

STATUTORY TORT CLAIMS AGAINST
ASSISTED LIVING FACILITIES IN FLORIDA

Statutory Tort Claims Against Assisted Living Facilities in Florida

By

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I. MINIMUM SERVICES REQUIRED OF LICENSED ASSISTED LIVING FACILITIES:

The rights of residents of assisted living facilities, also known as adult congregate living facilities and "ALF's", are governed by Chapter 429, *Florida Statutes*. Like the provisions of Chapter 400, *Florida Statutes* governing nursing homes, the "ALF" provisions of Chapter 429, *Florida Statutes* govern the rights of residents of assisted living facilities and establish the responsibilities and liabilities of operators of assisted living facilities.

Section 429.01 through 429.54, *Florida Statutes* is known as the Assisted Living Facilities Act. Pursuant to Section 429.02, *Fla. Stat.* "assisted living

facility" means any building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, or other residential facility, whether operated for profit or not, which undertakes through its ownership or management to provide housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.

Section 429.04 requires assisted living facilities to be licensed by the State of Florida's Agency for Health Care Administration. Under a standard license, an assisted living facility can provide only the most basic care, including room, meals, and limited personal services. An assisted living facility can provide more complex nursing services through licensed nurses or more complex mental health services. In order to provide more complex services, the facility must obtain a special license. Facilities that hold a special license must provide more extensive care than facilities that hold a standard license.

Chapter 58A-5, *Florida Administrative Code* contains regulations pertaining to the licensing and operation of assisted living facilities licensed under Chapter 429, *Fla. Stat.* Section 58A-5.0182, *Florida Administrative Code* defines the basic services that assisted living facilities must provide. An assisted living facility *shall* provide care and services appropriate to the needs of residents accepted for admission to the facility, including:

- (1) SUPERVISION. Facilities shall offer personal supervision, as appropriate for each resident, including the following:

- (a) Monitor the quantity and quality of resident diets in accordance with Rule 58A-5.020, *Florida Administrative Code*.
- (b) Daily observation by designated staff of the activities of the resident while on the premises, and awareness of the general health, safety, and physical and emotional well-being of the individual.
- (c) General awareness of the resident's whereabouts. The resident may travel independently in the community.
- (d) Contacting the resident's health care provider and other appropriate party such as the resident's family, guardian, health care surrogate, or case manager if the resident exhibits a significant change; contacting the resident's family, guardian, health care surrogate, or case manager if the resident is discharged or moves out.
- (e) A written record, updated as needed, of any significant changes as defined in 58A-5.0131(33), *Florida Administrative Code*, any illnesses which resulted in medical attention, major incidents, changes in the method of medication administration, or other changes which resulted in the provision of additional services.

All assisted living facilities must provide these basic services. Assisted living facilities that hold special licenses must also comply with additional regulations. For example, ALF's may choose to seek and obtain limited mental

health counseling licenses or licenses pursuant to Section 429.075, *Fla. Stat.*

II. RIGHTS OF RESIDENTS OF ASSISTED LIVING FACILITIES:

Chapter 429, *Fla. Stat.* grants each resident of an assisted living facility specific rights as follows:

429.28 Resident bill of rights.--

(1) No resident of a facility shall be deprived of any civil or legal rights, benefits, or privileges guaranteed by law, the Constitution of the State of Florida, or the Constitution of the United States as a resident of a facility. Every resident of a facility shall have the right to:

(a) Live in a safe and decent living environment, free from abuse and neglect.

(b) Be treated with consideration and respect and with due recognition of personal dignity, individuality, and the need for privacy.

(c) 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 such would be unsafe, impractical, or an infringement upon the rights of other residents.

(d) 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 a.m. and 9 p.m. at a minimum. Upon request, the facility shall make provisions to extend visiting hours for caregivers and out-of-town guests, and in other similar situations.

(e) Freedom to participate in and benefit from community services and activities and to achieve the highest possible level of independence, autonomy, and interaction within the community.

(f) 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 as provided in s. 429.27.

(g) Share a room with his or her spouse if both are residents of the facility.

(h) Reasonable opportunity for regular exercise several times a week and to be outdoors at regular and frequent intervals except when prevented by inclement weather.

(i) Exercise civil and religious liberties, including the right to independent personal decisions. No religious beliefs or practices, nor any attendance at religious services, shall be imposed upon any resident.

