

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/SB 72

INTRODUCER: Rules Committee; Senator Brandes and others

SUBJECT: Civil Liability for Damages Relating to COVID-19

DATE: March 15, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	Favorable
3.	<u>Davis</u>	<u>Phelps</u>	<u>RC</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 72 is a combination of SB 72 and SB 74, with some additional changes. SB 72 creates civil liability protections for individuals, businesses, governmental entities, and other organizations against COVID-19-related claims. SB 74 provides lesser liability protections to health care providers, who are defined in the bill, and provides procedures for civil actions against them.

Liability Protections for COVID-19-Related Claims

The bill defines a COVID-19-related claim, against a person, business, or other entity, but generally not a health care provider, as a claim that arises from or is related to COVID-19. For claims against a person other than a health care provider, the bill establishes preliminary requirements that a plaintiff must complete before the case is allowed to proceed. A court must determine whether:

- The complaint was pled with particularity.
- A physician's affidavit was simultaneously submitted stating that, within a reasonable degree of medical certainty, the physician believed that the defendant caused, through acts or omissions, the plaintiff's damages, injury, or death. If the plaintiff did not meet these requirements, the court must dismiss the action, but the plaintiff is not barred from correcting the deficiencies and refile the claim.
- The defendant made a good faith effort to substantially comply with authoritative or controlling health standards when the action accrued. If the court determines that the defendant made the requisite good faith effort, the defendant is immune from civil liability.

If, in contrast, the court determines that the defendant did not make the requisite good faith effort, the action may proceed.

If a plaintiff meets these preliminary requirements, then he or she bears the burden of proving that the defendant did not make the good faith effort. Additionally, the plaintiff must meet the heightened standard of proving that the defendant's acts or omissions were grossly negligent by the clear and convincing evidence standard.

Liability Protections for Health Care Providers

The liability protections for COVID-19-related claims against a health care provider mainly relate to claims:

- Arising from the diagnosis or treatment of a person for COVID-19;
- The provision of a novel or experimental COVID-19 treatment;
- The transmission of COVID-19; and
- The delay or cancellation of a surgery or medical procedure.

However, a claim by a person other than a patient or resident alleging that the health care provider caused the person to contract COVID-19 may be pursued under the provisions of the bill that primarily relate to claims against persons other than a health care provider.

A COVID-19-related lawsuit against any defendant must be brought within 1 year after a cause of action accrues unless the cause of action occurred before the effective date of the bill. However, if a cause accrues before the effective date of the bill, the plaintiff has 1 year from the effective date of the act to bring the claim.

The bill takes effect upon becoming a law and applies retroactively. However, the bill does not apply in a civil action against a particular defendant if the suit is filed before the bill's effective date.

II. Present Situation:

Background

The COVID-19 pandemic has affected the state of Florida in ways that were unimaginable one year ago. The toll on individuals, businesses, and the economy has been catastrophic. According to the Department of Health, 1,940,380 residents have tested positive for COVID-19 in the state, 82,256 residents have been hospitalized, and 32,255 residents have died of the virus.¹

As the pandemic forced businesses to close, millions of Americans lost their jobs. The U.S. economy contracted at the greatest rate since World War II. In Florida, general revenue collections for Fiscal Year 2019-20 were down nearly \$1.9 billion from the forecast projections made in January 2020. The vast majority of the loss, 84.7 percent, came from a loss of sales tax revenues, the largest component and category most affected by the pandemic. The Revenue Estimating Conference adopted a forecast for sales tax revenues in December 2020, as compared

¹ Florida Department of Health, Division of Disease Control and Health Protection, *Florida's COVID-19 Data and Surveillance Dashboard*, <https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429> (last visited March 14, 2021).

to the January 2020 forecast, that anticipates a loss to General Revenue of approximately \$2 billion in Fiscal Year 2020-21 and \$1 billion in Fiscal Year 2021-22. The sales tax losses are attributable to a substantial loss in the tourism and recreation areas, often driven by out-of-state tourism, and also by reduced sales to local residents at restaurants and venues, including leisure activities impacted by the pandemic.²

Governor DeSantis issued Executive Order No. 20-52 on March 9, 2020, declaring a state of emergency and issuing guidelines to halt, mitigate, or reduce the spread of the outbreak. The order has been extended 7 times,³ most recently by Executive Order No. 21-45, issued on February 26, 2021.

