

New Law Could Mean Fewer Claims for Florida Assisted Living Facilities, article by Christopher Brown, Partner and Henry Norwood, Associate, 2-28-2024

A pending Florida statute would potentially limit the number of claims brought against assisted living facilities (ALFs) in Florida by narrowing the list of defendants' claims can be lodged against. Specifically, the bill would amend Florida Statute § 429.29, which provides the general framework for civil claims brought against ALFs in Florida. The section creates an "exclusive cause of action for negligence or a violation of a resident's rights." The statute applies to claims for direct or vicarious liability, resulting in personal injury to or the death of an ALF resident. A proposed amendment to the statute was submitted by the Florida House of Representatives on December 21, 2023. The bill currently sits in the Civil Justice Subcommittee.

Three Key Changes

There are three substantial changes made by the amendment of importance to ALFs and their counsel:

Narrowing the Class of Potential Defendants

The amendment limits the class of defendants who may be sued under the section, absent prior court approval. The amendment limits claims under the section to an ALF's licensee, the licensee's management or consulting company, the licensee's managing employees, and any direct caregivers. These terms are explicitly defined by the amendment.

A "licensee" is any entity or individual licensed to operate an ALF. A "management or consulting company" is an entity or individual who contracts with a licensee to control staffing, control budgets, implement or enforce policies, or hire or fire an administrator or director of nursing. Passive investors of the ALF are insulated from liability under the section. A "passive investor" is an individual or entity owning an interest in an ALF, but which has no input in the decision-making or operations of the ALF.

For a claimant to sue any entity outside of this class, it must seek prior approval from the court or arbitration panel. At the hearing, the claimant must show that the claimant will likely succeed on each of the elements of negligence duty, breach, causation, and damages against the entity outside the designated class specifically.

Claimants' Election of Survivor or Wrongful Death Damages

The amendment specifies the time period during which a successful claimant on a claim involving the death of an ALF resident must elect either survival damages (under Fla. Stat. § 46.021) or wrongful death damages (Fla. Stat. § 768.21). The amendment specifies that this election must take place "after the verdict, but before the judgment is entered." The original section did not specify a time period to make the election. The amendment will result in specific motions electing damages during this time period.

Punitive Damages

The amendment also provides additional requirements to plead punitive damages in claims under this section. No claim for punitive damages under the section may be made unless the claimant shows at a hearing, by admissible evidence, that it is likely the claimant will establish its entitlement to punitive damages under the clear and convincing standard. Punitive damages are only permitted if the claimant establishes by clear and convincing evidence that a specific individual or corporate defendant "actively and knowingly participated in intentional misconduct or engaged in conduct that constitutes gross negligence," contributing to the claimant's injuries.

For punitive damages in claims for vicarious liability based on the actions of any employee or agent, the claimant must show:

- (1) the employee/agent "actively and knowingly participated in intentional misconduct or engaged in conduct that constitutes gross negligence"; and,*
- (2) the officer, director, or manager of the employee's/agent's actual employer consented to, ratified, or condoned the actions of the employee/agent. The prior version of the section also permitted punitive damages under these circumstances, but also under additional circumstances.*

Conclusion

The amendment takes effect on July 1, 2024. The new provisions only apply to claims arising after the effective date. The most significant effect of the amendment will be the narrower class of potential defendants who may be sued. Although claimants may seek to bring in defendants outside the permitted class, claimants will be required to make their case early, a high burden, which should result in fewer claims.

Kaufman Dolowich Can Help

If you have questions about this pending amendment or other healthcare-related legal matters, Kaufman Dolowich's skilled Health Care/Managed Care attorneys have a deep understanding of the complex legal landscape and rapidly changing business environment that health care providers operate within. We regularly advise clients in this sector on matters that uniquely affect the health care industry as well as the full range of legal matters that affect health care business operations.