

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 7005      PCB HHS 21-01      Civil Liability for Covid-19-Related Claims Against Certain Health Care Providers

**SPONSOR(S):** Judiciary Committee, Pandemics & Public Emergencies Committee and Health & Human Services Committee, Burton

**TIED BILLS:**                      **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health & Human Services Committee	17 Y, 3 N	McElroy	Calamas
1) Pandemics & Public Emergencies Committee	12 Y, 6 N, As CS	Landry	Dearden
2) Judiciary Committee	15 Y, 5 N, As CS	Jones	Kramer

### SUMMARY ANALYSIS

As COVID-19 spread across the world, the country, and the state, information about the virus evolved at a rapid pace. Official guidance came from multiple sources and sometimes changed on a daily basis. Health care providers and long-term care facilities made decisions based on evolving information, often while also experiencing an inadequate supply of personal protective equipment and COVID-19 related staffing shortages.

CS/CS/HB 7005 provides heightened civil liability protections to health care entities for negligence claims brought by patients and residents related to:

- Diagnosis or treatment of, or failure to diagnose or treat, a person for COVID-19;
- Provision of a novel or experimental COVID-19 treatment;
- Transmission of COVID-19;
- Delay or cancellation of a surgery or medical procedure, test, or appointment in certain situations; or
- An act or omission with respect to an emergency medical condition, which act or omission was due to a lack of resources directly caused by the COVID-19 pandemic.

A plaintiff must prove by a preponderance of the evidence that a defendant was grossly negligent or committed intentional misconduct to recover under these COVID-19-related medical claims. The bill provides enumerated affirmative defenses for defendants in certain situations.

The bill also provides heightened liability protections for a negligence claim against a health care provider for causing a person who is not a patient or resident to contract COVID-19 (such as a claim brought against a health care provider by a visitor to the facility). A health care provider making a good faith effort to substantially comply with applicable COVID-19 guidance is immune from these negligence claims. Additionally, to recover under these claims, a plaintiff must:

- Plead his or her complaint with particularity.
- Submit, at the time of filing suit, a physician's affidavit confirming the physician's belief that the plaintiff's COVID-19-related damages were due to the defendant's conduct.
- Prove, by clear and convincing evidence, that the defendant was at least grossly negligent.

The bill has a severability clause and sunsets one year and one day after become law unless reenacted by the Legislature. The bill also includes provisions clarifying how the bill's provisions interact with other laws.

The bill may have a positive fiscal impact on state courts. The bill provides that it is effective upon becoming a law and applies retroactively. However, the bill's provisions do not apply in a civil action against a particular defendant if the action is filed before the bill's effective date.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### COVID-19 Outbreak, Spread, & Aftermath<sup>1</sup>

###### *Initial Outbreak*

On December 31, 2019, the Chinese government confirmed that health officials were treating "dozens of cases" of pneumonia of an "unknown cause." A few days later, researchers identified a new virus, which later came to be known as the novel coronavirus, or "COVID-19." It was ultimately determined that the virus had surfaced at a Chinese seafood and poultry market. On January 11, 2020, China reported its first death from a COVID-19 infection.

On January 14, 2020, the World Health Organization ("WHO") reported that preliminary investigations by Chinese authorities had found "no clear evidence of human-to-human transmission." But WHO also stated that it was "certainly possible that there is limited human-to-human transmission," and that further investigation was necessary.

Just a week later, on January 21, 2020, WHO modified its statement and said that it was very clear, based on the latest information, that there was "at least some human-to-human transmission." On January 22 and 23, 2020, WHO convened fifteen experts from around the world to determine if the virus constituted a "public health emergency of international concern," but the experts were unable to reach a consensus opinion. On January 30, 2020, the virus was labeled a public health emergency of international concern; however, by February 4, 2020, ninety-nine percent of the confirmed COVID-19 cases were still in China. As the situation developed, WHO disseminated and updated COVID-19 guidance.

###### *Outbreak & Response in the United States, Europe, and Other Countries<sup>2</sup>*

Several other countries soon began confirming the spread of the virus to their own citizens. On January 21, 2020, the first case in the United States was confirmed after a man in Washington returned home after having visited Wuhan. On January 30, 2020, WHO declared a global health emergency.

The next day, President Donald Trump suspended entry into the United States for certain foreign nationals who had travelled to China within the previous two weeks. During the month of February, the virus continued its spread to Europe, the Middle East, and Latin America. On February 29, 2020, the United States confirmed what was then believed to be its first COVID-19 related death. President Trump issued a "do not travel" warning for various parts of the world heavily affected by COVID-19. By March 26, 2020, the United States had become the world's hardest-hit country at the time.

###### *Evolving Guidance Regarding Social Distancing and the Use of Masks*

As the virus spread across the world, the United States, and Florida, information about the virus evolved at a rapid pace, with official guidance coming from multiple sources and sometimes changing on a day-to-day basis. Everyone, including health care providers and long-term care facilities were forced to make the best decisions possible based on their knowledge of the situation at the time.

On February 27, 2020, in the face of a mask shortage, WHO published guidance stating that "[f]or asymptomatic individuals, wearing a mask of any type is not recommended."<sup>3</sup> Two days later, WHO

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<sup>1</sup> World Health Organization, *Listings of WHO's Response to COVID*, <https://www.who.int/news/item/29-06-2020-covidtimeline> (last visited March 3, 2021).

<sup>2</sup> *Id.*

published additional quarantine guidelines. On March 11, 2020, WHO classified the COVID-19 outbreak as a pandemic.

On March 13, 2020, President Trump declared a national emergency due to COVID-19. On March 15, 2020, the U.S. Center for Disease Control ("CDC") recommended that people should not gather in groups of more than fifty. The next day, President Trump stated an even more cautious number, recommending that people should not gather in groups of more than ten. During the months of March and April, many states put "stay-at-home orders" into effect, requiring their citizens to quarantine, shelter in place, or otherwise limit their normal interactions with others.

On March 23, 2020, WHO launched a joint campaign with the International Federation of Association Football ("FIFA") to stop the spread of COVID-19. The campaign focused on five steps to stop the spread, including:

- Frequent handwashing;
- Containing one's sneezes and coughs;
- Avoiding touching one's face;
- Socially distancing at a distance of one meter (equivalent to a little over three feet); and
- Staying at home when not feeling well.<sup>4</sup>

Notably, the campaign letter did not include any guidance about wearing a face mask.<sup>5</sup>

On March 31, 2020, in response to a growing number of falsified medical products claiming to treat COVID-19, WHO issued a medical product alert. On April 2, 2020, WHO reported that a person who has not yet exhibited symptoms can spread COVID-19.

