate in the protection of such residents.
- Ensure that needed economic, social, mental health, health, and leisure services are made available to residents of such facilities through the efforts of the Agency for Health Care Administration, the Department of Elderly Affairs, the Department of Children and Families, the Department of Health, assisted living facilities, and other community agencies.

<sup>2</sup> Section 429.02(5), F.S. An ALF does not include an adult family-care home or a non-transient public lodging establishment.

<sup>3</sup> Section 429.02(17), F.S.

<sup>4</sup> Section 429.02(1), F.S.

<sup>5</sup> University of South Florida, School of Aging Studies, Florida Policy Exchange Center on Aging, *Exploring Assisted Living Communities in Florida*, <https://www.usf.edu/cbcs/aging-studies/fpeca/research/alf.aspx> (last visited Jan. 24, 2024).

<sup>6</sup> Section 429.07(3)(c), F.S.

<sup>7</sup> Section 429.075, F.S.

<sup>8</sup> Section 429.07(3)(b), F.S.

ALFs are required to provide care and services appropriate to the needs of the residents accepted for admission to the facility.<sup>9</sup> The owner or facility administrator determines whether an individual is appropriate for admission to the facility based on a number of criteria.<sup>10</sup> If, as determined by the facility administrator or the health care provider, a resident no longer meets the criteria for continued residency, or the facility is unable to meet the resident's needs, the resident must be discharged in accordance with the Resident Bill of Rights.

### ***The Resident Bill of Rights***

The Act includes a "Resident Bill of Rights."<sup>11</sup> The Resident Bill of Rights provides that no resident of a facility may be deprived of any civil or legal rights, benefits, or privileges guaranteed by law, the State Constitution, or the U.S. Constitution.<sup>12</sup>

Under the Resident Bill of Rights, every resident of a facility has the right to:<sup>13</sup>

- Live in a safe and decent living environment, free from abuse and neglect.
- Be treated with consideration and respect and with due recognition of personal dignity, individuality, and the need for privacy.
- Retain and use his or her own clothes and other personal property in his or her immediate living quarters, so as to maintain individuality and personal dignity, except when the facility can demonstrate that doing so would be unsafe, impractical, or an infringement upon the rights of other residents.
- Unrestricted private communication, including receiving and sending unopened correspondence, access to a telephone, and visiting with any person of his or her choice, at any time between the hours of 9:00 a.m. and 9:00 p.m. at a minimum. Upon request, the facility must make provisions to extend visiting hours for caregivers and out-of-town guests.
- Freedom to participate in, and benefit from, community services and activities, and to pursue the highest possible level of independence, autonomy, and interaction within the community.
- Manage his or her financial affairs unless the resident or, if applicable, the resident's representative, designee, surrogate, guardian, or attorney in fact authorizes the administrator of the facility to provide safekeeping for funds.<sup>14</sup>
- Share a room with his or her spouse, if both are residents of the facility.
- Reasonable opportunity for regular exercise several times a week, and to be outdoors at regular and frequent intervals, except when prevented by inclement weather.
- Exercise civil and religious liberties, including the right to independent personal decisions. No religious beliefs or practices, nor any attendance at religious services, may be imposed upon any resident.
- Assistance with obtaining access to adequate and appropriate health care.
- At least 45 days' notice of relocation or termination of residency from the facility unless, for medical reasons, the resident is certified by a physician to require an emergency relocation to a facility providing a more skilled level of care, or the resident engages in a pattern of conduct that is harmful or offensive to other residents.

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<sup>9</sup> See Fla. Admin. Code R. 59A-36.007, F.A.C. (providing specific minimum standards).

<sup>10</sup> Section 429.26, F.S., and Fla. Admin. Code R. 59A-36.006, F.A.C.

<sup>11</sup> Section 429.28, F.S.

<sup>12</sup> Section 429.28(1), F.S.

<sup>13</sup> *Id.*

<sup>14</sup> See s. 429.27, F.S.

