

## CHAPTER 2014-83

### Committee Substitute for Committee Substitute for Senate Bill No. 670

An act relating to nursing home litigation; amending s. 400.023, F.S.; specifying that a cause of action for negligence or violation of residents' rights alleging direct or vicarious liability for the injury or death of a nursing home resident may be brought against a licensee, its management or consulting company, its managing employees, and any direct caregiver employees or contractors; providing that a cause of action may not be asserted against other individuals or entities except under certain circumstances; revising related judicial procedures; defining terms; amending s. 400.0237, F.S.; providing that a claim for punitive damages may not be brought unless there is a showing of evidence that provides a reasonable basis for recovery of such damages when certain criteria are applied; requiring the court to conduct a hearing to determine whether there is sufficient evidence to demonstrate that the recovery of punitive damages is warranted; requiring the trier of fact to find that a specific person or corporate defendant participated in or engaged in conduct that constituted gross negligence and contributed to the damages or injury suffered by the claimant before a defendant may be held liable for punitive damages; requiring an officer, director, or manager of the employer, corporation, or legal entity to condone, ratify, or consent to specified conduct before holding such person or entity vicariously liable for punitive damages; creating s. 400.024, F.S.; authorizing the Agency for Health Care Administration to revoke the license or deny a license renewal or change of ownership application of a nursing home facility that fails to pay a judgment or settlement agreement; providing for notification to the agency of such failure and for agency notification to the licensee of disciplinary action; providing licensee grounds for overcoming failure to pay; authorizing the agency to issue an emergency order and notice of intent to revoke or deny a license; authorizing the agency to deny a license renewal and requiring the agency to deny a change of ownership; amending s. 400.145, F.S.; revising procedures for obtaining the records of a resident; specifying which records may be obtained and who may obtain them; providing immunity from liability to a facility that provides such records in good faith; providing that the agency may not cite a facility that does not meet these records requirements; providing applicability; providing an effective date.

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

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 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 or death may be brought only against the licensee, the licensee's management or consulting company, the licensee's managing employees, and any direct caregivers, whether employees or contractors are violated shall have a cause of action. A passive investor is not liable under this section. An action against any other individual or entity may be brought only pursuant to subsection (3).

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

(b) If the action alleges a claim for the resident's rights or for negligence that caused the death of the resident, the claimant shall, after the verdict, but before the judgment is entered, be required to elect either survival damages pursuant to s. 46.021 or wrongful death damages pursuant to s. 768.21. If the action alleges a claim for the resident's rights 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.

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

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

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

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

(a) "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 that is legally responsible for all aspects of the operation of the nursing home facility.

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

- 1. Hiring or firing of the administrator or director of nursing;
- 2. Controlling or having control over the staffing levels at the facility;
- 3. Having control over the budget of the facility; or
- 4. Implementing and enforcing the policies and procedures of the facility.

(c) "Passive investor" means an individual or entity that has an interest in a facility but does not participate in the decisionmaking or operations of the facility.

(3) A cause of action may not be asserted against an individual or entity other than the licensee, the licensee's management or consulting company, 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:

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

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

For purposes of this subsection, if, in a proposed amended pleading, it is asserted that such cause of action 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.

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

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

~~Nothing in~~ This part ~~does not shall be interpreted to~~ create strict liability. A violation of the rights set forth in s. 400.022, ~~or~~ in any other standard or

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

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

~~(6)(4)~~ In ~~a any~~ claim for a residents' resident's rights violation or negligence by a nurse licensed under part I of chapter 464, such nurse ~~has shall have~~ the duty to exercise care consistent with the prevailing professional standard of care for a nurse. The prevailing professional standard of care for a nurse ~~is shall be~~ that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar nurses.

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

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

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

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

400.0237 Punitive damages; pleading; burden of proof.—

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

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

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

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

(2) A defendant may be held liable for punitive damages only if the trier of fact, ~~by based on~~ 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 the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

(a) “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.

(b) “Gross negligence” means that ~~a the~~ 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.

(3) 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 only if the conduct of the employee or agent meets the criteria specified in subsection (2) and an officer, director, or manager of the actual employer, corporation, or legal entity condoned, ratified, or consented to the specific conduct as provided in subsection (2):

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

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

~~(c) 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.~~

(4) The plaintiff shall ~~must~~ establish at trial, by clear and convincing evidence, its 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.