During the pandemic, government-issued health standards and guidance detailing how to best combat the virus have sometimes been in conflict. They sometimes changed rapidly, making appropriate responses difficult. Businesses and individuals often scurried to provide appropriate responses based upon the information they received at any given time.

As businesses and entities struggle to re-open or keep their doors open, a growing concern has been expressed that unfounded or opportunistic lawsuits for COVID-19-related claims could threaten their financial survival. The concern is that time, attention, and financial resources diverted to respond to the lawsuits could be the difference between individuals and entities succeeding or failing as they attempt to emerge from the pandemic. One protection that has been offered is the provision of heightened legal immunity from COVID-19 claims to fend off meritless lawsuits and preserve scant resources.

COVID-Related Lawsuits

According to the Congressional Research Service,⁴ a growing number of plaintiffs have filed tort lawsuits in hopes of being compensated for personal injuries that resulted from alleged exposure to COVID-19 or from the failure of a defendant to properly treat the virus. Some examples of the lawsuits include:

- The relatives of deceased family members, who allegedly contracted the virus in the workplace, have filed cases stating that the employers caused the decedents' deaths because they failed to implement workplace safety measures.
- Many cruise ship passengers have filed lawsuits against cruise lines alleging that the cruise line exposed them to the virus or caused them to contract the virus while on a cruise.

² *Executive Summary, Revenue Estimating Conference for the General Revenue Fund & Financial Outlook Statement*, August 14, 2020, and subsequently updated. <http://edr.state.fl.us/Content/conferences/generalrevenue/archives/200814gr.pdf> (last visited Mar. 1, 2021).

³ A state of emergency declared under the State Emergency Management Act may not last for more than 60 days unless it is renewed by the Governor. Section 252.36(2), F.S.

⁴ The Congressional Research Service works solely for the U.S. Congress and provides policy and legal analysis to both members and committees of the House and Senate. It is a legislative branch agency housed within the Library of Congress. <https://www.loc.gov/crsinfo/>.

- Plaintiffs have sued assisted living facilities and nursing homes. They allege that their relatives died because these entities negligently exposed their relatives to the virus or failed to diagnose them in a timely or appropriate manner, and then treat the symptoms.
- Businesses that folded have sued their insurance companies challenging the denial of their coverage for claims of business interruptions.
- Consumers have filed suits seeking financial reimbursement for travel, events, and season passes at recreational venues which were cancelled or closed because of the pandemic.
- Employees have sued their employers alleging that the employer unlawfully terminated them because they contracted the virus.
- Stockholders have sued public companies alleging that the companies violated federal securities laws when they did not accurately state the pandemic's toll on the companies' finances as required in mandatory disclosure statements.⁵

The Congressional Research Service states that proponents of COVID-19 liability protections assert that litigation and the cost of legal fees will cripple businesses, individuals, schools, and non-profit organizations and deter the organizations from reopening. Proponents are concerned that these entities will shape their business decision-making to avoid liability. This unwillingness to continue or reopen businesses will delay the national economic recovery. Others believe that many COVID-19-related claims “are generally meritless, and therefore serve primarily to benefit plaintiffs’ lawyers rather than vindicate injured person’s legal rights.”⁶

In contrast, opponents of liability protections disagree. They maintain that organizations would encounter only minimal legal exposure for COVID-19 liability. The opponents also contend that providing a shield for defendants would harm the public by permitting defendants to commit negligent acts with legal protections. It would also remove any incentives for businesses to take precautions against the spread of the virus.⁷

Florida Lawsuits

It is difficult to determine how many COVID-19-related lawsuits have been filed in the state. Staff contacted the Office of the State Courts Administrator to ask if it could determine how many claims have been filed in the state courts. The office did not have that data available. One database estimates that 582 complaints relating to COVID-19 have been filed in Florida, but this data does not delineate between those which are filed in state courts versus federal courts.⁸

Many of the claims that have been filed in the federal district courts of the state are suits against cruise ship lines where passengers allege that they contracted the virus while on the cruise.

⁵ Congressional Research Service, *COVID-19 Liability: Tort, Workplace Safety, and Securities Law* (Sept. 24, 2020), <https://crsreports.congress.gov/product/pdf/R/R46540> (last visited Mar. 1, 2021).

⁶ *Id.* at 2.

⁷ *Id.* at 3.