On April 6, 2020, WHO updated its guidance with respect to the use of face masks, cautioning that "[m]edical masks should be reserved for health care workers" and that "the wide use of masks by healthy people in the community setting is not supported by current evidence and carries uncertainties and critical risks."<sup>6</sup>

About two months later, on June 5, 2020, WHO again updated its guidance for face masks. In this guidance document, WHO acknowledged that a face mask may be used to protect a person when such person is in contact with an infected individual. The guidance ultimately recommended that a person exhibiting symptoms should wear a mask. The guidance deferred, however, on the question of whether a healthy individual should wear a mask, citing a lack of good data and the fact that "there are potential benefits and harms to consider."<sup>7</sup>

On August 5, 2020, WHO launched the "#WearAMask Challenge" on social media "to help spread the word about how and when to use a mask to protect against COVID-19."<sup>8</sup> On November 10, 2020, WHO launched the "#WeAreInThisTogether" campaign to "promote collaboration and adherence to five key measures to counter COVID-19: cleaning hands, wearing masks, coughing and sneezing safely, keeping distant[,], and opening windows."<sup>9</sup>

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<sup>3</sup> World Health Organization, *Rational Use of Personal Protective Equipment for Coronavirus Disease 2019 (COVID-19): Interim Guidance* (Feb. 27, 2020), [https://apps.who.int/iris/bitstream/handle/10665/331215/WHO-2019-nCov-IPCPE\\_use-2020.1-eng.pdf?sequence=1&isAllowed=y.9](https://apps.who.int/iris/bitstream/handle/10665/331215/WHO-2019-nCov-IPCPE_use-2020.1-eng.pdf?sequence=1&isAllowed=y.9) (last visited March 3, 2021).

<sup>4</sup> World Health Organization, *Pass the Message—Five Steps to Kicking Out Coronavirus* (March 23, 2020) (emphasis supplied), <https://www.who.int/news/item/23-03-2020-pass-the-message-five-steps-to-kicking-out-coronavirus> (last visited March 3, 2021).

<sup>5</sup> See *id.*

<sup>6</sup> World Health Organization, *Advice on the Use of Masks in the Context of COVID-19, Interim Guidance* (April. 6, 2020) [https://apps.who.int/iris/bitstream/handle/10665/331693/WHO-2019-nCov-IPC\\_Masks-2020.3-eng.pdf?sequence=1&isAllowed=y](https://apps.who.int/iris/bitstream/handle/10665/331693/WHO-2019-nCov-IPC_Masks-2020.3-eng.pdf?sequence=1&isAllowed=y) (last visited March 3, 2021).

<sup>7</sup> World Health Organization, *Advice on the Use of Masks in the Context of COVID-19, Interim Guidance* (June 5, 2020) (emphasis supplied) ([https://apps.who.int/iris/bitstream/handle/10665/332293/WHO-2019-nCov-IPC\\_Masks-2020.4-eng.pdf?sequence=1&isAllowed=y](https://apps.who.int/iris/bitstream/handle/10665/332293/WHO-2019-nCov-IPC_Masks-2020.4-eng.pdf?sequence=1&isAllowed=y)) (last visited March 3, 2021).

<sup>8</sup> World Health Organization, *Listings of WHO's Response to COVID*, <https://www.who.int/news/item/29-06-2020-covidtimeline> (last visited March 3, 2021).

<sup>9</sup> *Id.*

On December 1, 2020, WHO again updated its mask guidance, advising that wearing a mask is a good idea and should be "a normal part of being around other people."<sup>10</sup>

### *Evolving Guidance for Health Care Providers and Long-term Care Facilities*

Scientific knowledge of COVID-19 has grown exponentially over the last year, and continues to grow, due to the novel nature of the disease. Guidance to health care providers and long-term care facilities for treatment and infection prevention and control of this disease is also constantly changing<sup>11</sup> as understanding of the disease evolves.<sup>12</sup> The lack of adequate supply of personal protective equipment (PPE)<sup>13</sup> and staffing shortages caused by the pandemic<sup>14</sup> further worsened this situation and resulted in the Federal Centers for Medicare and Medicaid Services issuing recommendations to postpone or delay the performance of elective surgery and other non-essential health care procedures.<sup>15</sup> Several states, including Florida<sup>16</sup>, made this recommendation mandatory and prohibited health care providers from providing these services for a period of time.

### *Outbreak & Response in Florida*

For the COVID-19 outbreak in Florida, Governor Ron DeSantis declared a state of emergency and issued a series of executive orders, including the following:

- March 1, 2020:<sup>17</sup> Directing the State Health Officer to declare a public health emergency pursuant to the State Health Officer's authority under s. 381.00315, F.S.; and directing the Department of Health to take action pursuant to its authority under ch. 381. Accordingly, the State Health Officer immediately declared a public health emergency.<sup>18</sup>
- March 9, 2020:<sup>19</sup> Declaring a general state of emergency in Florida under ch. 252, F.S.
- March 20, 2020:<sup>20</sup> Prohibiting all hospitals, ambulatory surgical centers, office surgery centers, dental, orthodontic and endodontic offices, and other health care practitioners' offices from providing any medically unnecessary, non-urgent or non-emergency procedure or surgery.
- March 23-24, 2020:<sup>21</sup> Directing certain individuals travelling from out of state into Florida to self-quarantine for a period of time.

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<sup>10</sup> World Health Organization, *Coronavirus Disease (COVID-19) Advice for the Public: When and How to Use Masks* (Dec. 1, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks> (last visited March 3, 2021).

<sup>11</sup> The Agency for Health Care Administration facility information and alerts page is demonstrative of the ever-changing COVID-19 guidance health care providers and long-term care facilities have received throughout the duration of the pandemic, [https://ahca.myflorida.com/COVID-19\\_Facilities.shtml#facility](https://ahca.myflorida.com/COVID-19_Facilities.shtml#facility) (last visited on March 3, 2021).

<sup>12</sup> See *The COVID-19 Pandemic: Biological Evolution, Treatment Options and Consequences*, Das S, Das S, Ghangrekar MM, Innovative Infrastructure Solutions, 2020;5(3):76, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7330532/> (last visited on March 3, 2021); see also, Coronavirus Treatment Acceleration Program (CTAP), U.S. Food and Drug Administration, available at <https://www.fda.gov/drugs/coronavirus-covid-19-drugs/coronavirus-treatment-acceleration-program-ctap> (last visited on March 3, 2021); Additionally, the Centers for Disease Control and Prevention, among others, periodically updates its guidance for clinical care, prevention and control and facility operations. See *Healthcare Workers: Information on COVID-19*, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/coronavirus/2019-nCoV/hcp/index.html> (last visited March 3, 2021).

<sup>13</sup> Personal protective equipment includes, among others, masks, face shields, gloves, shoe covers and gowns.

