



QUINTAIROS, McCUMBER, PRIETO & WOOD, P.A.
ADVOCATES FOR THE NURSING HOME & LONG-TERM CARE INDUSTRY

QMPW Opens 4th Florida Office in Orlando

Quintairos, McCumber, Prieto & Wood, P.A., one of Florida's most prominent law firms in the defense of nursing homes and long-term care facilities, has opened its fourth Florida office, said **Hugh L. Wood, Jr.**, managing partner of the firm, which now has nearly 30 attorneys representing its clients throughout the state.

"We are delighted to have this opportunity to better serve our many clients in Central Florida directly from Orlando,"



Wood said. **E. Patrick Buntz** has been named Managing Attorney of the Orlando office, and will manage an initial staff of seven.

"Rick joined our firm last year and, during that time in our Tampa office, he has demonstrated exceptional litigation skills in our primary practice area of nursing home defense," Wood added.

Buntz earned a Juris Doctor from the Stetson University College of Law in 1990. ♦

A Review of Florida's Tort Reform: 2001 Edition

By **Andrew R. McCumber**
Managing Partner, Tampa

The new changes are not a panacea, but we have made great strides toward creating a more level playing field. The changes will not immediately make nursing homes and other long-term care facilities an unpopular defendant and do not contain hard caps on non-economic or punitive damages in particular. Significant progress was, however, made during this legislative session which will give long-term care facilities in this state the ability over time to begin to substantially reduce their litigation involvement and expense. By broad general category, the most significant aspects of those changes are as follows.

Negligence Standard:

Unlike the old statute which provided that the statutory action was "in addition to and

During the recently concluded Florida Legislative Session, Quintairos, McCumber, Prieto & Wood, P.A. was intimately involved in the identification of legislative goals, drafting of proposed legislation, identification of concerns in legislation proposed by others, and negotiations with the Academy of Florida Trial Lawyer representatives, on behalf of the Florida Health Care Association.

cumulative with" all common law actions, the new statutory action is the exclusive remedy for any claim which includes an asserted violation of resident's rights or negligence against a long-term care facility. We regularly see counts under the old statute for negligence per se and hear even from trial judges that the old statute is essentially a strict liability statute.

The new law expressly provides that the concepts of strict liability and negligence per se are inapplicable and the negligence standard is expressly set forth with all

its elements. The standard of care is now the pertinent determination and, where the actions for which the facility is being held responsible were performed by a licensed nurse, the applicable standard of care is the prevailing professional medical negligence standard of care. The goal here was to bring the legal analysis in long-term care cases in line with the analysis in a medical negligence case.

Significantly, the new statute does away with the terrible case law established in the *Spilman* decision,

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Does the Media Give Nursing Homes a Fair Shake?

By **Deborah L. Moskowitz**
Associate, Orlando Office

Just about everyone has heard about the unfortunate events of May 18, 2000 at a Sarasota-area nursing home. Even *The New York Times* reported the story of an 87-year-old female resident being bitten 1,625 times by ants as

she lay in her bed in the nursing home.

The media aggressively reported that the local Medical Examiner, as well as State and Federal investigators, investigated the incident. It was also reported that the Agency for Health Care Administration (AHCA) imposed an indefinite

moratorium on the facility and that the family had hired an attorney to sue the facility.

Did you ever hear or read anything about the outcome of the facility's appeal of the AHCA survey and investigation regarding the incident? Probably not.

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A Reputation for Results...

Quintairos, McCumber, Prieto & Wood has built its practice on a solid record of positive results.

By specializing in the defense of nursing homes and long-term care facilities, we have developed the expertise necessary to achieve success for our clients in even the most complex and emotional cases... from simple nuisance cases to those that reach the Supreme Court.

Our strategy is to seek results for our clients. Whether obtaining a defense verdict from successful litigation or reaching a favorable settlement by negotiating from a position of confidence and strength, Quintairos, McCumber, Prieto & Wood is committed to winning.

Our firm's extraordinary track record of achieving a defense verdict for every case taken to trial to date makes Quintairos, McCumber, Prieto & Wood's attorneys better positioned to negotiate settlements favorable to our clients.

Our People...

The firm has assembled a staff of seasoned professionals who deliver exceptional results through dedication and hard work. The staff includes the partners, associates, nurse paralegals and discovery paralegals, working from offices in all of the major markets in Florida.