⁸ Hunton Andrews Kurth LLP, *COVID-19 Complaint Tracker*, <https://www.huntonak.com/en/covid-19-tracker.html> (last visited Mar. 1, 2021).

Legislative and Executive Responses of Other States

At least 17 states have enacted legislation to provide civil liability immunity to individuals and entities from COVID-19-related claims.⁹ At least two additional states have issued executive orders to provide liability limitations.¹⁰ These laws do not reflect separate healthcare liability protections. To date, no similar federal legislation has been enacted, although S. 4317 was introduced in the Senate on July 27, 2020, and referred to committee.¹¹

In general terms, the legislation enacted by other states provides protections if a defendant acts in good faith to substantially comply with the applicable COVID-19 standards. The immunity does not apply if the defendant's acts or omissions constitute gross negligence or willful or wanton misconduct.

Torts: Negligence, Elements, and Standards

A tort is a civil legal action to recover damages for a loss, injury, or death due to the conduct of another. Some have characterized a tort as a civil wrong, other than a claim for breach of contract, in which a remedy is provided through damages.¹² When a plaintiff files a tort claim, he or she alleges that the defendant's "negligence" caused the injury. Negligence is defined as the failure to use reasonable care. It means the care that a reasonably careful person would use under similar circumstances. According to the Florida Standard Jury Instructions, negligence means "doing something that a reasonably careful person would not do" in a similar situation or "failing to do something that a reasonably careful person would do" in a similar situation.¹³

When a plaintiff seeks to recover damages for a personal injury and alleges that the injury was caused by the defendant's negligence, the plaintiff bears the legal burden of proving that the defendant's alleged action was a breach of the duty that the defendant owed to the plaintiff.¹⁴

Negligence Pleadings

To establish a claim for relief and initiate a negligence lawsuit, a plaintiff must file a "complaint." The complaint must state a cause of action and contain: a short and plain statement establishing the court's jurisdiction, a short and plain statement of the facts showing why the plaintiff is entitled to relief, and a demand for judgment for relief that the plaintiff deems himself

⁹ The states are: Alabama, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, and Wyoming. Additional, and sometimes separate, legislation has been enacted by 17 states that provides medical liability limitations for health care facilities and workers. The database was current as of December 14, 2020. National Conference of State Legislatures, *State Action on Coronavirus (COVID-19)*, <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx#db> (last visited Mar. 1, 2021).

¹⁰ Alabama Executive Order signed by Governor Kay Ivey on May 8, 2020, and Arkansas Executive Order 20-33 signed by Governor Asa Hutchinson on June 5, 2020.

¹¹ Safe to Work Act, s. 4317 –116th Cong. (2020) <https://www.congress.gov/bill/116th-congress/senate-bill/4317/actions> (last visited Mar. 1, 2021).

¹² BLACK'S LAW DICTIONARY (11th ed. 2019).

¹³ Fla. Std. Jury Instr. Civil 401.3, *Negligence*.

¹⁴ Florida is a comparative negligence jurisdiction as provided in s. 768.81(2), F.S. In lay terms, if a plaintiff and defendant are both at fault, a plaintiff may still recover damages, but those damages are reduced proportionately by the degree that the plaintiff's negligence caused the injury.

or herself entitled. The defendant responds with an “answer,” and provides in short and plain terms the defenses to each claim asserted, admitting or denying the averments in response.¹⁵

Under the Florida Rules of Civil Procedure, there is a limited group of allegations that must be pled with “particularity.” These allegations include allegations of fraud, mistake, and a denial of performance or occurrence.¹⁶

Four Elements of a Negligence Claim

To establish liability, the plaintiff must prove four elements:

Duty – That the defendant owed a duty, or obligation, of care to the plaintiff;

Breach – That the defendant breached that duty by not conforming to the standard required;

Causation – That the breach of the duty was the legal cause of the plaintiff’s injury; and

Damages – That the plaintiff suffered actual harm or loss.