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

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

400.024 Failure to satisfy a judgment or settlement agreement.—

(1) Upon the entry by a Florida court of an adverse final judgment against a licensee as defined in s. 400.023(2) which arises from an award pursuant to s. 400.023, including an arbitration award, for a claim of negligence or a violation of residents’ rights, in contract or tort, or from noncompliance with the terms of a settlement agreement as determined by a court or arbitration panel, which arises from a claim pursuant to s. 400.023, the licensee shall pay the judgment creditor the entire amount of the judgment, award, or settlement and all accrued interest within 60 days after the date such judgment, award, or settlement becomes final and subject to execution unless otherwise mutually agreed to in writing by the parties. Failure to make such payment shall result in additional grounds that may be used by the agency for revoking a license or for denying a renewal application or a related party change of ownership application as provided in this section.

(2) The agency is deemed notified of an unsatisfied judgment or settlement under subsection (1) when a certified copy of the judgment and a certified copy of a valid judgment lien certificate, filed in accordance with ss. 55.202 and 55.203, are served to the agency by process server or received by certified mail, return receipt requested. Within 60 days after receiving such documents, the agency shall notify the licensee by certified mail, return receipt requested, that it is subject to disciplinary action unless, within 30 days after the date of mailing the notice, the licensee:

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

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

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

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

(e) Shows proof by submitting an order from a court or arbitration panel that is overseeing any action seeking indemnification from an insurance carrier or other party that the licensee believes is required to pay the award.

(3) If the agency is placed on notice pursuant to subsection (2) and proof pursuant to subsection (2) is not provided by the licensee, the agency shall issue an emergency order pursuant to s. 120.60 declaring that the facility lacks financial ability to operate and a notice of intent to revoke or deny a license.

(4) If, after the agency is placed on notice pursuant to subsection (2) and:

(a) The license is subject to renewal, the agency may deny the license renewal unless compliance with this section is achieved; and

(b) A change of ownership application for the facility at issue is submitted by the licensee, by a person or entity identified as having a controlling interest in the licensee, or by a related party, the agency shall deny the change of ownership application unless compliance with this section is achieved.

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

(Substantial rewording of section. See s. 400.145, F.S., for present text.)

400.145 Copies of records of care and treatment of resident.—

(1) Upon receipt of a written request that complies with the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) and this section, a nursing home facility shall furnish to a competent resident, or to a representative of that resident who is authorized to make requests for the resident's records under HIPAA or subsection (2), copies of the resident's paper and electronic records that are in possession of the facility. Such records must include any medical records and records concerning the care and treatment of the resident performed by the facility, except for progress notes and consultation report sections of a psychiatric nature. The facility shall provide the requested records within 14 working days after receipt of a request relating to a current resident or within 30 working days after receipt of a request relating to a former resident.

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

(a) A person appointed by a court to act as the personal representative, executor, administrator, curator, or temporary administrator of the deceased resident's estate;

(b) If a judicial appointment has not been made as provided in paragraph (a), a person designated by the resident to act as his or her personal representative in a last will that is self-proved under s. 732.503; or

(c) If no judicial appointment has been made as provided in paragraph (a) or no person has been designated by the resident in a last will as provided in paragraph (b), only the following individuals:

1. A surviving spouse.
2. If there is no surviving spouse, a surviving child of the resident.
3. If there is no surviving spouse or child, a parent of the resident.

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

(a) Paragraph (2)(a) must include a copy of the letter of administration and a copy of the court order appointing such person as the representative of the resident's estate.

(b) Paragraph (2)(b) must include a copy of the self-proved last will designating the person as the resident's representative.

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

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

(5) If a nursing home facility determines that disclosure of the records to the resident would be detrimental to the physical or mental health of the resident, the facility may refuse to furnish the record directly to the resident; however, upon such refusal, the resident's records shall, upon written request by the resident, be furnished to any other medical provider designated by the resident.

(6) A nursing home facility that in good faith and in reliance upon this section releases copies of records shall be indemnified by the party who requested the records pursuant to subsection (2) for any damages resulting from such release, and may not be found to have violated any criminal or civil laws, and is not civilly liable to the resident, the resident's estate, or any other person for any damages resulting from such release.

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

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

(9) This section does not limit any right to obtain records by subpoena or other court process.

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

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

Approved by the Governor June 13, 2014.

Filed in Office Secretary of State June 13, 2014.