The passion, experience and diligence of Quintairos, McCumber, Prieto & Wood, P.A. positions us as the premier legal team defending long-term care and hospital facilities. ♦

Florida's 2001 Tort Reform Could Alter the Landscap

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which essentially allowed a Plaintiff in a long-term care case to recover both wrongful death and survival damages measured by both the pain and suffering of the decedent and the pain and suffering of the surviving family members.

Under the new statute, the Plaintiff must make an election of remedies and seek damages based on either the pain and suffering of the decedent *or* the family so that the jury should not hear all of this cumulative and extremely prejudicial testimony. With respect to the facility's liability for the actions of the physician acting as the medical director, the new law clarifies that the facility can only be held liable for the failure of this physician to perform necessary administrative, not medical, services.

Limits on Non-Economic Damages:

Early on in the process we determined that the only precedent we could find for constitutionally limiting recovery of non-economic damages under a common law negligence theory was found in the medical negligence provisions of Chapter 766. Unfortunately, Chapter 766 has recently been interpreted to provide that the \$250,000 cap on non-economic damages available to claimants electing to admit liability and arbitrate their claims is to be determined on a per incident, per claimant basis. This does no good in a nursing home case where there are always numerous incidents alleged.

As you might imagine, the legislature was also not convinced that nursing home residents should have the same dollar cap as a physician or hospital, and when this cap was multiplied per claim, per incident over a period

often extending for many years, the caps became unrealistic. The decision was made, accordingly, to focus on the building blocks of the big verdicts and eventually compromise any illusory gains which could be obtained in this area to accomplish our other goals.

We did, however, create the equivalent of a pre-suit investigatory process lasting 75 days which is applicable to all long-term care cases. These provisions are identical to the medical malpractice pre-suit discovery provisions without the teeth which might allow for claimants to strike a defendant's claims. In place of the arbitration provisions available under the medical negligence statute the new statute contains mandatory mediation provisions.

Limits on Punitive Damages:

Not surprisingly, this became the biggest fight during the legislative session. Unlike the current statute, the new law provides for a two-step analysis to determine whether punitive damages may be recovered. The jury must find that the responsible employee's conduct was the equivalent of gross negligence, which has been equated to a manslaughter standard in Florida. The jury must now also proceed to find that the Defendant employer being held responsible for paying the judgment of punitive damages was either involved in the conduct or was itself grossly negligent in allowing such conduct to occur.

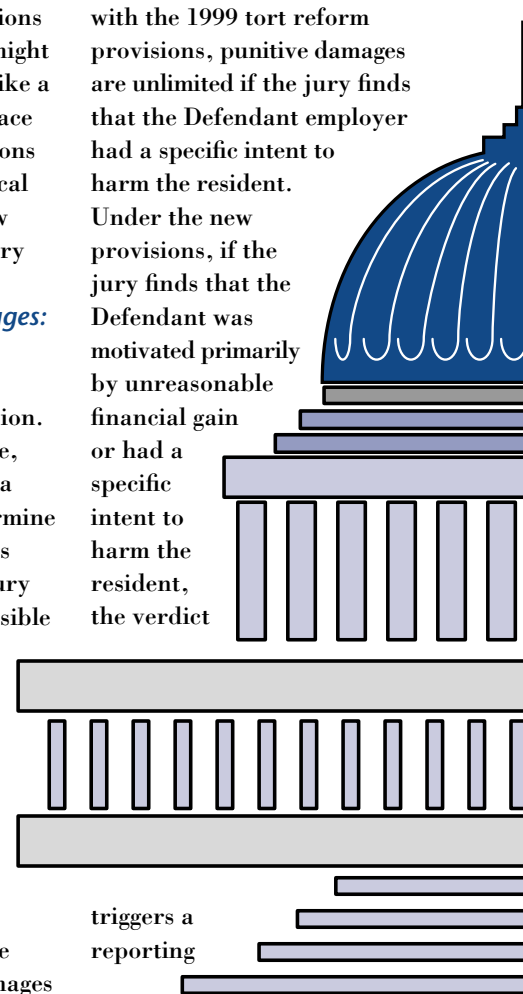
This is a significant improvement from the state of the current law. If the Plaintiff meets this standard, a three-tiered limitation provision becomes applicable

which is similar in most respects to the tort reform provisions which are applicable to all other Defendants in Florida after 1999.