<sup>14</sup> *Contributing Factors to Personal Protective Equipment Shortages During the COVID-19 Pandemic*, Cohen J, Rodgers YVM., *Prev Med.* 2020;141:106263. doi:10.1016/j.ypmed.2020.106263, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7531934/pdf/main.pdf> (last visited March 3, 2021); see also *Shortages of Staff in Nursing Homes During the COVID-19 Pandemic: What are the Driving Factors?*, *J Am Med Dir Assoc.* 2020 Oct; 21(10): 1371–1377, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7418696/pdf/main.pdf> (last visited March 3, 2021).

<sup>15</sup> *Non-Emergent, Elective Medical Services, and Treatment Recommendations*, Centers for Medicare and Medicaid Services, April 7, 2020, available at <https://www.cms.gov/files/document/cms-non-emergent-elective-medical-recommendations.pdf> (last visited March 3, 2021).

<sup>16</sup> See Fla. Exec. Order 20-72 (March 20, 2020), available at [https://ahca.myflorida.com/docs/EO\\_20-72.pdf](https://ahca.myflorida.com/docs/EO_20-72.pdf) (last visited March 3, 2021).

<sup>17</sup> See Fla. Exec. Order 20-51 (March 1, 2020), available at [https://ahca.myflorida.com/docs/Executive\\_Order\\_20-51.pdf](https://ahca.myflorida.com/docs/Executive_Order_20-51.pdf) (last visited March 3, 2021).

<sup>18</sup> See Fla. Exec. Order 20-83 (March 24, 2020) (indicating the State Health Officer's declaration of public health emergency).

<sup>19</sup> See Fla. Exec. Order 20-52 (March 9, 2020), available at [https://ahca.myflorida.com/docs/Executive\\_Order\\_20-52\\_COVID-19.pdf](https://ahca.myflorida.com/docs/Executive_Order_20-52_COVID-19.pdf) (last visited March 3, 2021).

<sup>20</sup> See Fla. Exec. Order 20-72 (March 20, 2020), available at [https://ahca.myflorida.com/docs/EO\\_20-72.pdf](https://ahca.myflorida.com/docs/EO_20-72.pdf) (last visited March 3, 2021).

<sup>21</sup> See Fla. Exec. Order 20-80 (Mar. 23, 2020) and 20-82 (Mar. 24, 2020).

- April 1, 2020:<sup>22</sup> Directing Floridians to stay at home, with exceptions for "essential" services and activities.
- May 4, 2020:<sup>23</sup> Allowing the elective procedures prohibited in the March 20, 2020, Order to resume as long as the provider had adequate PPE, capacity to convert treatment beds in a surge capacity situation and had not refused to assist long-term care facilities.<sup>24</sup>

While some of the Governor's executive orders eventually expired or were modified, the Governor has continued to extend the state of emergency, with the most recent extension occurring on February 26, 2021.<sup>25</sup>

### Tort Liability and Negligence

A "tort" is a wrong for which the law provides a remedy. The purpose of tort law is to fairly compensate a person harmed by another person's wrongful acts, whether intentional, reckless, or negligent, through a civil action or other comparable process. A properly functioning tort system:

- Provides a fair and equitable forum to resolve disputes;
- Appropriately compensates legitimately harmed persons;
- Shifts the loss to responsible parties;
- Provides an incentive to prevent future harm; and
- Deters undesirable behavior.<sup>26</sup>

"Negligence" is a legal term for a type of tort action that is unintentionally committed. In a negligence action, the plaintiff is the party that brings the lawsuit, and the defendant is the party that defends against it. To prevail in a negligence lawsuit, a plaintiff must demonstrate that the:

- Defendant had a legal duty of care requiring the defendant to conform to a certain standard of conduct for the protection of others, including the plaintiff, against unreasonable risks;
- Defendant breached his or her duty of care by failing to conform to the required standard;
- Defendant's breach caused the plaintiff's injury; and
- Plaintiff suffered actual damage or loss resulting from his or her injury.<sup>27</sup>

#### *Duty of Care*

The first of the four elements a plaintiff must show to prevail in a negligence action is that the defendant owed the plaintiff a "duty of care" to do something or refrain from doing something. The existence of a legal duty is a threshold requirement that, if satisfied, "merely opens the courthouse doors."<sup>28</sup> Whether a duty sufficient to support a negligence claim exists is a matter of law<sup>29</sup> determined by the court.<sup>30</sup> A duty may arise from many sources, including:

- Legislative enactments or administrative regulations;
- Judicial interpretations of such enactments or regulations;
- Other judicial precedent; and
- The general facts of the case.<sup>31</sup>

<sup>22</sup> See Fla. Exec. Order 20-91 and 20-92 (Apr. 1, 2020).

<sup>23</sup> See Fla. Exec. Order 20-112 (April 29, 2020), available at <https://www.flgov.com/wp-content/uploads/2020/04/EO-20-112.pdf> (last visited March 3, 2021).

<sup>24</sup> On September 25, 2020, Phase 3 of the Plan for Florida's Recovery took effect and all medical services, including elective procedures, were fully re-opened.

<sup>25</sup> Fla. Exec. Order 21-45 (February 26, 2021), available at [https://www.flgov.com/wp-content/uploads/orders/2021/EO\\_21-45.pdf](https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-45.pdf) (last visited March 11, 2021).

<sup>26</sup> Am. Jur. 2d Torts s. 2.

<sup>27</sup> 6 *Florida Practice Series* s. 1.1; see *Barnett v. Dept. of Financial Services*, 303 So. 3d 508 (Fla. 2020).

<sup>28</sup> See *Kohl v. Kohl*, 149 So. 3d 127 (Fla. 4th DCA 2014).

<sup>29</sup> A matter of law is a matter determined by the court, unlike a matter of fact which must be determined by the jury. Matters of law include issues regarding a law's application or interpretation, issues regarding what the relevant law is, and issues of fact reserved for judges to resolve. Legal Information Institute, *Question of Law*, [https://www.law.cornell.edu/wex/question\\_of\\_law](https://www.law.cornell.edu/wex/question_of_law) (last visited March 3, 2021); Legal Information Institute, *Question of Fact*, [https://www.law.cornell.edu/wex/Question\\_of\\_fact](https://www.law.cornell.edu/wex/Question_of_fact) (last visited March 3, 2021).

<sup>30</sup> See *Kohl*, 149 So. 3d at 135; *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1110.

<sup>31</sup> See *Goldberg*, 899 So. 2d at 1105, citing *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182 (Fla. 2003).