Burden or Standard of Proof

A “burden of proof” is the obligation a party bears to prove a material fact. The “standard of proof” is the level or degree to which an issue must be proved.¹⁷ The plaintiff carries the burden of proving, by a specific legal standard, that the defendant breached the duty that was owed to the plaintiff that resulted in the injury. In civil cases, two standards of proof generally apply:

- The “greater weight of the evidence” standard, which applies most often in civil cases, or
- The “clear and convincing evidence” standard, which applies less often, and is a higher standard of proof.¹⁸

However, both of these standards are lower than the “reasonable doubt” standard which is used in criminal prosecutions.¹⁹ Whether the greater weight standard or clear and convincing standard applies is determined by case law or the statutes that govern the underlying substantive issues.²⁰

Greater Weight of the Evidence

The greater weight of the evidence standard of proof means “the more persuasive and convincing force and effect of the entire evidence in the case.”²¹ Some people explain the “greater weight of the evidence” concept to mean that, if each party’s evidence is placed on a balance scale, the side that dips down, even by the smallest amount, has met the burden of proof by the greater weight of the evidence.

Clear and Convincing

The clear and convincing standard, a higher standard of proof than a preponderance of the evidence, requires that the evidence be credible and the facts which the witness testifies to must be remembered distinctly. The witness’s testimony “must be precise and explicit and the

¹⁵ Fla. R. Civ. P. 1.110.

¹⁶ Fla. R. Civ. P. 1.120(b) and (c).

¹⁷ 5 Fla. Prac. Civil Practice s. 16.1, (2020 ed.)

¹⁸ *Id.*

¹⁹ Thomas D. Sawaya, *Florida Personal Injury Law and Practice with Wrongful Death Actions*, s. 24:4 (2020).

²⁰ 5 Fla. Prac. Civil Practice s. 16.1 (2020 ed.).

²¹ Fla. Std. Jury Instr. 401.3, *Greater Weight of the Evidence*.

witnesses must be lacking in confusion as to the facts in issue.” The evidence must be so strong that it guides the trier of fact to a firm conviction, to which there is no hesitation, that the allegations are true.²²

Standards of Care and Degrees of Negligence

Courts have developed general definitions for the degrees of negligence.

Slight Negligence

Slight negligence is generally defined to mean the failure to exercise a great amount of care.²³

Ordinary Negligence

Ordinary negligence, which is also referred to as simple negligence, is the standard of care applied to the vast majority of negligence cases. It is characterized as the conduct that a reasonable and prudent person would know could possibly cause injury to a person or property.²⁴

Gross Negligence

Gross negligence means the failure of a person to exercise slight care. Florida courts have defined gross negligence as the type of conduct that a “reasonably prudent person knows will probably and most likely result in injury to another” person.²⁵

In order for a plaintiff to succeed on a claim involving gross negligence, he or she must prove:

- Circumstances, which, when taken together, create a clear and present danger;
- Awareness that the danger exists; and
- A conscious, voluntary act or omission to act, that will likely result in an injury.^{26, 27}

Tort Laws Applicable to COVID-19 Lawsuits against Health Care Providers and Professionals

There is no established tort law specific to claims related to the COVID-19 pandemic. Absent legislative action, it will take years before the appellate courts hear and resolve the outstanding cases related to COVID-19 in order to develop common law principals applicable to COVID-19. In a case involving tuberculosis, an airborne disease, one federal trial court has found that “negligent transmission of a contagious disease is not actionable under Florida common law.”²⁸ Absent current clear directions from the courts, there are two likely theories of common law negligence that may be used by plaintiffs seeking damages from health care providers: premises liability and medical malpractice. It is also possible that a claim could be made on contract theory.

²² *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983) as discussed in the Sawaya treatise, *supra* at note 19.

²³ Sawaya, *supra* at s. 2:12.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Culpable negligence is a fourth degree of negligence but is not discussed in this analysis.

²⁸ *Quezada v. Circle K Stores, Inc.*, No. 204CV190FTM33DNF, 2005 WL 1633717, at 2 (M.D. Fla. July 7, 2005)

(convenience store patron contracted tuberculosis because store employee known to have tuberculosis was allowed to work).

Premises Liability

Premises liability refers to the duty of an individual or entity that owns or controls real property to reasonably operate and maintain such property for the safety of those who enter or remain on the property. There are different standards of negligence for premises liability based on the legal status of the injured party. However, in most cases related to health care providers, the patient or client or supplier is a legal invitee, so that standard is appropriate for consideration. As to an invitee, a landowner or possessor is liable if he/she/it:

- Negligently failed to maintain the premises in a reasonably safe condition; or
- Negligently failed to correct a dangerous condition about which the defendant either knew or should have known, by the use of reasonable care; or
- Negligently failed to warn the claimant of a dangerous condition about which the defendant had, or should have had, knowledge greater than that of claimant, and, if so, such negligence was a legal cause of loss, injury, or damage.²⁹