(j) Access to adequate and appropriate health care consistent with established and recognized standards within the community.

(k) 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. In the case of a resident who has been adjudicated mentally incapacitated, the guardian shall be given at least 45 days' notice of a non-emergency relocation or residency termination. Reasons for relocation shall be set forth in writing. In order for a facility to terminate the residency of an individual without notice as provided herein, the facility shall show good cause in a court of competent jurisdiction.

(l) 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. Each facility shall establish a grievance procedure to facilitate the residents' exercise of this right. This right includes access to ombudsman volunteers and advocates and the right to be a member of, to be active in, and to associate with advocacy or special interest groups.

(2) The administrator of a facility shall ensure that a written notice of the rights, obligations, and prohibitions set forth in this part is posted in a prominent place in each facility and read or explained to residents who cannot read. This notice shall include the name, address, and telephone numbers of the local

ombudsman council and central abuse hotline and, when applicable, the Advocacy Center for Persons with Disabilities, Inc., and the Florida local advocacy council, where complaints may be lodged. The facility must ensure a resident's access to a telephone to call the local ombudsman council, central abuse hotline, Advocacy Center for Persons with Disabilities, Inc., and the Florida local advocacy council.

(3)(a) The agency shall conduct a survey to determine general compliance with facility standards and compliance with residents' rights as a prerequisite to initial licensure or licensure renewal.

(b) In order to determine whether the facility is adequately protecting residents' rights, the biennial survey shall include private informal conversations with a sample of residents and consultation with the ombudsman council in the planning and service area in which the facility is located to discuss residents' experiences within the facility.

(c) During any calendar year in which no survey is conducted, the agency shall conduct at least one monitoring visit of each facility cited in the previous year for a class I or class II violation, or more than three uncorrected class III violations.

(d) The agency may conduct periodic follow-up inspections as necessary to monitor the compliance of facilities with a history of any class I, class II, or class III violations that threaten the health, safety, or security of residents.

(e) The agency may conduct complaint investigations as warranted to investigate any allegations of noncompliance with requirements required under this part or rules adopted under this part.

(4) The facility shall not hamper or prevent residents from exercising their rights as specified in this section.

(5) No facility or employee of a facility may serve notice upon a resident to leave the premises or take any other retaliatory action against any person who:

(a) Exercises any right set forth in this section.

(b) Appears as a witness in any hearing, inside or outside the facility.

(c) Files a civil action alleging a violation of the provisions of this part or notifies a state attorney or the Attorney General of a possible violation of such provisions.

(6) Any facility which terminates the residency of an individual who participated in activities specified in subsection (5) shall show good cause in a court of competent jurisdiction.

(7) Any person who submits or reports a complaint concerning a suspected violation of the provisions of this part or concerning services and conditions in facilities, or who testifies in any administrative or judicial proceeding arising from such a complaint, shall have immunity from any civil or criminal liability therefor, unless such person has acted in bad faith or with malicious purpose or the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.

III. Minimum Staffing Standards

In providing these services and assuring the residents' rights are not violated, every ALF depends on its administration and staff. Failure of the administration or staff is always the cause of a violation of a resident's statutory rights or a failure to provide the services required by regulations. The number of and type of staff required in an ALF, as well as the training required, the background screening that is a condition of employment, and the specific hours of staff time required for the type of facility given its census (resident population) is specifically defined in 58A-5.019, *Florida Administrative Code*. Reference to this regulation and an evaluation of the facility's employee timecards, payroll records, and other records and reports concerning staffing can be critical pieces of evidence that explain system failures that cause violations of resident's rights or a failure to provide the

necessary and required services to prevent harm, injury and death to residents.

This is the most difficult and expensive evidence to discover, secure and

develop in most cases.