In determining whether a duty arises from the general facts of the case, courts look to whether the defendant's conduct foreseeably created a broader "zone of risk" that posed a general threat of harm to others, i.e., the likelihood that the defendant's conduct would result in the type of injury suffered by the plaintiff.<sup>32</sup> Such zone of risk defines the scope of the defendant's legal duty, which is typically to either lessen the risk or ensure that sufficient precautions are taken to protect others from the harm the risk poses.<sup>33</sup> However, it is not enough that a risk merely exists or that a particular risk is foreseeable; rather, the defendant's conduct must create or control the risk before liability may be imposed.<sup>34</sup>

### *Breach of Duty of Care*

The second element a plaintiff must prove is that the defendant "breached," or failed to discharge, the duty of care. Whether a breach occurred is generally a matter of fact for the jury to determine.<sup>35</sup>

### *Causation*

The third element is that the defendant's breach of the duty of care "proximately caused" the plaintiff's injury. Like a breach, whether or not proximate causation exists is generally a matter of fact for the jury to determine.<sup>36</sup> Florida follows the "more likely than not" standard in proving causation; thus, the inquiry is whether the negligence probably caused the plaintiff's injury.<sup>37</sup> In determining whether a defendant's conduct proximately caused a plaintiff's injury, the factfinder must analyze whether the injury was a foreseeable consequence of the danger created by the defendant's negligent act or omission.<sup>38</sup> This analysis does not require the defendant's conduct to be the exclusive or even the primary cause of the injury suffered; instead, the plaintiff must only show that the defendant's conduct was a substantial cause of the injury.<sup>39</sup>

### *Damages*

The final element a plaintiff must show to prevail in a negligence action is that the plaintiff suffered some harm, or "damages." Actual damages, also called compensatory damages, are those damages actually suffered by a plaintiff as the result of the injury alleged and proved.<sup>40</sup> Juries award actual damages to compensate an injured person for a defendant's negligent acts.<sup>41</sup> Factors considered when calculating actual damages include lost wages or income, medical bills connected to the injury, the cost of repair to damaged property, and costs for coping with an injury (such as the cost of a wheelchair or prosthetic limb).<sup>42</sup>

### *Degrees of Negligence*

Courts distinguish varying degrees of civil negligence by using terms such as "slight negligence," "ordinary negligence," and "gross negligence." Slight negligence is the failure to exercise great care and often applies to injuries caused by common carriers charged with the duty to exercise the highest degree of care toward their passengers.<sup>43</sup> Ordinary negligence is the failure to exercise that degree of care which an ordinary prudent person would exercise; or, in other words, a course of conduct which a

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<sup>32</sup> See *Kohl*, 149 So. 3d at 135, citing *McCain v. Fla. Power Corp.*, 593 So. 2d 500 (Fla. 1992); see also *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001).

<sup>33</sup> See *Kohl*, 149 So. 3d at 135; see also *Whitt*, 788 So. 2d at 217.

<sup>34</sup> See *Bongiorno v. Americorp, Inc.*, 159 So. 3d 1027 (Fla. 5th DCA 2015), citing *Demelus v. King Motor Co. of Fort Lauderdale*, 24 So. 3d 759 (Fla. 4th DCA 2009).

<sup>35</sup> See *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009).

<sup>36</sup> See *Sanders v. ERP Operating Ltd. Partnership*, 157 So. 3d 273 (Fla. 2015).

<sup>37</sup> See *Ruiz v. Tenent Hialeah Healthsystem, Inc.*, 260 So. 3d 977 (Fla. 2018).

<sup>38</sup> See *id.* at 981-982.

<sup>39</sup> See *id.* at 982.

<sup>40</sup> See *Birdsall v. Coolidge*, 93 U.S. 64 (1876).

<sup>41</sup> See *St. Regis Paper Co. v. Watson*, 428 So. 2d 243 (Fla. 1983).

<sup>42</sup> See Legal Information Institute, *Actual Damages*, [https://www.law.cornell.edu/wex/actual\\_damages](https://www.law.cornell.edu/wex/actual_damages) (last visited March 3, 2021).

<sup>43</sup> See *Faircloth v. Hill*, 85 So. 2d 870 (Fla. 1956); see also, e.g., *Holland America Cruises, Inc. v. Underwood*, 470 So. 2d 19 (Fla. 2d DCA 1985); see also, e.g., *Werndli v. Greyhound Corp.*, 365 So. 2d 177 (Fla. 2d DCA 1978); 6 *Florida Practice Series* s. 1.2.

reasonable and prudent person would know might possibly result in injury to others.<sup>44</sup> Gross negligence is a course of conduct which a reasonable and prudent person knows would probably and most likely result in injury to another.<sup>45</sup> To prove gross negligence, a plaintiff must usually show that the defendant had knowledge or awareness of imminent danger to another and acted or failed to act with a conscious disregard for the consequences.<sup>46</sup> Once proven, gross negligence may support a punitive<sup>47</sup> damages award.<sup>48</sup> Beyond gross negligence are several other degrees of misconduct, such as "recklessness" and "intentional actions."

### *Comparative Negligence in Florida*

In Florida, before the court awards damages in a negligence action, the jury generally assigns a fault percentage to each party under the comparative negligence rule. Florida applies<sup>49</sup> a "pure" comparative negligence rule, which allows a plaintiff to recover damages proportional to his or her fault percentage.<sup>50</sup> For example, if a plaintiff is 40 percent at fault for an accident causing the plaintiff's injury and the defendant is 60 percent at fault, the plaintiff would recover 60 percent of his or her damages.

### *Statute of Limitations*

A statute of limitations bars the filing of civil claims after the passing of a specified time period and begins to run from the date the cause of action accrues, which is usually when the last element constituting the cause of action occurs.<sup>51</sup> Under Florida law, a negligence action, including a COVID-19 related claim based on negligence, must be brought within four years of when the cause of action accrues.<sup>52</sup> A cause of action generally accrues when "the last element constituting the cause of action accrues";<sup>53</sup> practically speaking, in a negligence action, this is usually when the plaintiff is injured.<sup>54</sup>

### *Pleading a Negligence Claim*

The Florida Rules of Civil Procedure generally require a plaintiff in a civil action to file a complaint, and require a defendant to file an answer to the complaint.<sup>55</sup> A lawsuit begins when a complaint is filed, and a plaintiff may amend the complaint to add a defendant or additional claims once as a matter of course at any time before a responsive pleading, such as an answer, is served.<sup>56</sup> A plaintiff may otherwise only amend a complaint with the permission of the court or the defendant.<sup>57</sup>

Florida is a "fact-pleading jurisdiction." This means that a pleading setting forth a claim for relief, including a complaint, must generally state a cause of action and contain a:

- Short and plain statement of the grounds on which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds to support it;

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<sup>44</sup> See *De Wald v. Quamstrom*, 60 So. 2d 919 (Fla. 1952); see also *Clements v. Deeb*, 88 So. 2d 505 (Fla. 1956); 6 *Florida Practice Series* s. 1.2.

<sup>45</sup> See *Clements*, 88 So. 2d 505; 6 *Florida Practice Series* s. 1.2.

<sup>46</sup> See *Carraway v. Revell*, 116 So. 2d 16 (Fla. 1959).

<sup>47</sup> Punitive damages are awarded in addition to actual damages to punish a defendant for behavior considered especially harmful. Florida generally caps punitive damage awards at \$500,000 or triple the value of compensatory damages, whichever is greater, and caps cases of intentional misconduct with a financial motivation at two million dollars or four times the amount of compensatory damages, whichever is greater. S. 768.73(1), F.S.