Medical Negligence

Negligence of a medical provider is the failure to use reasonable care. Reasonable care on the part of a physician, hospital, or health care provider is that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful physicians, hospitals, or health care providers. Negligence on the part of a physician, hospital, or health care provider is doing something that a reasonably careful physician, hospital, or health care provider would not do under like circumstances or failing to do something that a reasonably careful physician, hospital, or health care provider would do under like circumstances.³⁰

Procedures for the filing and prosecution of a medical negligence claim are found in ch. 766, F.S. One such requirement is that the plaintiff's attorney certify that he or she has investigated the claim and found a good faith belief that grounds exist for an action against each named defendant. A lawyer may support the good faith finding by way of a reviewing physician's affidavit. The affidavit is not attached to the complaint or available in discovery.³¹

Breach of Contract

Breach of contract is not a tort claim. The cause of action is similar, in that the injured party must show duty, breach, and damages. In contract law, the parties have a relationship defined by a contract. The contract spells out the duties owed to one another and the potential damages recoverable. However, duties beyond those specifically listed in the contract may be implied based on industry custom, regulation, or mutual understanding of the parties. So, for instance, it is unlikely that a nursing home contract would say how the nursing home would deal with the unique challenges of COVID-19. Still, courts would likely find that a nursing home has the implied contractual duty to undertake commercially reasonable measures for infection control consistent with applicable laws and regulations, and a nursing home may be found to be in breach of contract for failing to do so.

²⁹ Fla. Std. Jury Instr. 401.20 *Issues On Plaintiff's Claim — Premises Liability*.

³⁰ Fla. Std. Jury Instr. 402.4 *Medical Negligence*.

³¹ Section 766.104, F.S.

Access to Courts – *Kluger v. White*

The State Constitution provides in Article 1, s. 21, the “Access to courts” section,

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Case law has demonstrated, however, that this provision is not absolute. In 1973, the Florida Supreme Court issued an opinion, *Kluger v. White*,³² a case which construed the access to courts provision. In broad terms, the case before the Court involved the abolition of a statute governing a tort action for property damage in an automobile accident case. When the Legislature abolished the remedy, it did not provide an alternative protection to the injured party.

The Court was confronted with the issue of whether the Legislature could abolish a right of access to the courts. The Court determined that the Legislature may not abolish a pre-1968 common law right or a statutory cause of action unless the Legislature provides a reasonable alternative to that action or unless an overpowering public necessity exists for abolishing the right of action. The Court applies a three-part test to determine whether a statute violates the access to courts provision:

- Does the change abolish a preexisting right of access?
- If so, whether a reasonable alternative exists to protect that preexisting right of access.
- If no reasonable alternative exists, whether an overwhelming public necessity exists.³³

Restrictions on the ability to bring a lawsuit have been upheld as constitutional, but the point at which a restriction becomes an unconstitutional bar is not well defined.

Statute of Limitations

A statute of limitations establishes a time limit for a plaintiff to file an action, or the case will be barred. An action for a negligence claim must be brought within 4 years after the cause of action accrues.³⁴

Statutes of limitations are created to encourage a plaintiff to initiate an action while witnesses and evidence can be found. They also serve as a shield to protect a defendant from having to defend against a claim that occurred so long ago that precise memories have grown hazy.³⁵ A statute of limitations begins to run when the cause of action accrues. A cause of action accrues when the last element constituting the cause of action occurs.³⁶ In a personal injury action based on the negligent act of another, the last element occurs when the plaintiff is injured.³⁷

³² *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

³³ *Eller v. Shova*, 630 So. 2d 537 (Fla. 1993).

³⁴ Section 95.11(3), F.S.

³⁵ 35 Fla. Jur 2d *Limitations and Laches* s. 1 (2020).

³⁶ Section 95.031(1), F.S.

³⁷ 35 Fla. Jur 2d *Limitations and Laches* s. 65 (2020).

Retroactive Application of a Statute

Under Florida law, statutes are presumed to operate prospectively, not retroactively. In other words, statutes generally apply only to actions that occur on or after the effective date of the legislation, not before the legislation becomes effective.

The Florida Supreme Court has noted that, under the rules of statutory construction, if statutes are to operate retroactively, the Legislature must clearly express that intent for the statute to be valid.³⁸ When statutes that are expressly retroactive have been litigated and appealed, the courts have been asked to determine whether the statute applies to cases that were pending at the time the statute went into effect. The conclusion often turns on whether the statute is procedural or substantive.

