

KANSAS TRIAL LAWYERS ASSOCIATION



To: Fred Patton, Chairman
Members of the House Judiciary Committee

From: Ashley Ricket, Ricket Law Firm LLC
On behalf of the Kansas Trial Lawyers Association

Date: February 3, 2021

RE: HB 2126 Concerning adult care facilities; immunity

Thank you for the opportunity to appear today on behalf of the Kansas Trial Lawyers Association and in opposition to HB 2126. The affirmative defense in current law is balanced; blanket immunity in HB 2126 goes too far. We respectfully request that the Committee oppose HB 2126.

KTLA is a professional association of Kansas attorneys that represent individuals in personal injury, workers compensation, and consumer protection cases. Our policy is to oppose immunity laws because they protect the negligent and irresponsible. Injured persons have a right to access a court of law to seek fair resolution of disputes and to hold accountable those that cause injury. Immunity laws tread upon those rights.

Despite KTLA's core position on legal immunity, and our belief that the justice system can operate fairly during the pandemic without special rules, KTLA worked with policyholders and stakeholders during the 2020 Special Session to craft provisions for the COVID-19 emergency bill. We advocated for legislation that (1) was narrowly tailored and limited to the COVID-19 emergency; and (2) was fair to all parties to a dispute.

The Legislature granted adult care homes an affirmative defense to COVID-19 claims in 2020 HB 2016. The affirmative defense is a path to immunity from liability for facilities under the following circumstances:

- In compliance with the law, the facility re-accepted a patient who had been removed for treatment of COVID-19;
- The facility treats a resident who tests positive for COVID-19 in compliance with the law; or
- The facility is acting pursuant to and in substantial compliance with public health directives.

The current affirmative defense law is a fair approach and a reasonable compromise. It accounts for the following policy considerations:

- Adult care homes do not provide front-line medical care for the diagnosis and treatment of COVID-19;
- Some adult care homes had been cited with violation of infection control practices prior to the COVID-19 emergency¹ and immunity would protect them for negligent practices they had not remedied that predated the emergency;
- Adult care homes have immunity under the affirmative defense when they follow the law and public health directives. Facilities that fail to follow the law and public health directives should not be protected;
- Adult care homes may have facilitated the spread of the virus and are the location of a significant portion of the state’s COVID-19 deaths; and
- The frail elderly in adult care homes should receive the highest protection of law in order to deter negligence and malpractice.

HB 2126 abandons these considerations. It replaces the affirmative defense in current law with broad immunity provisions that tip the scales in favor of adult care homes at the expense of residents and their families.

HB 2126 is drafted so broadly that its effect will be to give adult care homes nearly complete immunity for all services and care they provide. HB 2126 does not require that services or care be related to COVID-19; it only requires that it be provided during the COVID-19 public health emergency, beginning March 12, 2020. The limitations for gross negligence or willful, wanton or reckless conduct are not meaningful because the legal standards for proving such conduct will rarely be met.

HB 2126’s broad language could possibly be construed to preclude claims against adult care homes under the Kansas Consumer Protection Act, or enforcement of the Act’s provisions by the Attorney General.

Nothing has changed that warrants shifting policy and law and substantially favoring adult care facilities to the detriment of Kansas residents and their families. Instead, adult care homes have been the site of a significant portion of our state’s COVID-19 illnesses and deaths including the Andbe House in Norton where all 61 residents tested positive for COVID-19 and at least 10 died. HB 2126 will immunize all past negligent conduct in adult care homes that contributed to the state’s COVID-19 public health emergency, including failing to take reasonable precautions to stop the spread of infectious diseases.²

The adult care facilities that benefit most from HB 2126 are the small minority with the most dangerous practices. The Health Care Stabilization Fund reported that as of October 1, 2020,

¹ Kaiser Health News, March 4, 2020, <https://khn.org/news/coronavirus-preparedness-infection-control-lapses-at-top-rated-nursing-homes/>

² Many adult care facilities had a history of failing to prevent the spread of infectious diseases prior to the COVID-19 emergency. Kaiser Health News reviewed federal records on nursing homes and found that nationwide, 63 percent of nursing homes were cited for one or more infection control deficiencies for the past two regular inspection periods, in a study released March 4, 2020. Of the 293 Kansas facilities included in the review, 58 percent had deficiencies indicating “potential for harm.” Of those having deficiencies indicating potential for harm, 40 percent had at least one citation related to infection control and 17 percent had two.

three (3) Kansas facilities had been named in 25 COVID-19-related lawsuits or claims, including one (1) Wyandotte County facility that had 19 alone.³ Allegations relate to protective equipment not being used; not testing employees having symptoms of COVID-19 and permitting them to work; and appropriate techniques to stop the spread of the virus not being used.⁴

HB 2126 is retroactive to March 12, 2020. If passed, HB 2126 would affect pending litigation such as the lawsuits and claims of which the Health Care Stabilization Fund has received notice. Because it limits a substantive cause of action, HB 2126 is unconstitutional.⁵

The Legislature should not pick winners and losers by eliminating rights and protecting negligent and dangerous conduct. Residents and their families that have been harmed have a right to seek justice, particularly Kansans harmed in a facility with deficiencies and a history of practices that contributed to the spread of the COVID-19 virus.

The current affirmative defense law is balanced; it is a fair and reasonable compromise. The majority of adult care homes that have followed the law and public health directives are protected by the affirmative defense law. The affirmative defense law does not preclude families that are harmed from seeking justice and holding a negligent facility accountable.

On behalf of the Kansas Trial Lawyers Association, I respectfully request that the committee reject HB 2126 and retain the current affirmative defense law.

³ Report of the Health Care Stabilization Fund Oversight Committee to the 2021 Kansas Legislature, 2020 Health Care Stabilization Fund Oversight, Kansas Legislative Research Department, page 0-9.

⁴ Ibid.

⁵ Under well settled Kansas law, Section 18 of the Bill of Rights to the Kansas Constitution requires that the Legislature provide an adequate substitute remedy when it takes away a cause of action available at common law. This is part of what is commonly referred to as “the quid pro quo test.” See *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012). Proposals that apply retroactively are suspect. The Legislature is restricted in retroactively limiting causes of action because those causes of action are vested property rights under Kansas law. See *Resolution Trust Corp. v. Fleischer*, 257 Kan. 360, 892 P.2d 497.