- Present grievances and recommend changes in policies, procedures, and services to the staff of the facility, governing officials, or any other person without restraint, interference, coercion, discrimination, or reprisal.<sup>15</sup>

### ***Training***

Administrators and other ALF staff must meet minimum training and education requirements established by rule.<sup>16</sup> These requirements are intended to assist ALFs in responding appropriately to the needs of residents; maintaining resident care and facility standards; and meeting licensure requirements.<sup>17</sup>

ALF core training requirements established by the AHCA currently consist of a minimum of 26 hours of training, and passing a competency test. Administrators and managers must successfully complete the core training requirements within three months after becoming an ALF administrator or manager. The minimum passing score for the competency test is 75 percent.<sup>18</sup>

Administrators and managers must participate in 12 hours of continuing education in assisted living-related topics every two years.<sup>19</sup> Newly-hired administrators or managers, who have successfully completed the ALF core training and continuing education requirements, are not required to retake the core training. Administrators or managers who have successfully completed the core training, but have not maintained the continuing education requirements, must retake both the ALF core training and the competency test.<sup>20</sup>

Facility administrators or managers are required to facilitate six hours of in-service training for facility staff who provide direct care to residents. Generally, staff training requirements must be completed within 30 days after staff begin employment at the facility; however, staff must have at least one hour of infection control training before providing direct care to residents. Nurses, certified nursing assistants, and home health aides who are on staff with an ALF are exempt from many of the training requirements. In addition to the standard six hours of in-service training, staff must complete one hour of elopement training and one hour of training on “do not resuscitate” orders. Staff may be required to also complete training on special topics such as self-administration of medication and Alzheimer’s disease, if applicable.<sup>21</sup>

### ***Inspections and Surveys***

The AHCA is required to conduct a survey, investigation, or monitoring visit of an ALF:

- Prior to the issuance of a license.
- Prior to biennial renewal of a license.

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<sup>15</sup> *Id.*

<sup>16</sup> Fla. Admin. Code R. 59A-36.011, F.A.C.

<sup>17</sup> Section 429.52(1), F.S.

<sup>18</sup> Fla. Admin. Code R. 59A-36.011(1)(a)-(b). Administrators who have attended core training prior to July 1, 1997, and managers who attended the core training program prior to April 20, 1998, are not required to take the competency test. Administrators licensed as nursing home administrators in accordance with part II of ch. 468, F.S., are exempt from this requirement. *Id.*

<sup>19</sup> Fla. Admin. Code R. 59A-36.011(1)(c).

<sup>20</sup> Fla. Admin. Code R. 59A-36.011(1)(d).

<sup>21</sup> Fla. Admin. Code R. 59A-36.011(3), (10)-(11).

- When there is a change of ownership.
- To monitor ALFs licensed to provide limited nursing services or extended congregate care services.
- To monitor ALFs cited in the previous year for a class I or class II violation or for four or more uncorrected class III violations.
- Upon receipt of an oral or written complaint of practices that threaten the health, safety, or welfare of residents.
- If the AHCA has reason to believe an ALF is violating a provision of part III of chapter 429, F.S., relating to adult day care centers, or an administrative rule.
- To determine if cited deficiencies have been corrected.
- To determine if an ALF is operating without a license.<sup>22</sup>

An applicant for licensure renewal is eligible for an abbreviated biennial survey by the AHCA if the applicant does not have any:

- Class I, class II, or uncorrected class III violations.
- Confirmed complaints from the long-term care ombudsman program.<sup>23</sup>
- Confirmed licensing complaints within the two licensing periods immediately preceding the current renewal date.<sup>24</sup>

### **Causes of Action under the Assisted Living Facilities Act**

#### ***Generally***

The Act authorizes any person or resident whose rights under the Act have been violated by a licensee, person, or entity to bring a cause of action against them. The action may be brought by the resident or his or her guardian, or by a person or organization acting on behalf of the resident, with the resident's consent, or the consent of his or her guardian or the personal representative of the deceased resident's estate, regardless of the cause of death.<sup>25</sup>

If the action alleges a claim for a resident's rights violation or for negligence that caused the death of the resident, the claimant must elect either survival damages<sup>26</sup> or wrongful death damages.<sup>27</sup> If the action alleges a claim for a resident's rights violation or for negligence that did not cause the death of the resident, the personal representative of the estate may recover damages for the negligence that caused injury to the resident.<sup>28</sup>

The action may be brought in any court of competent jurisdiction, to enforce such rights and to recover actual, as well as punitive, damages, for violations of the resident's rights or negligence.