In a recent Florida Supreme Court case, the Court acknowledged that “[t]he distinction between substantive and procedural law is neither simple nor certain.”³⁹ The Court further acknowledged that their previous pronouncements regarding the retroactivity of procedural laws have been less than precise and have been unclear.⁴⁰

Courts, however, have invalidated the retroactive application of a statute if the statute impairs vested rights, creates new obligations, or imposes new penalties.⁴¹ Still, in other cases, the courts have permitted statutes to be applied retroactively if they do not create new, or take away, vested rights, but only operate to further a remedy or confirm rights that already exist.⁴²

In a case challenging the application of an increase in the standard of proof from a preponderance of the evidence to the clear and convincing evidence standard after the plaintiff had filed a complaint, the court concluded that the statute could apply retroactively.⁴³ The Florida Supreme Court has noted that burden of proof requirements are procedural and may be abrogated retroactively because litigants do not have a vested right in a method of procedure.⁴⁴ The Court also permitted retroactive application of a statute that altered the plaintiff’s burden of proof.⁴⁵

III. Effect of Proposed Changes:

CS/SB 72 provides heightened liability protections against COVID-19-related claims due to the threat of unknown and potentially unbounded liability claims that may arise from the pandemic. The protections are extended widely to all persons, businesses, or other entities, including healthcare providers.

³⁸ *Walker & LaBerge, Inc., v. Halligan*, 344 So. 2d 239 (Fla. 1977).

³⁹ *Love v. State*, 286 So. 3d 177, 183 (Fla. 2019) quoting *Cagle v. Tuttle’s Design-Build, Inc.*, 753 So. 2d 49, 53 (Fa. 2000).

⁴⁰ *Love* at 184.

⁴¹ *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210 (Fla 2004).

⁴² *Ziccardi v. Strother*, 570 So. 2d 1319 (Fla. 1990).

⁴³ *Stein v. Miller Industries, Inc.*, 564 So. 2d 539 (Fla. 4th DCA 1990).

⁴⁴ *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 243 (Fla. 1977).

⁴⁵ *Love*, supra.

WHEREAS Clauses

According to the “Whereas Clauses” the State continues to operate under a declared state of emergency, but one in which Floridians must be allowed to earn a living and support their families, and one in which businesses are encouraged to operate safely and contribute to the state’s success, well-being, and economic recovery. Because the Legislature recognizes the significant risks that businesses, entities, institutions, and health care providers accept to provide services to the public during the pandemic, the Legislature is willing to extend protections to alleviate liability concerns, while continuing to provide for the public health. The final clause notes that the Legislature finds that the unprecedented nature of the COVID-19 pandemic, and the indefinite legal environment that has followed, require swift and decisive action.

Legislative Findings

According to the legislative findings, the creation of heightened legal protections is necessary to reduce the threat of unlimited liability and legal exposure for businesses, educational institutions, governmental entities, and religious institutions as they seek to recover and contribute to the well-being of the state. The legislative findings conclude that there are no alternative means to meet this public necessity of providing legal protections caused by the sudden and unprecedented nature of the COVID-19 pandemic. Therefore, the public interest, as a whole, is best served by providing relief to these entities so that they may remain viable and contribute to the economic recovery of the state.

Legislative findings have a unique place in case law. The Florida Supreme Court has determined that they are to be given great weight. In the case of *University of Miami v. Echarte*, the Court stated that “legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous.”⁴⁶ The Court reflected on the *Kluger* decision and referred to its test. The Court also examined whether the Legislature expressly found that no alternative or less onerous method existed, thereby establishing a necessary requirement.

Section 1 - Pursuing a COVID-19-Related Claim

A COVID-19-related Claim Defined and Who is Protected Under the Bill

A COVID-19-related claim is defined as a civil liability claim for damages, injury, or death that arises from, or is related to, COVID-19.⁴⁷ The bill provides protections for any civil liability claim against a person,⁴⁸ a natural person, business entity, including certain charitable organizations and non-profits, a public or non-public educational institution, a governmental entity, or a religious institution. The bill extensively defines what or who a health care provider

⁴⁶ *University of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993).