<sup>48</sup> See *Glaab v. Caudill*, 236 So. 2d 180 (Fla. 2d DCA 1970); 6 *Florida Practice Series* s. 1.2; s. 768.72(2), F.S.

<sup>49</sup> The comparative negligence standard does not apply to any action brought to recover economic damages from pollution, based on an intentional tort, or to which the joint and several liability doctrine is specifically applied in chs. 403, 498, 517, 542, and 895, F.S. S. 768.81(4), F.S.

<sup>50</sup> S. 768.81(2), F.S.; see *Williams v. Davis*, 974 So. 2d 1052 (Fla. 2007).

<sup>51</sup> Ss. 95.011 and 95.031(1), F.S.

<sup>52</sup> S. 95.11(3)(a), F.S.; see *R.R. v. New Life Community Church of CMA, Inc.*, 303 So. 3d 916 (Fla. 2020).

<sup>53</sup> S. 95.031(1), F.S.

<sup>54</sup> See *R.R.*, 303 So. 3d at 921; see also *Am. Op. Corp. v. Spiewak*, 73 So. 3d 120, 126 (Fla. 2011) (stating generally that "[i]t is axiomatic that a cause of action for negligence . . . does not accrue until the complaining party sustains some type of damage" but acknowledging the Court's past holding that in a case for damages for exposure to an asbestos-related disease, "an action accrues when the accumulated effects of the substance manifest in a way which supplies some evidence of the causal relationship to the manufactured product").

<sup>55</sup> Fla. R. Civ. P. 1.100.

<sup>56</sup> Fla. R. Civ. P. 1.100 and 1.190.

<sup>57</sup> Fla. R. Civ. P. 1.190.

- Short and plain statement of the ultimate facts<sup>58</sup> showing that the pleader is entitled to relief; and
- Demand for the relief to which the pleader believes he or she is entitled to.<sup>59</sup>

However, certain allegations<sup>60</sup> must be plead with "particularity," which is a heightened level of pleading requiring a statement of facts sufficient to satisfy the elements of each claim.

### *Burden of Proof*

The burden of proof is an obligation to prove a material fact in issue.<sup>61</sup> Generally, the party who asserts the material fact in issue has the burden of proof.<sup>62</sup> Thus, in a criminal proceeding, the burden is on the state to prove that the defendant committed the crime with which he or she was charged, while in a civil proceeding, the burden of proof is on the plaintiff to prove the allegations contained in his or her complaint. Further, a defendant in either a criminal or a civil proceeding has the burden to prove any affirmative defenses<sup>63</sup> he or she may raise in response to the charges or allegations. However, there are certain statutory and common law presumptions<sup>64</sup> that may shift the burden of proof from the party asserting the material fact in issue to the party defending against such fact.<sup>65</sup> These presumptions remain in effect following the introduction of evidence rebutting the presumption, and the factfinder must decide if such evidence is strong enough to overcome the presumption.<sup>66</sup>

### *Standard of Proof*

A standard of proof is the level or degree of proof necessary to meet the burden of proof for a particular issue.<sup>67</sup> In criminal actions, the standard of proof necessary for a conviction<sup>68</sup> is beyond a reasonable doubt, meaning that the factfinder must be virtually certain of the defendant's guilt in order to render a guilty verdict. In most civil actions, the standard of proof is by the preponderance of the evidence, meaning the burden of proof is met when the party with the burden convinces the factfinder that there is a greater than 50 percent chance that the claim is true.<sup>69</sup> However, certain civil actions<sup>70</sup> are subject to a heightened standard of proof, requiring the plaintiff to prove the allegations by clear and convincing evidence. This standard requires the evidence to be highly and substantially more likely to be true than untrue.<sup>71</sup> The clear and convincing evidence standard is an intermediate-level standard. It is more rigorous than the "preponderance" standard but less rigorous than the "beyond a reasonable doubt" standard.

### *Evidence Admissibility*

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<sup>58</sup> Ultimate facts are facts that must be accepted for a claim to prevail, usually inferred from a number of supporting evidentiary facts, which themselves are facts making other facts more probable. See Legal Information Institute, *Ultimate Fact*, [https://www.law.cornell.edu/wex/ultimate\\_fact](https://www.law.cornell.edu/wex/ultimate_fact) (last visited March 3, 2021); see also Legal Information Institute, *Evidentiary Facts*, [https://www.law.cornell.edu/wex/evidentiary\\_fact](https://www.law.cornell.edu/wex/evidentiary_fact) (last visited March 3, 2021).

<sup>59</sup> See *Goldschmidt v. Holman*, 571 So. 2d 422 (Fla. 1990); Fla. R. Civ. P. 1.110.

<sup>60</sup> These allegations include fraud, mistake, condition of the mind, and denial of performance or occurrence. Fla. R. Civ. P. 1.120(b), (c).

<sup>61</sup> 5 *Florida Practice Series* s. 16:1.

<sup>62</sup> *Id.*; see *Berg v. Bridle Path Homeowners Ass'n, Inc.*, 809 So. 2d 32 (Fla. 4th DCA 2002).

<sup>63</sup> An affirmative defense is a defense which, if proven, negates criminal or civil liability even if it is proven that the defendant committed the acts alleged. Examples include self-defense, entrapment, insanity, necessity, and *respondeat superior*. Legal Information Institute, *Affirmative Defense*, [https://www.law.cornell.edu/wex/affirmative\\_defense](https://www.law.cornell.edu/wex/affirmative_defense) (last visited March 3, 2021).

<sup>64</sup> These presumptions tend to be social policy expressions, such as the presumption that all people are sane or that all children born in wedlock are legitimate. 5 *Florida Practice Series* s. 16:1.

<sup>65</sup> 5 *Florida Practice Series* s. 16:1.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> The standard of proof for proving affirmative defenses raised in a criminal trial may vary.

<sup>69</sup> 5 *Florida Practice Series* s. 16:1.

<sup>70</sup> These actions typically include actions to impose a civil penalty, civil actions based on conduct amounting to a criminal law violation, and actions in which the effect of a civil ruling might be deprive a party of a protected interest. 5 *Florida Practice Series* s. 16:1.

<sup>71</sup> 5 *Florida Practice Series* s. 16:1; see *Colorado v. New Mexico*, 467 U.S. 310 (1984).