IV. Statutory Causes of Action

A. Statutory Civil Cause of Action:

In the tragic event of an injury or wrongful death in an assisted living facility, Chapter 429, *Fla. Stat.* provides the exclusive remedy for legal redress. Recently renumbered, the statutory scheme governing tort claims against assisted living facilities was almost completely rewritten in 2001 in order to clarify a variety of legal issues that caused concern to those in the assisted living facility industry. Issues such as the legal duties owed to residents, principles of “legal cause” applicable to tort claims against ALF’s, the standard of care of the various staff members caring for residents, and they types of damages awardable are all now defined in the statute. In addition, to resolve an issue commonly resulting in confusion and inequities, the statute makes it clear that statutory tort claims against ALF’s are not claims for medical malpractice subject to Chapter 766, *Fla. Stat.* Specifically, Section 429.29, *Fla. Stat.* provides as follows:

429.29 Civil actions to enforce rights.--

(1) Any person or resident whose rights as specified in this part are violated shall have a cause of action. The action may be brought by the resident or his or her guardian, or 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. If the action alleges a claim for the resident's rights or for negligence that caused the death of the resident, the claimant shall 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. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual damages, and punitive damages for violation of the rights of a resident or negligence. 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's fee assessed against the defendant 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 429.29-429.298 provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a resident arising out of negligence or a violation of rights specified in s. 429.28. This section does not preclude theories of recovery not arising out of negligence or s. 429.28 which are available to a resident or to the agency. The provisions of chapter 766 do not apply to any cause of action brought under ss. 429.29-429.298.

(2) In any claim brought pursuant to this part alleging a violation of resident's rights or negligence causing injury to or the death of a resident, the claimant 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 shall be interpreted to create strict liability. A violation of the rights set forth in s. 429.28 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 shall be evidence of negligence but shall not be considered negligence per se.

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

(4) In any claim for resident's rights violation or negligence by a nurse licensed under part I of chapter 464, such nurse 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 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.

(5) 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 a claim for punitive damages.

(6) In addition to any other standards for punitive damages, any award of punitive damages 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.

(7) The resident or the resident's legal representative shall serve a copy of 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.

B. Attorneys' Fees:

Previous to the 2001 amendments, the statutory scheme provided for an award of attorneys' fees for successful prosecution of residents' legal actions against ALF's. In 2001, the statutory attorneys' fee provision was eliminated, and now residents must bear their own expense of finding competent legal representation.

C. Informal Pre-Suit Discovery Process:

The Assisted Living Facilities Act was also amended in 2001 to require a statutory pre-suit written notice of claim and provide for a 75 day period of informal pre-suit discovery between the parties. In addition, a pre-suit mediation conference is required as a condition precedent to litigation. Section 429.293, *Fla. Stat.* governing the pre-suit notice, investigation, and mediation or statutory tort claims against ALF's provides as follows:

429.293 Presuit notice; investigation; notification of violation of residents' rights or alleged negligence; claims evaluation procedure; informal discovery; review; settlement offer; mediation.--

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

(a) "Claim for residents' rights violation or negligence" means a negligence claim alleging injury to or the death of a resident arising out of an asserted violation of the rights of a resident under s. 429.28 or an asserted deviation from the applicable standard of care.

(b) "Insurer" means any self-insurer authorized under s. 627.357, liability insurance carrier, joint underwriting association, or uninsured prospective defendant.

(2) Prior to filing a claim for a violation of a resident's rights or a claim for negligence, a claimant alleging injury to or the death of a resident shall notify each prospective defendant by certified mail, return receipt requested, of an asserted violation of a resident's rights provided in s. 429.28 or deviation from the standard of care. Such notification shall include an identification of the rights the prospective defendant has violated and the negligence alleged to have caused the incident or incidents and a brief description of the injuries sustained by the resident which are reasonably identifiable at the time of notice. The notice shall contain a certificate of counsel that counsel's reasonable investigation gave rise to a good faith belief that grounds exist for an action against each prospective defendant.

(3)(a) No suit may be filed for a period of 75 days after notice is mailed to any prospective defendant. During the 75-day period, the prospective defendants or their insurers shall conduct an evaluation of the claim to determine the liability of each defendant and to evaluate the damages of the claimants. Each defendant or insurer of the defendant shall have a procedure for the prompt evaluation of claims during the 75-day period. The procedure shall include one or more of the following:

1. Internal review by a duly qualified facility risk manager or claims adjuster;
2. Internal review by counsel for each prospective defendant;
3. A quality assurance committee authorized under any applicable state or federal statutes or regulations; or
4. Any other similar procedure that fairly and promptly evaluates the claims.

Each defendant or insurer of the defendant shall evaluate the claim in good faith.

