

HOUSE BILL 2243

By Lundberg

AN ACT to amend Tennessee Code Annotated, Title 29
and Title 68, relative to liability of long-term care
facilities and standards for nursing homes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 68, Chapter 11, is amended by adding the following new part thereto:

§ 68-11-2001. Every long-term care facility shall at least annually request all patients or their families to respond to surveys to determine whether they would rate the overall performance of the facility as "poor", "fair", "good", or "excellent" and to determine whether they would recommend the long-term care facility to someone else. The results of these two (2) categories of questions as well as the percentages of patients or families responding shall be provided to the department of health and the department shall make that information available to the public through web site posting.

SECTION 2. Tennessee Code Annotated, Title 29, Chapter 26, is amended by adding the following new part thereto:

§ 29-26-301. As used in this part, unless the context otherwise requires:

(1) "Direct care staff" means all licensed nursing personnel, certified nursing assistants, therapists, therapy assistants, aides, and certified medication aides;

(2) "Economic damages" means objectively verifiable monetary losses including but not limited to: the costs of reasonable and necessary medical care, rehabilitation services, custodial care, funeral expenses and any loss of earned income;

(3) "Health-related services" means any service or activity:

(A) Where the manner of performance is based on the medical condition of the patient and is performed by a person who has been trained or instructed on the performance of such service or activity and the person's performance of such service or activity is within the scope of the person's employment; or

(B) That could be performed by the patient but for the patient's medical condition and is performed by a person who has been trained or instructed on the performance of such service or activity and the person's performance of such service or activity is within the scope of the person's employment;

(4) "Long-term care facility" means any nursing home licensed under title 68, and its employees, owners, managers, licensees, affiliates and any person or entity participating in or exercising control over the care rendered at the long-term care facility, including the medical director when acting in the capacity of a medical director but excluding a treating physician;

(5) "Long-term care tort action" means any civil action in any forum for any damages for, or related to, injury or death of a long-term care facility patient brought against a long-term care facility or long-term care facilities; and

(6) "Non-economic damages" means subjective nonmonetary losses of any nature that result from an injury or death, including but not limited to: pain, suffering, mental anguish, loss of enjoyment of life, companionship, attention, protection, advice, guidance, counsel, inconvenience, disability, disfigurement, emotional distress, loss of society and companionship, loss of consortium, destruction of the parent-child relationship or any other intangible loss.

§ 29-26-302.

(a) Any long-term care tort action related to the provision of health-related services shall be brought solely as a medical malpractice action pursuant to §§ 29-26-115 - 29-26-120.

(b) All occurrences that are or could have been asserted in a long-term care tort action shall constitute one (1) long-term care tort action for purposes of this part regardless of whether the action or actions are based on a single act or omission or a series of acts or omissions that allegedly caused the injury, injuries, death or deaths and regardless of the number of long-term care facilities against whom the long-term care tort action is brought.

§ 29-26-303.

(a) There is no limit on the amount of economic damages that may be recovered in a long-term care tort action.

(b) The maximum amount of non-economic damages recoverable in any long-term care tort action is three hundred thousand dollars (\$300,000). In the case of a jury trial, the jury shall not be told of the limit on non-economic damages recoverable. The judge shall adjust the final award in compliance with this section. The limit of this section shall be adjusted for inflation as of January 1, 2012, and at three-year intervals thereafter. Inflation shall be determined in accordance with the consumer price index for all urban consumers for the previous year as published by the bureau of labor statistics of the United States department of labor.

(c) For purposes of this section, the maximum amount of punitive damages recoverable in a long-term care tort action shall be limited as follows:

(1) Upon the long-term care facility establishing that it was staffing at least three and five tenths (3.5) hours per patient day of direct care staff, then

punitive damages shall be limited to three hundred thousand dollars (\$300,000);

(2) Upon the long-term care facility establishing that it was staffing at least three (3) hours per patient day of direct care staff, then punitive damages shall be limited to five hundred thousand dollars (\$500,000);

(3) Upon the long-term care facility establishing that it was staffing at least two and eight tenths (2.8) hours per patient day of direct care staff, then punitive damages shall be limited to seven hundred fifty thousand dollars (\$750,000);

(4) Upon the long-term care facility establishing that it was staffing at least two and five tenths (2.5) hours per patient day of direct care staff, then punitive damages shall be limited to one million dollars (\$1,000,000);

(5) Upon the long-term care facility establishing that it was staffing at least two (2) hours per patient day of direct care staff, then punitive damages shall be limited to one million five hundred thousand dollars (\$1,500,000); and

(6) There shall be no limitation on punitive damages if the long-term care facility fails to establish that it was staffing at two (2) or more hours per patient day of direct care staff.