In general, not all evidence is admissible in a civil proceeding for consideration by the factfinder. Florida law provides that all relevant evidence is generally admissible, except as provided by law.<sup>72</sup> Relevant evidence is evidence tending to prove or disprove a material fact.<sup>73</sup>

### Medical Malpractice Claims

A medical malpractice claim is a tort claim to recover damages for death or personal injury of a patient caused by the negligent acts or omissions of a health care provider.<sup>74</sup> Prior to filing a medical malpractice claim, a plaintiff's attorney must conduct a reasonable investigation and determine that there are grounds to believe that the health care provider was negligent in its care or treatment of the patient.<sup>75</sup> If, after the completion of a pre-suit investigation, an attorney determines that such grounds exist, the attorney must notify each prospective defendant of his or her intent to initiate litigation.<sup>76</sup> This notice must include a verified written medical expert opinion that corroborates the reasonable grounds to initiate litigation.<sup>77</sup>

A plaintiff must wait at least 90 days after providing a prospective defendant with the notice of intent to litigate before filing a complaint.<sup>78</sup> During this 90-day period, a prospective defendant or its insurers must conduct an investigation to determine prospective liability and the parties are required to participate in informal discovery.<sup>79</sup> A prospective defendant or its insurers must either reject the claim, make a settlement offer, or make an offer to arbitrate damages prior to the expiration of this time period.<sup>80</sup> If a complaint is filed, the parties must meet for an in-person mediation within 120 days.<sup>81</sup>

The statute of limitations for medical malpractice causes of action is 2 years from the incident or 2 years from when the incident is or should have been discovered, but in either event may not exceed 4 years.<sup>82</sup> In cases involving fraud, concealment, or intentional misrepresentation the period of limitations is extended 2 years from the time that the injury is discovered or should have been discovered, but in any event cannot exceed 7 years from when the incident occurred.<sup>83</sup>

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<sup>72</sup> S. 90.402, F.S.

<sup>73</sup> S. 90.401, F.S.

<sup>74</sup> S. 766.102, F.S. Section 766.202, F.S., defines health care provider as any hospital or ambulatory surgical center as defined and licensed under chapter 395; a birth center licensed under chapter 383; any person licensed under chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, part I of chapter 464, chapter 466, chapter 467, part XIV of chapter 468, or chapter 486; a health maintenance organization certificated under part I of chapter 641; a blood bank; a plasma center; an industrial clinic; a renal dialysis facility; or a professional association partnership, corporation, joint venture, or other association for professional activity by health care providers

<sup>75</sup> S. 766.104 (1), F.S.

<sup>76</sup> S. 766.106(2)(a), F.S.

<sup>77</sup> S. 766.206(2), F.S.

<sup>78</sup> S. 766.106(3)(a), F.S.

<sup>79</sup> *Id.* and s. 766.106(6), F.S.

<sup>80</sup> S. 766.106(3)(b), F.S.

<sup>81</sup> S. 766.108(1), F.S.

<sup>82</sup> S. 95.11 (4)(b), F.S. The 4-year period does not bar an action brought on behalf of a minor on or before the child's eighth birthday.

<sup>83</sup> *Id.* The 7-year period does not bar an action brought on behalf of a minor on or before the child's eighth birthday.

## Long-Term Care Facility Claims

Residents of long-term care facilities<sup>84</sup> may bring claims<sup>85</sup> for negligence to recover damages for death<sup>86</sup> or personal injury or for violation of residents' rights.<sup>87</sup> A plaintiff must notify prospective defendants prior to filing a complaint.<sup>88</sup> A plaintiff must also include a certificate of counsel that indicates counsel's reasonable investigation gave rise to a good faith belief that grounds exist for an action against the prospective defendant within this notice.<sup>89</sup>

A plaintiff must wait at least 75 days after providing notice a prospective defendant before filing a complaint.<sup>90</sup> A prospective defendant or its insurers must conduct an evaluation of the claim to determine liability and evaluate damages within this 75-day period and the parties may engage in informal discovery.<sup>91</sup> A prospective defendant or its insurers must provide the claimant with a written response either rejecting the claim or making a settlement offer prior to the expiration of this time period.<sup>92</sup>

The statute of limitations for negligence and residents' rights claims is 2 years from the incident or 2 years from when the incident is or should have been discovered, but in either event may not exceed 4 years.<sup>93</sup> In cases involving fraud, concealment, or intentional misrepresentation the period of limitations is extended 2 years from the time that the injury is discovered or should have been discovered, but in any event cannot exceed 6 years from when the incident occurred.<sup>94</sup>

## Access to Courts

The Florida Constitution broadly protects the right to access the courts, which "shall be open to every person for redress of any injury . . . ."<sup>95</sup> However, this constitutional right is not unlimited.

In *Kluger v. White*,<sup>96</sup> the Florida Supreme Court evaluated to what extent the Legislature may alter a civil cause of action. The Court stated that it would not completely prohibit the Legislature from altering a cause of action, but neither would it allow the Legislature "to destroy a traditional and long-standing cause of action upon mere legislative whim . . . ." The takeaway from *Kluger* and other relevant case law is that the Legislature may:

- Reduce the right to bring a cause of action as long as the right is not entirely abolished.<sup>97</sup>
- Abolish a cause of action that is not "traditional and long-standing"—that is, a cause of action that did not exist at common law, and that did not exist in statute before the adoption of the Florida Constitution's Declaration of Rights.<sup>98</sup>

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<sup>84</sup> These are facilities licensed under chapters 400 and 429 F.S., and include nursing homes and assisted living facilities (ALFs).

<sup>85</sup> For nursing homes these claims may be brought only against a licensee, a licensee's management or consulting company, a licensee's managing employees, and any direct caregivers, whether employees or contractors. Sections 400.023(1), F.S.

<sup>86</sup> A claimant must elect survival damages or wrongful death damages for any action alleges a claim for the resident's rights or for negligence that caused the death of the resident. Ss. 400.023, F.S. and 429.29, F.S.

<sup>87</sup> Ss. 400.023, F.S., and 429.29, F.S. Residents' rights for nursing home and ALFs are set forth in ss. 400.022, F.S., and 429.28, F.S., respectively and include, among many others, the right to: civil and religious liberties; private and uncensored communication; reasonable access to individuals who provide health, social or legal services; present grievances for self and others; participate in social, religious, and community activities; manage his or her own financial affairs or to delegate such responsibility to the licensee; be adequately informed of his or her medical condition and proposed treatment; and be treated courteously, fairly, and with the fullest measure of dignity.

<sup>88</sup> Ss. 400.0233, F.S., and 429.293, F.S.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Ss. 400.0236, F.S., and 429.296, F.S.

<sup>94</sup> *Id.*

<sup>95</sup> Art. I, s. 21, Fla. Const.

<sup>96</sup> *Kluger*, 281 So. 2d 1.

<sup>97</sup> See *Achord v. Osceola Farms Co.*, 52 So. 3d 699 (Fla. 2010).