(b) At or before the end of the 75 days, the defendant or insurer of the defendant shall provide the claimant with a written response:

1. Rejecting the claim; or
2. Making a settlement offer.

(c) The response shall be delivered to the claimant if not represented by counsel or to the claimant's attorney, by certified

mail, return receipt requested. Failure of the prospective defendant or insurer of the defendant to reply to the notice within 75 days after receipt shall be deemed a rejection of the claim for purposes of this section.

(4) The notification of a violation of a resident's rights or alleged negligence shall be served within the applicable statute of limitations period; however, during the 75-day period, the statute of limitations is tolled as to all prospective defendants. Upon stipulation by the parties, the 75-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving written notice by certified mail, return receipt requested, of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

(5) No statement, discussion, written document, report, or other work product generated by presuit claims evaluation procedures under this section is discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including, but not limited to, physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit claims evaluation procedure. Any licensed physician or registered nurse may be retained by either party to provide an opinion regarding the reasonable basis of the claim. The presuit opinions of the expert are not discoverable or admissible in any civil action for any purpose by the opposing party.

(6) Upon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery as provided in subsection (7).

(7) Informal discovery may be used by a party to obtain unsworn statements and the production of documents or things, as follows:

(a) *Unsworn statements.*--Any party may require other parties to appear for the taking of an unsworn statement. Such statements may be used only for the purpose of claims evaluation and are not discoverable or admissible in any civil action for any purpose by any party. A party seeking to take the unsworn statement of any party must give reasonable notice in writing to all parties. The notice must state the time and place for taking the statement and the name and address of the party to be examined. Unless otherwise impractical, the examination of any party must be done at the same time by all other parties. Any party may be

represented by counsel at the taking of an unsworn statement. An unsworn statement may be recorded electronically, stenographically, or on videotape. The taking of unsworn statements is subject to the provisions of the Florida Rules of Civil Procedure and may be terminated for abuses.

(b) *Documents or things.*--Any party may request discovery of relevant documents or things. The documents or things must be produced, at the expense of the requesting party, within 20 days after the date of receipt of the request. A party is required to produce relevant and discoverable documents or things within that party's possession or control, if in good faith it can reasonably be done within the timeframe of the claims evaluation process.

(8) Each request for and notice concerning informal discovery pursuant to this section must be in writing, and a copy thereof must be sent to all parties. Such a request or notice must bear a certificate of service identifying the name and address of the person to whom the request or notice is served, the date of the request or notice, and the manner of service thereof.

(9) If a prospective defendant makes a written settlement offer, the claimant shall have 15 days from the date of receipt to accept the offer. An offer shall be deemed rejected unless accepted by delivery of a written notice of acceptance.

(10) To the extent not inconsistent with this part, the provisions of the Florida Mediation Code, Florida Rules of Civil Procedure, shall be applicable to such proceedings.

(11) Within 30 days after the claimant's receipt of defendant's response to the claim, the parties or their designated representatives shall meet in mediation to discuss the issues of liability and damages in accordance with the mediation rules of practice and procedures adopted by the Supreme Court. Upon stipulation of the parties, this 30-day period may be extended and the statute of limitations is tolled during the mediation and any such extension. At the conclusion of mediation, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

D. Limitations Upon Punitive Damages:

Pursuant to Sections 429.297-298, *Fla. Stat.* claims for punitive damages are subject to strict proof requirements and heightened standards of care. There are also limitations on the amounts of punitive damages that can be sustained post-verdict depending on the bases for the punitive damages award and the amount of compensatory damages awarded.

429.297 Punitive damages; pleading; burden of proof.--

(1) In any action for damages brought under this part, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. 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. 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 shall proceed until after the pleading concerning punitive damages is permitted.

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that 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 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 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 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 subsection (2) and:

- (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 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...

429.298 Punitive damages; limitation.--

(1)(a) Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of:

1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
2. The sum of \$1 million.

(b) Where the fact finder determines that the wrongful conduct proven under this section was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of:

1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
2. The sum of \$4 million.

(c) Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.

(d) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s. 768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

(e) In any case in which the findings of fact support an award of punitive damages pursuant to paragraph (b) or paragraph (c), the clerk of the court shall refer the case to the appropriate law enforcement agencies, to the state attorney in the circuit where the long-term care facility that is the subject of the underlying civil cause of action is located, and, for multijurisdictional facility owners, to the Office of the Statewide Prosecutor; and such agencies, state attorney, or Office of the Statewide Prosecutor shall initiate a criminal investigation into the conduct giving rise to the award of punitive damages. All findings by the trier of fact which support an award of punitive damages under this paragraph shall be admissible as evidence in any subsequent civil or criminal proceeding relating to the acts giving rise to the award of punitive damages under this paragraph.