In general, punitive damages are limited to the greater of three times compensatory damages or one million. If the jury finds that the employer's conduct was motivated primarily by unreasonable financial gain, the limit increases to the greater of four times compensatory damages or two million. Just as is the case with the 1999 tort reform provisions, punitive damages are unlimited if the jury finds that the Defendant employer had a specific intent to harm the resident. Under the new provisions, if the jury finds that the Defendant was motivated primarily by unreasonable financial gain or had a specific intent to harm the resident, the verdict

triggers a reporting requirement to the State Attorney for potential prosecution.

It is significant to note that these new punitive damages limitations will apply to all claims which accrue after May 15, 2001. This is the effective date for all other provisions of the new tort law. There is also



...e of Long-Term Care Litigation in the Future

a retroactivity to the punitive damage provisions so that the new punitive damage law will also apply to claims which accrued before May 15, 2001 if the claim is not filed on or before October 5, 2001. This provision is the only provision in the new law which will help affect the insurance tail and claims in the pipeline.

We would anticipate that trial lawyers around the state will clear the backlog of claims in their offices by October 5, 2001 to take advantage of the essentially unlimited punitive damages available before the new law took effect. The effect of this will be numerous filing(s)

on or before October 5 of claims which are not investigated to the same extent as some of the claims we are accustomed to seeing.

Add-On Attorneys Fees:

For all claims subject to the

new law, Plaintiff's

attorneys must recover their attorneys fees on a contingency basis as is the case with all other claims. The only add-on attorneys fees which will be available going forward are for claims for injunctive relief or administrative remedies and those claims are capped at

\$25,000. It is expected that these provisions will significantly reduce the number of frivolous claims filed, especially by the smaller Plaintiff's firms.

Statute of Limitations:

The new law reduces the statute of limitations from a presumptive four-year (4) limit to a presumptive two-year (2) statute of limitations which is consistent with the medical negligence statute of limitations in Florida and, in one respect, is better. There is now a four-year (4) statute of repose and claims can only be extended out a maximum of (6) six years where the Defendant has fraudulently concealed or intentionally misrepresented a fact which prevented the discovery of the injury.

Chapter 415:

This last goal was a proactive step taken in response to the language we are now seeing frequently seeking to hold facilities responsible under Chapter 415. This is a statute intended to provide additional Chapter 400 remedies to residents in actions directly against the individuals

responsible for abuse of the elderly rather than the long-term care facilities.

The statute now clearly provides that Chapter 415 actions may not be brought against the licensee or any person who establishes, controls or manages a long-term care facility and that the operator may not be held vicariously responsible for any judgment obtained against an individual sued under Chapter 415.

Miscellaneous:

It should also be noted that efforts to enact granny-cam legislation and additional whistle-blower protections to residents or employees were

defeated during this legislative session. In addition, required minimum staffing levels were significantly raised from 1.7 CNA hours per patient day to 2.3 CNA hours per patient day by January 1, 2002.

Conclusion:

It is our hope and expectation that this new legislation will significantly alter the landscape of long-term care litigation in Florida once a significant portion of the claims are governed by its provisions.

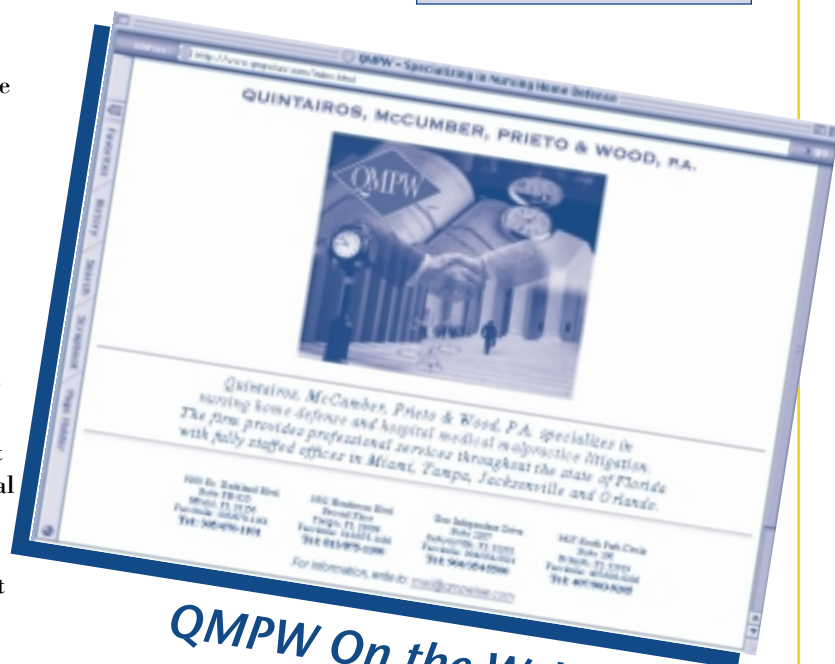
Aside from the influx of new cases which we can expect before October 5, we also expect that the mitigation afforded by this legislation for new claims should allow us to focus to a greater extent on the existing cases, and as the settlement numbers begin to drop and we have a greater ability to take some of the newer cases to trial, we should have an increasing amount of leverage with respect to the existing cases to get them resolved alone or in conjunction with some of the newer cases. ♦