(d) In the case of a jury trial, the jury shall not be told of the limit on punitive damages recoverable. The judge shall adjust the final award in compliance with this section.

(e) For purposes of this section, the burden shall be on the long-term care facility to prove to the court, acting as the fact finder on this issue, the hours per patient day of direct care staff and the long-term care facility may do so by filing a motion at any time after the complaint is filed. Upon such a showing, the court shall issue an order setting

forth the level of staffing that has been proven and the punitive damage limit which will apply to the long-term care tort action. For purposes of determining the hours per patient day of direct care staff, the long-term care facility shall use the same method of calculation used to calculate compliance with Rule 1200.-8-6.06(d) of the official compilation of rules and regulations. Notwithstanding any provision to the contrary, for purposes of this section, the long-term care facility may use the average for either each day, week or month of the patient's residency limited to the last year of the patient's residency. Whichever time period the long-term care facility uses, it must show the proven staffing ratio was met at least ninety percent (90%) of the time.

(f) The amount of punitive damages awarded in a long-term care tort action shall be paid fifty percent (50%) to the claimants and fifty percent (50%) to the long-term care improvement trust fund, as established by subsection (k). There shall be no fee taken by the attorneys for the claimant of the fifty percent (50%) paid to the fund.

(g) In the case of a jury trial, the jury shall not be told how the punitive damages award shall be paid. The clerk of the court shall transmit a copy of the jury verdict to the commissioner of finance and administration by certified mail. In the final judgment, the court shall order the percentages of the award, payable as provided in this section.

(h) A settlement agreement entered into between the parties to the action after a verdict has been returned, must provide a proportionate share payable to the long-term care improvement trust fund specified in this section. For purposes of this subsection (h), a proportionate share is a fifty-percent share of that percentage of the settlement amount which the punitive damages portion of the verdict bore to the total of the compensatory and punitive damages in the verdict.

(i) The department of finance and administration shall collect or cause to be collected all payments due the fund under this section. Such payments shall be made

to the commissioner of finance and administration and deposited in the fund specified in this section.

(j) If the full amount of punitive damages awarded cannot be collected, the claimant and fund shall be entitled to a proportionate share of the punitive damages collected.

(k) There is created within the department of health a long-term care improvement trust fund to support activities and programs directly related to the improvement of long-term care provided to Tennessee citizens. The trust fund shall be funded through proceeds generated pursuant to subsection (f), through funds specifically appropriated by the legislature, through gifts, endowments, or other contributions allowed under federal and state law.

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(1) Expenditures from the fund shall be allowable for direct support of the following:

(A) Nurse scholarships for nurses committing to practice in long-term care or home and community based services;

(B) Development and operation of a mentoring program, in consultation with the department of health, for increasing the competence, professionalism, and career preparation of long-term care facility direct care staff, including: nurses, nursing assistants, social services, and dietary personnel;

(C) Addressing areas of deficient practice identified through regulation or state monitoring; and

(D) Provision of economic and other incentives to enhance stability and career development of the long-term care facility direct care

workforce, including paid sabbaticals for exemplary direct care staff to visit long-term care facilities throughout the state to train and to motivate younger workers to commit to careers in long-term care.

(2) The department of health shall establish the priorities of the fund and direct such disbursements through appropriation in the department's budget for the fund. Upon allocation of dollars into the fund, the department of health is directed to establish an advisory board to provide input on how the fund shall be distributed. The advisory board should consist of representatives of the American Association of Retired Persons (AARP), other interested organizations, and representatives of the long-term care industry.

SECTION 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to that end the provisions of this act are declared to be severable.

SECTION 4. This act shall take effect July 1, 2009, the public welfare requiring it and shall apply to any long-term care tort action in which a complaint has not been filed prior to the effective date of this act.