<sup>22</sup> See generally ss. 429.34 and 408.811, F.S.

<sup>23</sup> Florida's Long-Term Care Ombudsman Program was founded in 1975 as a result of the federal Older Americans Act, which grants a special set of residents' rights to individuals who live in long-term care facilities such as nursing homes, assisted living facilities and adult family care homes. Volunteer ombudsmen seek to ensure the health, safety, welfare and rights of these residents throughout Florida. Florida Department of Elder Affairs, *Florida Long-Term Care Ombudsman Program*, <http://ombudsman.myflorida.com/AboutUs.php> (last visited on Jan. 24, 2024).

<sup>24</sup> Fla. Admin. Code R. 59A-36.023(1)(a), F.A.C.

<sup>25</sup> Section 429.29(1), F.S.

<sup>26</sup> See s. 46.021, F.S.

<sup>27</sup> See s. 768.21, F.S.

<sup>28</sup> Section 429.29(1), F.S.

Any resident who prevails in seeking injunctive relief or a claim for an administrative remedy, is entitled to recover the costs of the action and reasonable attorneys' fees up to \$25,000. Fees may be awarded only for the injunctive or administrative relief, and not for any claim or action for damages, regardless of whether the claim or action is brought together with a request for an injunction or administrative relief or as a separate action, except as otherwise provided under state law.<sup>29</sup>

The resident, or the resident's legal representative, must serve a copy of any complaint alleging a violation of the Resident Bill of Rights to the AHCA at the time he or she files the initial complaint. This requirement does not impair the resident's legal rights or ability to seek relief for his or her claim.<sup>30</sup>

The ALF civil enforcement statutes<sup>31</sup> provide the exclusive remedy for the recovery of damages due to the personal injury or death of a resident arising out of negligence or a violation of the Resident Bill of Rights. The statute does not preclude theories of recovery not arising out of negligence or violations of the Resident Bill of Rights that may be available to a resident or to the agency. The provisions of chapter 766, F.S., which govern medical malpractice and related matters, do not apply to causes of action brought under the ALF civil enforcement statutes.<sup>32</sup>

### ***Punitive Damages***

In order for a plaintiff to bring a claim for punitive damages, there must be a reasonable showing, based upon evidence in the record or proffered by the claimant, that there is a reasonable basis for the recovery of punitive damages.<sup>33</sup>

Claimants may move to amend their complaints to assert a claim for punitive damages, as allowed by the rules of civil procedure. The rules must be liberally construed so as to allow the claimant to discover evidence that is reasonably calculated to lead to admissible evidence on the issue.<sup>34</sup> Discovery of financial information for the purpose of determining the value of punitive damages may not be had unless the plaintiff shows the court, by proffer or evidence in the record, that a reasonable basis exists to support the claim for punitive damages.<sup>35</sup>

Punitive damages may only be imposed against a defendant if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. In this context, "intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage. "Gross negligence" means that the defendant's conduct

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<sup>29</sup> *Id.* (referencing s. 768.79, F.S., which is the offer of judgment and demand for judgment statute, and the Florida Rules of Civil Procedure).

<sup>30</sup> Section 429.29(7), F.S.

<sup>31</sup> Sections 429.29-429.298, F.S.

<sup>32</sup> Section 429.29(1), F.S.

<sup>33</sup> Section 429.297(1), F.S.