⁴⁷ A “COVID-19-related claim” is defined as “a civil liability claim against a person, including a natural person, a business entity, an educational institution, a governmental entity, or a religious institution which arises from or is related to COVID-19, otherwise known as the novel coronavirus. The term includes any such claim for damages, injury, or death. Any such claim, no matter how denominated, is a COVID-19 related claim for purposes of this section. The term does not include a claim against a healthcare provider, regardless of whether the healthcare provider meets one or more of the definitions in this subsection.”

⁴⁸ A “person” is broadly defined in the statutes to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations. Section 1.01(3), F.S.

is and includes healthcare providers in the liability protections established by the bill. The bill also provides definitions for an educational institution, governmental entity, and a religious institution.

Preliminary Procedures for a Plaintiff

The bill requires two preliminary steps from a plaintiff. In each civil action for a COVID-19-related claim, a plaintiff must:

- Set forth the pleadings with particularity; and
- Provide, at the same time that the complaint is filed, an affidavit signed by a physician, stating that the plaintiff's COVID-19-related claim for damages, injury, or death was caused by the defendant's acts or omissions. The physician who submits an affidavit must be actively licensed in the state. Additionally, the physician must state that it is his or her belief, within a reasonable degree of medical certainty, that the plaintiff's COVID-related damages, injury, or death occurred as a result of the defendant's acts or omissions.

These preliminary procedures are similar to the pre-suit investigation requirements for a claimant filing a medical malpractice claim. According to s. 766.104(1), F.S., the attorney filing the action must make a reasonable investigation to determine that there are grounds for a good-faith belief that negligence has occurred in the care or treatment of the claimant. The complaint or initial pleading must contain a certificate of counsel stating that a reasonable investigation supported the belief that there are grounds for an action against the defendant. Good faith may be demonstrated if the claimant or counsel has received a written opinion from an expert that there appears to be evidence of medical negligence. If the court determines that the certificate was not made in good faith and that there is no justiciable issue presented against the health care provider, the court must award attorney fees and taxable costs against the claimant's counsel and must submit the matter to The Florida Bar for disciplinary review against the attorney.

The Court's Responsibilities

Before a trial may proceed, a court must determine whether:

- The plaintiff submitted a complaint that was pled with particularity; and
- The physician's affidavit complied with the necessary requirements.

If the plaintiff did not meet these two requirements, the court must dismiss the case *without* prejudice, meaning that the plaintiff is not prohibited from correcting deficiencies and refile the claim.

The court must also determine whether a defendant made a good faith effort to substantially comply with authoritative or controlling government-issued health standards or guidance at the time that the cause of action accrued. At this stage of the proceeding, the only admissible evidence is limited to evidence pertinent to whether the defendant made a good faith effort to comply with the health standards of guidance. If more than one source or set of standards or guidance was authoritative or controlling when the cause of action accrued, a defendant's good faith effort to substantially comply with any one of those sources or sets of standards or guidance confers immunity from civil liability.

If the court decides that the defendant met the good faith compliance burden, the defendant is immune from civil liability and the proceeding ends. However, if the court determines that the defendant did not make a good faith effort, the plaintiff may proceed. In order to prevail, the plaintiff must demonstrate that the defendant acted with at least gross negligence which is proven by clear and convincing evidence. If these two burdens are not met, the defendant will not be held liable for an act or omission pertaining to a COVID-19-related claim. The plaintiff bears the burden of proving that the defendant did not make a good faith effort to substantially comply with the authoritative or controlling government-issued health standards or guidance that were in place at the time the action accrued.

The Plaintiff's Burden to Prove Gross Negligence by the Clear and Convincing Standard

As discussed above in the "Present Situation," gross negligence is defined as the type of conduct that a reasonably prudent person knows will probably and most likely result in an injury to another person. Under this standard, a plaintiff will need to prove that the defendant's conduct was grossly negligent, meaning that the likelihood of injury to another person was known by the defendant to be imminent.

The plaintiff will need to demonstrate gross negligence by the "clear and convincing" standard of evidence. This is applied less often in civil cases and is a higher standard of proof than the greater weight of the evidence standard. To meet this standard, the plaintiff must provide evidence that is credible, that is remembered distinctly by the witness, and must be so strong that the trier of fact has a firm conviction, without hesitation, that the allegations are true.

Taken together, a plaintiff has high burdens to prevail in a COVID-19-related claim.