(2) The claimant's attorney's fees, if payable from the judgment, are, to the extent that the fees are based on the punitive damages, calculated based on the final judgment for punitive damages. This subsection does not limit the payment of attorney's fees based upon an award of damages other than punitive damages.

(3) The jury may neither be instructed nor informed as to the provisions of this section.

(4) Notwithstanding any other law to the contrary, the amount of punitive damages awarded pursuant to this section shall be equally divided between the claimant and the Quality of Long-Term Care Facility Improvement Trust Fund, in accordance with the following provisions:

(a) The clerk of the court shall transmit a copy of the jury verdict to the Chief Financial Officer by certified mail. In the final judgment, the court shall order the percentages of the award, payable as provided herein.

(b) A settlement agreement entered into between the original parties to the action after a verdict has been returned must provide a proportionate share payable to the Quality of Long-Term Care Facility Improvement Trust Fund specified herein. For purposes of this paragraph, a proportionate share is a 50-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.

(c) The Department of Financial Services shall collect or cause to be collected all payments due the state under this section. Such payments are made to the Chief Financial Officer and deposited in the appropriate fund specified in this subsection.

(d) If the full amount of punitive damages awarded cannot be collected, the claimant and the other recipient designated pursuant to this subsection are each entitled to a proportionate share of the punitive damages collected.

E. Statute of Limitations:

Finally the statute of limitations is now two years from the date of the incident is discovered or should have been discovered by the exercise of due diligence, but in no event more than four years from the date of the incident giving rise to the cause of action. See Section 429.296, *Fla. Stat.*

V. COMMON TYPES OF CLAIMS AGAINST ALF'S

A. Inappropriate Admission or Retention of a Resident

A common mistake made by assisted living facilities is admitting as a resident a senior citizen who is not appropriate for placement in an assisted

living facility holding the type of license the admitting ALF holds. Under standard licenses, ALF's can provide on very basic care, such as room, meals, and limited personal services. In order to provide more complex services, the ALF must have special licenses, such as licenses to provide limited mental health counseling or nursing services. Even ALF's with these special licenses must be careful during the admission process and admit only those residents appropriate for placement in their facility.

Some seniors require more care than can be provided at an ALF. Those persons should not be admitted for their own good and instead require long term care placement in a nursing home or possibly even a hospital or extended care facility of some type.

Chapter 58A-5, *Florida Administrative Code* regulates the licensing and operation of ALF's in Florida. Among the many regulations are 58A-5.0181, F.A.C. which defines when a person can be admitted to, or remain in, an assisted living facility. Most statutory or tort claims against ALF's involve the failure of the administration and staff to decline admission when they should or to require discharge when they should.

To meet the definitions of a resident appropriate for admission to an ALF, a potential resident must:

1. be able to perform activities of daily living, with supervision or assistance if necessary;
2. be free from signs and symptoms of communicable disease;

3. be in sufficient health so as not to require 24-hour nursing supervision;
4. be capable of administering his or her own medication, with or without supervision;
5. have no bedsores or skin breaks classified as stage 2, 3, or 4 pressure ulcers;
6. have dietary needs that can be met by the facility;
7. be able to participate in social and leisure activities;
8. be capable of self-preservation in an emergency, with assistance if necessary;
9. not be bedridden;
10. not be adjudicated incapacitated unless a guardian has been appointed;
11. not be a danger to self or others;
12. not require licensed professional mental health care on a 24-hour basis.

The facility administrator is legally responsible for determining whether a person meets the criteria for admission to an assisted living facility.

When an existing resident's condition changes after admission to the ALF, the administrator is again legally responsible for determining whether the person meets the criteria to remain in the assisted living facility.

