

KANSAS TRIAL LAWYERS ASSOCIATION



To: Senator Kellie Warren, Chairperson
Members of the Senate Judiciary Committee

From: Tom Wagstaff, Jr.
The Law Office of Tom Wagstaff Jr.
on behalf of the Kansas Trial Lawyers Association

Date: March 16, 2021

Re: HB 2126, providing immunity from civil liability for COVID-19 claims for adult care facilities – OPPOSED

Thank you for the opportunity to appear today, on behalf of the Kansas Trial Lawyers Association, in opposition to HB 2126. KTLA's opposition to HB 2126 is based on our association's long-standing policy position that special immunity exceptions do not serve to protect the interests of Kansans. More specifically, legal immunity:

- permits some entities to be held accountable for negligent conduct while others are not;
- denies injured persons and their families their constitutional right to trial by jury and the right to a remedy;
- conflicts with fundamental notions of right and wrong and the democratic principle that no one is above the law.

During the 2020 Special Session, while attempting to navigate the uncertainties of the pandemic, the Legislature reached a thoughtful compromise when it enacted the affirmative defense law. The current affirmative defense law protects the rights of elderly Kansas nursing home residents and considers their safety, security, and protection in the facilities that truly are their homes.

The affirmative defense law also protects adult care facilities. The affirmative defense law provides immunity from COVID-19 lawsuits if a facility re-accepts a resident who was removed for treatment of COVID-19, in compliance with the law; treats a resident who tests positive for COVID-19, in compliance with the law; or acts pursuant to, and in substantial compliance with, public health directives.

Since the passage of the affirmative defense law, the flood of personal injury and class action lawsuits involving COVID-19 claims that was predicted by the proponents of HB 2126 has not occurred¹.

HB 2126, as originally introduced, was broad. It provided almost complete immunity from civil

lawsuits and shielded adult care facilities from regulatory scrutiny and penalties. KTLA appreciates the work the House Judiciary committee did to amend HB 2126 and more narrowly focused qualifications for immunity; however, we remain concerned about the following provisions:

- **Expansion of facilities eligible to seek immunity.** KTLA remains opposed to HB 2126, as amended by the House, because it is another precedent for legal immunity and further expands the immunity provisions to include community mental health crisis intervention centers, community service providers, community developmental disability organizations, and institutions.
- **Constitutionality of retroactivity.** HB 2126 is retroactive to March 12, 2020. If passed, HB 2126 would affect pending litigation such as the lawsuits and claims already known to the Health Care Stabilization Fund. Because it limits a substantive cause of action, KTLA believes this provision is unconstitutional.

To be clear, HB 2126, as currently amended, does not protect gross negligence or willful, wanton or reckless conduct. But the effect of the gross negligence provision is not accountability; it is to shut the courthouse doors and bar claims. Only the most extreme, outrageous, and egregious conduct meets the legal standards for gross negligence or willful, wanton or reckless conduct. Residents with meritorious claims will more than likely be unable to prove a facility's conduct meets the legal standard for gross negligence.

KTLA appreciates the many difficult decisions the Kansas Legislature faces in responding to the COVID-19 public health emergency. When considering HB 2126, KTLA respectfully requests committee members find a fair balance between the economic health of adult care facilities and their employees, Kansas communities, Kansas businesses, and the state, and the constitutional rights, safety, and protection of facility residents and their families.

Residents in long-term care may have lived, worked, voted, paid taxes, and raised their families in Kansas for their entire lives before moving to an adult care facility. Now may be the time when these vulnerable Kansans most need the Legislature's help preserving their constitutional rights, along with their safety and well-being.

KTLA thanks Senate Judiciary Committee members for their thoughtful consideration. On behalf of the Kansas Trial Lawyers Association, I respectfully request that the committee retain the current affirmative defense law.

¹ The Health Care Stabilization Fund reported that as of October 1, 2020, 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. Allegations relate to protective equipment not being used; permitting employees with symptoms of COVID-19 to work without being tested; and not using appropriate techniques to stop the spread of the virus. *Report of the Health Care Stabilization Fund Oversight Committee to the 2021 Kansas Legislature*, 2020 Health Care Stabilization Fund Oversight Committee, Kansas Legislative Research Department, page 0-9.