<sup>34</sup> *Id.*

<sup>35</sup> Sections 429.297(1) and 429.29(5), F.S.

was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.<sup>36</sup>

In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in the previous paragraph, and:

- The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;
- The officers, directors, or managers of the employer, principal, corporation, or other legal entity condoned, ratified, or consented to such conduct; or
- The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.<sup>37</sup>

Plaintiffs must establish at trial, by clear and convincing evidence, their entitlement to an award of punitive damages. The “greater weight of the evidence” burden of proof applies to a determination of the amount of damages.<sup>38</sup> Any award of punitive damages under the Act must be reasonable in light of the actual harm suffered by the resident and the egregiousness of the conduct that caused the actual harm to the resident.<sup>39</sup>

### ***Comparisons to Nursing Home Civil Enforcement Statutes***

The nursing home civil enforcement statutes<sup>40</sup> are similar, but not identical, to the ALF civil enforcement statutes.

Unlike in the ALF civil enforcement context, which does not limit who may be sued,<sup>41</sup> an exclusive cause of action for negligence or for a violation of residents’ rights,<sup>42</sup> which alleges direct or vicarious liability for the personal injury or death of a nursing home resident arising from such negligence or violation of rights, and which seeks damages for such injury and death, may be brought only against:

- The licensee.
- The licensee’s management or consulting company.
- The licensee’s managing employees.
- Any direct caregivers, whether employees or contractors.<sup>43</sup>

Passive investors may not be held liable under the nursing home civil enforcement statutes.<sup>44</sup>

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<sup>36</sup> Section 429.297(2), F.S.

<sup>37</sup> Section 429.297(3), F.S.

<sup>38</sup> Section 429.297(4), F.S.

<sup>39</sup> Section 429.29(6), F.S.

<sup>40</sup> Sections 400.023-400.0239, F.S.

<sup>41</sup> *See* s. 429.29(1), F.S.

<sup>42</sup> Chapter 400, part II, F.S., governing nursing homes, contains a “residents’ rights” statute that is similar, but not identical, to the Resident Bill of Rights. *See generally* s. 400.022, F.S.

<sup>43</sup> Section 400.023(1), F.S.

<sup>44</sup> *Id.*

An action against an individual or entity not falling within any of the above four categories may only be brought after a hearing on a motion for leave to amend, and after the court or an arbitration panel determines that there is sufficient evidence in the record, or proffered by the claimant, to establish a reasonable showing that:

- The individual or entity owned a duty of reasonable care to the resident and that the individual or entity breached that fiduciary duty.
- The breach of that duty is a legal cause of loss, injury, death, or damage to the resident.<sup>45</sup>

Unlike the ALF civil enforcement statute, which does not specify when an election must be made,<sup>46</sup> if a nursing home civil enforcement action alleges a claim for a resident's rights violation or for negligence that caused the death of the resident, the claimant must elect survival damages<sup>47</sup> or wrongful death damages<sup>48</sup> after the verdict, but before the judgment is entered.<sup>49</sup>

With respect to punitive damages, a claim may not be brought under the nursing home civil enforcement statute unless the parties submit admissible evidence providing a reasonable basis for the recovery of such damages.<sup>50</sup> The court must conduct a hearing to determine whether the recovery of punitive damages is warranted under a claim for direct liability or vicarious liability as provided by statute.<sup>51</sup> In contrast, the ALF civil enforcement statute only requires a reasonable showing by evidence in the record, but no hearing.<sup>52</sup>

A defendant may be held liable for punitive damages only if the trier of fact, by clear and convincing evidence, finds that a specific person or corporate defendant actively and knowingly participated in intentional misconduct or engaged in conduct that constitutes gross negligence and contributed to the loss, damages, or injury suffered by the claimant. In this context, "intentional misconduct" means that the defendant against whom punitive damages are sought had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage. Gross negligence" means that a defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.<sup>53</sup>

In the case of vicarious liability of an individual, employer, principal, corporation, or other legal entity, punitive damages may not be imposed for the conduct of an employee or agent unless his or her conduct meets the criteria above and an officer, director, or a manager of the actual employer, corporation, or legal entity condoned, ratified, or consented to that conduct.<sup>54</sup>

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<sup>45</sup> Section 400.023(3), F.S.