Andrew R. McCumber is a founding partner of Quintairos, McCumber, Prieto & Wood, P.A., and managing partner of the firm's Tampa office.

He was Defense Attorney Advisor and lead draftsman for the Florida Health Care Association during the 2001 Legislative Session on Tort Reform issues.

He recently participated in a series of lectures sponsored by the FHCA on the new Florida Tort Reform. He served as the defense attorney advisor to Florida Lt. Gov. Frank Brogan's Task Force on Availability and Affordability of Long-Term Care.



QMPW On the Web...
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Does the Media Give Nursing Homes a Fair Shake?

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It turns out that on March 9, 2001, Administrative Law Judge Jeff B. Clark entered a Recommended Order that the nursing home did not violate the two severe deficiencies originally charged by the Agency.

One week after the original incident took place, AHCA officials conducted a survey of the nursing home. The Agency made two severe allegations: one regarding mistreatment, neglect, and abuse of residents and misappropriation of resident property, and the other, "The services provided or arranged by the facility must meet professional standards of quality." The Administrative Judge reviewing the allegations ruled that the Agency was unable to prove its case.

The result of this hearing was not widely reported. In fact, it appears it wasn't reported anywhere until a July 13, 2001 article in *The St. Petersburg Times* explained that AHCA would no longer pursue fines against the facility. After an extensive search, it appears this is the only news report regarding the outcome of the AHCA's investigation.

Although the article did report on the final outcome of the AHCA investigation, this article misstates facts regarding the incident as they were accepted by the AHCA.

The St. Petersburg Times article claimed the resident "who suffered for several hours before the attack was discovered, was never hospitalized for the bites." Although the woman was never hospitalized after being bitten, only a maximum of 90 minutes elapsed before the injuries were discovered, according to the factual findings made by the Administrative Judge.

As per the order submitted by the Administrative Judge, a certified nursing assistant checked on the resident at 6:30 a.m. and no problems were noted. At 8:00 a.m., a staff member found the ants on the woman's person. At that time, a team of seven members of the nursing staff — including three registered nurses — assessed her situation. The facts, as accepted by the Administrative Judge, revealed that the resident had not exhibited signs or symptoms of anaphylactic shock.

Although the ant bites are a

very serious issue not to be taken lightly by anyone, the woman's prior condition was likely relevant to the facility's decision not to send the resident to the hospital at that time.

She had just returned to the facility from a hospital only three days prior to the incident. Her admitting diagnoses included the following: congestive heart failure, chronic obstructive pulmonary disease, chronic renal failure, Alzheimer's Disease/dementia, bruising, and weeping through her skin.

The night prior to the incident, a test revealed that the woman was experiencing acute renal failure. The Administrative Judge accepted that acute renal failure "usually means that death is imminent." None of the publications reporting this incident discussed the resident's condition prior to the ant bites.

When this story broke it ran on the front page of most, if not all, local and national newspapers. However, when the investigation was completed, the results were buried in the back pages of the newspapers, if printed at all.

The initial headlines led the public to believe that the ant



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bites in fact caused the resident's death. But the Administrative Judge could not make that finding in a quasi-judicial setting.

Although the experience of this elderly resident is certainly unfortunate, fair and balanced reporting requires that all sides be explored and facts not be exaggerated or sensationalized. Without this, long-term care facilities, as a whole, will continue to suffer from an undeserved reputation of poor care. ♦