<sup>98</sup> See *Anderson v. Gannett Comp.*, 994 So. 2d 1048 (Fla. 2008) (false light was not actionable under the common law); *McPhail v. Jenkins*, 382 So. 2d 1329 (Fla. 1980) (wrongful death was not actionable under the common law); see also *Kluger*, 281 So. 2d at 4 ("We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of

- Abolish a cause of action if the Legislature either:
  - Provides a reasonable commensurate benefit in exchange;<sup>99</sup> or
  - Shows an "overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."<sup>100</sup>

### Retroactive Application of a Statute and Due Process

In Florida, absent an express statement of legislative intent, a statute is presumed to operate only prospectively, not retroactively.<sup>101</sup> Both the Florida and U.S. Constitutions explicitly forbid passage of a law criminalizing past conduct (an "ex post facto law");<sup>102</sup> but the Legislature may provide that a non-criminal law applies retroactively in certain situations. But even a non-criminal law may be held unconstitutional if its retroactive application impermissibly burdens existing constitutional rights.<sup>103</sup>

The Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law . . . ."<sup>104</sup> In turn, the Florida Supreme Court has held that in certain situations, a person whose legal cause of action has already accrued may have a due process right to bring such action.<sup>105</sup> Florida courts have sometimes invalidated the retroactive application of laws when such due process rights are implicated.<sup>106</sup> On other occasions, the courts have signaled that certain statutory provisions may be applied retroactively, including a statute retroactively:

- Raising the standard of proof from "preponderance of the evidence" to "clear and convincing evidence,"<sup>107</sup> with the statutory change becoming effective after the plaintiff had already filed a civil complaint;<sup>108</sup> and
- Altering the plaintiff's burden of proof.<sup>109</sup>

The Florida Supreme Court has recently acknowledged that Florida case law on this subject is "less than precise" and that the Court has sometimes "been unclear about what it means to give retroactive application" to a law.<sup>110</sup>

### **Effect of Proposed Changes**

CS/CS/HB 7005 provides heightened liability protections to health care providers for COVID-19-related medical claims and COVID-19-related negligence claims.

### Definition of Health Care Provider

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the common law of the State . . . the Legislature is without power to abolish such a right without providing a reasonable alternative . . . unless the Legislature can show an overpowering public necessity . . . ."

<sup>99</sup> *Kluger*, 281 So. 2d at 4; see *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) (upholding statutory cap on medical malpractice damages because the Legislature provided arbitration, which is a "commensurate benefit" for a claimant); *accord Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974); but see *Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1992) (striking down noneconomic cap on damages, which, although not wholly abolishing a cause of action, did not provide a commensurate benefit).

<sup>100</sup> *Kluger*, 281 So. 2d at 4-5 (noting that in 1945, the Legislature abolished the right to sue for several causes of action, but successfully demonstrated "the public necessity required for the total abolition of a right to sue") (citing *Rotwein v. Gersten*, 36 So. 2d 419 (Fla. 1948); see *Echarte*, 618 So. 2d at 195 ("Even if the medical malpractice arbitration statutes at issue did not provide a commensurate benefit, we would find that the statutes satisfy the second prong of *Kluger* which requires a legislative finding that an 'overpowering public necessity' exists, and further that 'no alternative method of meeting such public necessity can be shown'").

<sup>101</sup> *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 194-95 (Fla. 2011).

<sup>102</sup> U.S. Const. art. I, ss. 9, 10; Art. I, s. 10, Fla. Const.

<sup>103</sup> See *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873, 877 (Fla. 2010) ("[E]ven where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty").

<sup>104</sup> Art. I, s. 9, Fla. Const.

<sup>105</sup> See, e.g., *Spiewak*, 73 So. 3d 120 ("a cause of action constitutes an intangible property right that is grounded in tort").

<sup>106</sup> See, e.g., *R.A.M. of S. Fla., Inc. v. WCI Cmty., Inc.*, 869 So. 2d 1210 (Fla. 2d DCA 2004).

<sup>107</sup> See *Ziccardi v. Strother*, 570 So. 2d 1319 (Fla. 2d DCA 1990); *Stuart L. Stein, P.A. v. Miller Indus., Inc.*, 564 So. 2d 539 (Fla. 4th DCA 1990).

<sup>108</sup> See *Stuart L. Stein, P.A.*, 564 So. 2d at 540.

<sup>109</sup> See *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 243 (Fla. 1977) ("Burden of proof requirements are procedural in nature" and may "be abrogated retroactively because no one has a vested right in any given mode of procedure") (internal citations and punctuation omitted).

<sup>110</sup> See *Love v. State*, 286 So. 3d 177, 183-84 (Fla. 2019).

The bill's provisions extend to "health care providers," which includes:

- Any activity, service, agency, or facility regulated by the Agency for Health Care Administration, including hospitals, health care clinics, nursing homes, assisted living facilities, and home health agencies.
- A clinical laboratory providing services in the state or services to health care providers in the state, if the clinical laboratory is certified by the Federal Centers for Medicare and Medicaid Services under the federal Clinical Laboratory Improvement Amendments and the federal rules adopted thereunder.
- Federally qualified health care centers.
- Any site providing health care services which was established for the purpose of responding to the COVID-19 pandemic under any federal or state order, declaration, or waiver.
- Licensed acupuncturists, medical physicians, osteopathic physicians, chiropractors, podiatrists, naturopathic physicians, optometrists, nurses, pharmacists, dentists, dental hygienists, midwives, electrologists, massage therapists, opticians, physical therapists, psychologists, clinical social workers, mental health counselors, marriage and family therapists, speech-language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dietitians, nutritionists, athletic trainers, orthotists, pedorthists, prosthetists, clinical laboratory personnel, medical physicists, radiological personnel, and home health aides;
- Clinical and non-clinical staff of licensed substance abuse and mental health providers.
- Licensed continuing care facilities.
- Pharmacies.

### COVID-19-Related Medical Claims

The bill provides heightened civil liability protections to health care providers for negligence claims based on a breach of duty owed to a patient or resident related to:

- Diagnosis or treatment of, or failure to diagnose or treat, a person for COVID-19;
- Provision of a novel or experimental COVID-19 treatment;
- Transmission of COVID-19;
- Delay or cancellation of a surgery or medical procedure, test, or appointment in certain situations; or
- An act or omission with respect to an emergency medical condition, which act or omission was due to a lack of resources directly caused by the COVID-19 pandemic.

The bill requires a plaintiff to plead a COVID-19-related medical claim with particularity; if the plaintiff fails to do so, the court will dismiss the complaint. The bill also requires a plaintiff to prove by the greater weight of the evidence that a defendant was grossly negligent or committed intentional misconduct to recover for a COVID-19-related medical claim. The bill provides, in addition to any other affirmative defense provided in law, an affirmative defense for the health care provider's:

- Substantial compliance with government-issued health standards specifically relating to COVID-19 or other relevant standards.
- Substantial compliance with government-issued health standards relating to infectious diseases in the absence of standards specifically applicable to COVID-19.
- Substantial compliance with any applicable government-issued health standards relating to COVID-19 or other relevant standards if the standards were in conflict.
- Impossibility of substantial compliance with government-issued health standards because of:
  - Widespread shortages of necessary supplies, materials, equipment, or personnel.
  - Insufficient time to implement the standards.