<sup>46</sup> See s. 429.29(1), F.S.

<sup>47</sup> See s. 46.021, F.S.

<sup>48</sup> See s. 768.21, F.S.

<sup>49</sup> Section 400.023(1)(b), F.S.

<sup>50</sup> Section 400.0237, F.S.

<sup>51</sup> Section 400.0237(1)(b), F.S.

<sup>52</sup> Section 429.297(1), F.S.

<sup>53</sup> Section 400.0237(2), F.S.

<sup>54</sup> Section 400.0237(3), F.S.



### III. Effect of Proposed Changes:

The bill amends two sections of the Assisted Living Facilities Act to extend certain substantive and procedural protections that are already enjoyed by nursing homes to ALFs.

**Section 1** of the bill amends s. 429.29, F.S., which currently authorizes civil actions to enforce ALF residents' rights, in the following ways.

The bill amends the statute to include the following definitions:

- "Licensee" means an individual, corporation, partnership, firm, association, governmental entity, or other entity that is issued a permit, registration, certificate, or license by the agency and is legally responsible for all aspects of the operation of the facility.
- "Management company or active participant" means an individual or entity that contracts or receives a fee to provide any of the following services for a facility:
  - Hiring or firing the administrator or director of nursing.
  - Controlling or having control over staffing levels at the facility.
  - Having control over the budget of the facility.
  - Implementing and enforcing the policies and procedures of the facility.
  - Receiving and controlling a line of credit, loan, or other credit instrument that is used either in whole or in part by, or for the benefit of, the subject facility where a resident resides or resided during the subject residency.
- "Passive investor" means an individual or entity that has an interest in a facility but does not participate in the decision-making or operations of the facility.

The bill provides that an exclusive cause of action for an ALF residents' rights violation or for negligence, which alleges direct or vicarious liability for the personal injury or death of a resident arising from such rights violation or negligence, and which seeks damages for such injury or death, may be brought only against:

- The licensee.
- The licensee's management company or active participant.
- The licensee's managing employees.
- Any direct caregivers, whether employees or contractors.

The bill provides that passive investors are not liable under the statute. Additionally, an action against any other individual or entity may be brought only pursuant to a new provision in the bill, described below.

Currently, for ALFs, the law does not limit who can initially be sued.<sup>55</sup> For example, a plaintiff can sue the licensee, managing company, managing employees, direct caregivers, building owner, real property owner, and passive investors. However, for nursing homes, the initial cause of action is limited to being filed against the licensee, the licensee's management company or consulting company, the licensee's managing employees, and direct caregivers, whether employees or contractors.<sup>56</sup> The bill makes it so causes of action against ALFs involve similar potential defendants as causes of actions against nursing homes.

<sup>55</sup> See s. 429.29(1), F.S.

<sup>56</sup> Section 400.023(1), F.S.

With respect to actions alleging a claim for an ALF residents' rights violation or for negligence that caused the death of the resident, the bill amends the statute to require the claimant to elect survival damages<sup>57</sup> or wrongful death damages<sup>58</sup> after the verdict but before the judgment is entered. In cases involving the death of a resident, current law requires the claimant to elect either survival damages or wrongful death damages but does not specify when the election must be made.<sup>59</sup> For nursing homes, state law requires this election to be made after the verdict but before the judgment is entered.<sup>60</sup> The bill aligns this election in the ALF context with the same election in the nursing home context.

The bill provides that a cause of action for a residents' rights violation or for negligence may not be asserted against an individual or entity other than the licensee, the licensee's management company or active participant, the licensee's managing employees, and any direct caregivers, whether employees or contractors, unless, after a motion for leave to amend hearing, the court or an arbitration panel determines that there is sufficient evidence in the record or proffered by the claimant to establish a reasonable showing that:

- The individual or entity owed a duty of reasonable care to the resident and breached that duty.
- The breach of that duty is a legal cause of loss, injury, death, or damage to the resident.

The bill provides that for purposes of these causes of action against others, if it is asserted in a proposed amended pleading that they arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the proposed amendment relates back to the original pleading.