The criteria for remaining in an ALF are essentially the same as those for admission to the facility. For example, person may be bedridden for no more

then 7 consecutive days and still remain in the ALF. A resident who cannot evacuate in an emergency may remain in the ALF if he or she has a 24-hour attendant to assist with emergency evacuation. A terminally ill resident may remain in the ALF if he or she wants to remain in the ALF, is accepted for hospice services, and his or her health care provider agrees that the ALF is meeting his or her needs. Other than under these limited circumstances, a person who no longer meets the criteria for admission to the assisted living facility must be transferred to a more skilled facility that can meet the person's needs, whether a nursing home, hospital, or other facility.

When a resident who should not be admitted in or permitted to remain In ALF, often tragic consequences can occur, including serious injury or death from an accident such as a fall, or unnecessary deterioration of health status, such as dehydration, malnutrition, the development of bedsore, or serious worsening of an existing medical condition such as diabetes, heart disease, etc.

B. Sexual or Physical Abuse

More often than one would expect, residents are sexually abused, battered, or molested. Residents have free reign to move about most ALF's, and residents with problems behavior, such as sexual aggressiveness are sometimes permitted unsupervised contact with other residents. The results can be tragic, including sexual battery or rape. Sexual predators are also known to seek employment at ALF's, just as they do in other forms of employment that provide access to vulnerable potential victims.

A lack of a criminal record during a background check of a potential hire

does not alone ensure the safety of the residents from sexual or physical abuse by staff members. Likewise, a lack of reported misbehavior or misconduct by a resident prior to or during admission does not alone ensure that the resident won't engage in sexually aggressive or physically abusive behavior. The ALF administration must be constantly and continuously vigilant in monitoring the behavior of staff members to eliminate the risk of sexual abuse or physical abuse.

C. Falls

One of the most common types of claims in ALF's is fall injuries. Most often, falls are the result of a failure of the staff to provide adequate assistance and supervision, failure to maintain a clean, safe and hazard free environment, or a failure to recognize a decline that should have led to discharge of the resident to a facility able to provide the increased care required for safety.

D. Elopements

Another all too common type of claim against ALF's involves elopement injuries. A common behavior in seniors admitted to both ALF's and nursing homes is the attempt to elope from a facility or attempt to "escape." These incidents can result in death due to exposure to the elements, being run over on public streets or highways by motorists, drowning in bodies of water (see e.g. *Selvin v. DMC Regency Residence Ltd.*, 807 So.2d 676 (Fla. 4th DCA 2001), and any number of other tragedies.

E. Burns

Another common injury in ALF's is serious burns. Unsupervised smoking can have tragic results. Leaving residents unsupervised in whirlpools or bathtubs can likewise result in serious scalding and burn injuries. Hot beverages can also cause serious injuries. Not only are feeble and often mentally impaired residents a grave danger to themselves and others when left unsupervised with cigarettes, lighters, hot beverages, or any unprotected sources of hot water or fluids, but they are also, by reason of their age and condition unable to heal or susceptible to often fatal complications of burn injuries.

F. Malnutrition and Dehydration

Of course, residents with dementia or early Alzheimers disease or other mental or physical disease processes are highly susceptible to malnutrition and dehydration. Lack of adequate assistance at mealtime and lack of adequate monitoring of food and fluid intake can be dangerous combinations that can result in lengthy hospitalizations or death.

G. Medication Errors

ALF's are restricted in how medications prescribed by physicians can be administered to residents. Section 429.256, *Fla. Stat.* grants statutory permission and limitations on the permission granted to facilities to administer or assist in self-administration of medications in ALF's. Section 58A-5.0185,

Florida Administrative Code provides the specifics of assistance with medication that ALF's are allowed to provide and the manner in which that assistance must be provided. This regulation addresses assistance with self-administration of medications, for example with pill organizers, as well as services in administering medications that require direct administration by staff. Medication errors in any health care setting are indisputably the most common mistakes made by caregivers. ALF's are no exception, and medication errors are all too common and can cause serious complications or death. Failure to vigilantly follow the regulations, internal policies and procedures, and professional and industry standards of care occur all too often in ALF's.

VI. Conclusion

Investigating and prosecuting statutory tort claims against assisted living facilities in Florida requires knowledge of the Assisted Living Facilities Act, careful compliance with its roadblocks to justice, and a knowledge of both industry standards and regulations governing the licensing and operation of these facilities that are charged with caring for Florida's most vulnerable citizens who are often not only physically and/or mentally impaired, but also alone and far from the day to day monitoring of family members in today's mobile coast-to-coast American society.