### COVID-19-Related Negligence Claims

The bill also provides heightened civil liability protections for negligence claims against a health care provider for causing a person who is not a patient or resident to contract COVID-19.

The bill creates a bifurcated proceeding for such COVID-19-related negligence claims. The initial stage of this proceeding is heard by a judge. In this initial stage, a plaintiff must:

- Plead a COVID-19-related negligence claim with particularity, instead of merely providing the short and plain statement of facts required under current law;
- Submit with the complaint an affidavit from a Florida-licensed physician attesting that, within a reasonable degree of medical certainty, the defendant caused the plaintiff's COVID-19-related damages; and
- Prove that the defendant did not make a good faith effort to substantially comply with authoritative or controlling government-issued health standards or guidance available at the time the plaintiff's cause of action accrued.

The bill also limits the evidence admissible during the initial stage of the proceeding to evidence tending to show whether the defendant made a good faith effort as described above. If the plaintiff fails to show that the defendant did not make a good faith effort, the defendant is immune from civil immunity. Thus, under the bill, a plaintiff may only proceed to the jury stage of a COVID-19-related negligence claim if the court determines that the defendant did not make a good faith effort as described above.

In the second stage of the proceeding, the bill requires the plaintiff to prove that the defendant was at least grossly negligent, instead of at least ordinarily negligent as required under current law. The bill also raises the standard of proof from the "preponderance of the evidence" standard to the more rigorous "clear and convincing evidence" standard.

#### Statute of Limitations

The bill decreases the applicable statute of limitations for both COVID-19-related medical claims and COVID-19-related negligence claims to one year running from:

- The time the cause of action accrues for an injured person whose cause of action accrues after the bill's effective date.
- The bill's effective date for an injured person whose cause of action accrued before the bill's effective date.

This ensures that all persons with COVID-19-related claims against covered entities and institutions have a reasonable amount of time to bring their lawsuits, while also providing a measure of certainty to such entities and institutions as to the scope of their potential COVID-19 liability.

#### Interactions with Other Provisions of Law

The bill provides that it does not create a new cause of action, but instead applies in addition to any other provisions that may apply in a civil action, which may include provisions within chapters 400 (relating to nursing homes), 429 (relating to assisted living facilities), 766 (relating to medical malpractice), and 768 (relating to negligence). However, the bill expressly states that it does not apply to claims governed by chapter 440 (relating to workers' compensation).

#### Effective Date and Retroactivity

The bill provides that its effective date is upon becoming a law. The bill applies retroactively to a COVID-19-related civil action that is filed after the bill's effective date, even if the cause of action accrued before the bill's effective date, but not to a COVID-19-related civil action filed before the bill's effective date.

#### Severability and Sunset

The bill includes a severability clause and is repealed one year and a day from the date of becoming a law, unless reenacted by the Legislature.

### B. SECTION DIRECTORY:

**Section 1:** Creates s. 768.381, F.S., relating to liability protections for COVID-19- related claims against certain health care providers.

**Section 2:** Creates an unnumbered section of law providing for severability.

**Section 3:** Provides that the effective date is upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill requires a trial judge to make an initial determination of whether the plaintiff in certain COVID-19-related lawsuits has met certain requirements before sending the case to a jury. As such, the bill may reduce the need for jury trials and may have a positive fiscal impact on the state courts system.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides immunities and processes that may reduce the financial risk of health care providers and long-term care facilities for negligence related to the COVID-19 pandemic, thereby increasing the likelihood that they will remain solvent through the pendency of the pandemic.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. The bill does not appear to affect county or municipal governments.

2. Other:

Access to Courts

The Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."<sup>111</sup> In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court established a test to determine when the Legislature may restrict a judicial remedy. Where citizens have had a historical right of access to the courts, whether through statute or common law, the Legislature can only eliminate a judicial remedy under two circumstances. First, if it asserts a valid public purpose, the Legislature may restrict access to

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<sup>111</sup> Art. I, s. 21, Fla. Const.  
**STORAGE NAME:** h7005c.JDC  
**DATE:** 3/11/2021

the courts if it provides a reasonable alternative to litigation.<sup>112</sup> Second, if the Legislature finds that there is an overpowering public necessity and that there is no alternative method for meeting that necessity, it may restrict access to the courts.<sup>113</sup>

CS/CS/HB 7005 makes findings of an overpowering public necessity, in light of the unprecedented nature of the COVID-19 pandemic. Moreover, the bill does not eliminate all civil liability for a COVID-19-related claim, but rather provides various liability protections in certain situations.

### Due Process

The Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law . . . ."<sup>114</sup> In turn, the Florida Supreme Court has held that in certain situations, a person whose legal cause of action has already accrued may have a due process right to bring such action.<sup>115</sup> Florida courts have sometimes invalidated the retroactive application of laws when such due process rights are implicated.<sup>116</sup> The Florida Supreme Court has recently acknowledged, however, that Florida case law on this subject is "less than precise" and that the Court has sometimes "been unclear about what it means to give retroactive application" to a law.<sup>117</sup>

#### B. RULE-MAKING AUTHORITY:

Not applicable.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 2, 2021, the Pandemics and Public Emergencies Committee adopted three amendments and reported the bill favorably as a committee substitute. The amendments:

- Revised the definition of "COVID-19" to expressly include variants and mutations of the novel coronavirus.
- Deleted a redundant term ("recklessness") from the standard of proof required for a COVID-19-related medical claim.
- Revised the affidavit requirement for a COVID-19-related negligence claim to specifically apply to the injured party, not to the plaintiff.

On March 10, 2021, the Judiciary Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment:

- Revised the definitions of a COVID-19-related medical claim and a COVID-19-related negligence claim to be based on whether the action is brought by a patient or resident, rather than whether the action arises under a particular law.
- Revised the affirmative defenses a defendant may rely upon in a COVID-19-related medical claim.
- Added the requirement that a plaintiff must plead his or her claims with particularity in a COVID-related medical claim.
- Removed an unnecessary provision requiring a fact finder to consider the effects of the COVID-19 pandemic in a COVID-19-related medical or COVID-19-related negligence claim.
- Added a provision stating how the bill's provisions interact with other provisions of law.

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<sup>112</sup> See *Kluger*, 281 So. 2d at 4.

<sup>113</sup> *Id.*

<sup>114</sup> Art. I, s. 9, Fla. Const.

<sup>115</sup> See, e.g., *Spiewak*, 73 So. 3d at 123 ("a cause of action constitutes an intangible property right that is grounded in tort").

<sup>116</sup> See, e.g., *R.A.M.*, 869 So. 2d 1210.

<sup>117</sup> See *Love*, 286 So. 3d at 183-84.