**Section 2** of the bill amends s. 429.297, F.S., regarding punitive damages, in the following ways.

The bill clarifies that, in any action brought under the Act, no claim for punitive damages may be brought unless there is admissible evidence submitted by the parties providing a reasonable basis for recovery pursuant to the statute. Claimants may move to amend their complaints to assert a claim for punitive damages, as allowed by the rules of civil procedure, but only if in accordance with the evidentiary requirements in the bill.

The bill requires the court to conduct a hearing to determine whether there is sufficient admissible evidence submitted by the parties to ensure that there is a reasonable basis for a punitive damages award. The claimant, at trial, will need to demonstrate by clear and convincing evidence that the recovery of punitive damages is warranted under a claim for direct liability or vicarious liability as specified in the statute.

Currently, for ALFs, a plaintiff may claim punitive damages by a reasonable showing based on evidence in the record (*e.g.* an affidavit) or proffered by the claimant that would provide a reasonable basis for recovery of such damages.<sup>61</sup> However, for nursing homes, the court must

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<sup>57</sup> See s. 46.021, F.S.

<sup>58</sup> See s. 768.21, F.S.

<sup>59</sup> See s. 429.29(1), F.S.

<sup>60</sup> Section 400.023(1)(b), F.S.

<sup>61</sup> See s. 429.297(1), F.S.

conduct a hearing where the plaintiff must demonstrate that there is admissible evidence providing a reasonable basis for the recovery of punitive damages.<sup>62</sup> The bill aligns the statute with the corresponding statute for nursing homes.

The bill provides that a defendant may be held liable for punitive damages only if the trier of fact, by clear and convincing evidence, finds that a specific individual or corporate defendant actively and knowingly participated in intentional misconduct, or actively and knowingly engaged in conduct that constitutes gross negligence and contributed to the loss, damages, or injury suffered by the claimant. The bill also clarifies that in this context, “intentional misconduct” means that the defendant *against whom punitive damages are sought* had actual knowledge of the wrongfulness of the conduct, and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

The bill also provides that in the case of vicarious liability of an individual, employer, principal, corporation, or other legal entity, punitive damages may not be imposed for the conduct of an employee or agent unless the conduct of the employee or agent meets the criteria described above, and an officer, director, or manager of the actual employer, corporation, or legal entity condoned, ratified, or consented to that specific conduct.

**Section 3** of the bill provides that the bill’s provisions apply to causes of action that accrue on or after July 1, 2024.

**Section 4** of the bill provides an effective date of July 1, 2024.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

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<sup>62</sup> Section 400.0237(1)(b), F.S.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The bill will benefit passive investors of ALFs by exempting them from lawsuits under the civil enforcement provisions of the Assisted Living Facilities Act. Because passive investors will no longer be named as defendants in ALF lawsuits, they will avoid potential liability under the Act as well as the costs associated with defending themselves in court. Additionally, by reducing liability risks, ALFs may be better positioned to attract passive investors.

Additionally, the bill makes it more difficult for plaintiffs under the Act to seek punitive damages against defendants, by requiring the court to hold a hearing determining whether sufficient admissible evidence providing a reasonable basis for the recovery of punitive damages exists. If the plaintiff cannot make this demonstration, the defendant will not incur the costs associated with defending the claim.

**C. Government Sector Impact:**

The bill is likely to improve judicial economy by reducing the number of lawsuits filed under the civil enforcement provisions of the Act.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 429.29 and 429.297.

**IX. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on January 29, 2024:**

- Replaces the definition of “management or consulting company” with a new but similar definition for “management company or active participant.”
- Provides that “management company or active participant” means an individual or entity that contracts or receives a fee to provide the same services included in the definition for “management or consulting company,” but also the service of receiving

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and controlling a line of credit, loan, or other credit instrument that is used in whole or in part by, or for the benefit of, the subject facility where a resident resides or resided during the subject tenancy.

- Replaces all references to “management or consulting company” in the bill with “management company or active participant.”

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

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