Statute of Limitations

The bill requires a plaintiff to bring a civil action within 1 year after the cause of action accrues. Generally, a negligence action must be brought within 4 years after a cause of action accrues. Therefore, this bill reduces the amount of time that a plaintiff has to bring an action. If, however, the cause of action accrues before the effective date of the bill, which is the date it becomes law, the plaintiff has one year from the effective date of the bill to bring a claim. While this could be a reduction in the amount of time that a plaintiff has to bring a COVID-19-related claim, there is precedent for this. Court opinions have held that a reduction in the statute of limitations is not unconstitutional if the claimant is given a reasonable amount of time to file the action.⁴⁹

Section 2 – COVID-19-Related Claims Against Health Care Providers

The liability protections for health care providers in the bill are significant, but the protections are not as strong as those for other persons, businesses, and individuals.

As provided in the bill, a plaintiff generally must prove a COVID-19-related claim against a health care provider by showing by the greater weight of the evidence that the health care provider engaged in gross negligence or intentional misconduct. As defined, a COVID-19 related

⁴⁹ *Foley v. Morris*, 339 So. 2d 215 (Fla. 1976).

claim against a health care provider, to which the liability protections apply, mainly relate to claims:

- Arising from the diagnosis or treatment of a person for COVID-19,
- The provision of a novel or experimental COVID-19 treatment,
- The transmission of COVID-19, and
- The delay or cancellation of a surgery or medical procedure.

The procedures for claims against a health care provider differ from claims against other types of defendants in several ways. Claims against a health care provider need not be supported by an affidavit by a physician indicating that the defendant's actions *caused* the plaintiff's damages. There is no pre-suit immunity hearing. Additionally, claims need not be proven by clear and convincing evidence.

The bill also species several affirmative defenses that apply to a COVID-19-related claim against a health care provider. An affirmative defense is a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's claim. The defendant bears the burden of proving an affirmative defense. The affirmative defenses included in the bill mainly relate to a health care provider's substantial compliance with or reliance upon government issued-health standards. The affirmative defenses also relate to the impossibility of compliance with government-issued standards due to shortages of supplies, materials, equipment, and personnel and the defenses also relate to the impossibility of compliance due to the time necessary to implement new standards.

Although section 2 of the bill generally does not provide the same level of liability protections to a health care provider as those provided to others under section 1, some claims against a health care provider are subject to the heightened protections. Claims subject to the heightened protections include claims by a person who is not a patient or resident of a health care provider alleging that the health care provider caused the person to contract COVID-19.

Retroactive Application

This act takes effect upon becoming a law and applies retroactively. The bill applies retroactively to actions filed after the effective date of the bill even if the action accrued before the effective date. The bill, however, does not apply to a claim that is filed against a particularly named defendant before the effective date of the bill.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The Florida Bar submitted a brief response on the Agency Bill Analysis Request form and stated that it had not identified any fiscal impact with the proposed legislation. The response also stated that The Florida Bar would not be providing an analysis for the bill and does not have an official legislative position for the proposed legislation.⁵⁰

C. Government Sector Impact:

The Office of the State Courts Administrator states that the bill's impact on the judicial workload cannot be quantified with data that is currently available. The analysis stated, however, that the bill is not anticipated to create a significant increase to the judicial workload. The analysis did note that the Rules of Civil Procedure and jury instructions might need to be reviewed and revised to make certain that they accommodate the new procedures created in the bill. The analysis also stated that the additional requirements for plaintiffs could result in fewer COVID-19-related cases being filed, possibly reducing revenues from civil filing fees, but there is not enough information to accurately determine this.⁵¹

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

⁵⁰ The Florida Bar, *SB 72 Analysis*, (Jan. 12, 2021) (on file with the Senate Committee on Commerce and Tourism).

⁵¹ Office of the State Courts Administrator, *2021 Judicial Impact Statement, SB 72* (Jan. 21, 2021) <http://abar.laspbs.state.fl.us/ABAR/Attachment.aspx?ID=31076> (last visited Mar. 1, 2021).

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: s. 768.38 and s. 768.381.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Rules on March 11, 2021:

The committee substitute differs from the underlying bill by adding provisions based on SB 74 to establish liability protections and procedures for COVID-19 related claims against health care providers.

With respect to claims against a person other than a health care provider, the committee substitute provides that the defendant is immune from liability if he or she substantially complied with any source or set of standards or guidance that was authoritative or controlling at the time the cause of action accrued.

- B. **Amendments:**

None.