

Chairman Lefor and members of the House Industry Business and Labor committee, my name is David Schweigert and I am an attorney in Bismarck, ND. I am here in opposition to HB 1175, due primarily to the fact it is not needed.

The existing tort system provides ample protections for defendants accused of negligently spreading COVID-19 during the crisis. Current law puts the burden on the *accuser* to come forward with sufficient evidence to prove that the defendant (1) had a duty to protect them (2) *breached* that duty negligently by acting unreasonably under the circumstances, and (3) caused the plaintiffs harm—not just in a cosmological cause-and-effect sense, but in a common-sense way as well. All of these factors are potential hurdles to plaintiff.

The standard of care changes with time, guidance, and the facts on the ground. Early on in the pandemic, it was unclear how the virus spread. Guidance provided by state and federal authorities as well as the care administered by health professionals in March and April is insufficient given what we later learned. Businesses accused of acting unsafely will be judged by the standards *at the time* and their access to materials they did or should have had on hand. Yet as the guidance, standards, and material facts change, so does negligence law.

Proving that the defendant caused the plaintiff's harm can be impossible. When the harm is based on where the plaintiff was infected with the virus, proving one party infected them is extremely challenging. Given how easily this virus spreads, there are certain classes of cases where causation will be impossible to prove. To keep the system fair, the plaintiff is required to prove that they were infected by the defendant in these cases, rather than a third party. *Even if they were neglecting the health and safety of the plaintiff*, whole categories of business interests will find a defense readily available to them. Almost everyone - and certainly those who are venturing out to shop or dine - will have multiple potential exposure locations. Nailing down proof of which location was responsible for a claimant's exposure would be exceedingly difficult, which means the lawsuit will likely fail.

State law requires that a claimant's conduct be factored in, too. Often called "comparative fault" or "assumption of risk" it allows the court and jury to consider whether a claimant's own conduct was reasonable. If a claimant ignores a business' safety protocols - refuses to keep 6-foot buffers from others while inside the business, for example - the claimant can be at fault and thus denied damages. Similarly, those in high-risk categories have a responsibility to protect themselves, which means avoiding places that, even with safety protocols in place, carry at least some risk of exposure.

Currently, there are no injury claims or medical malpractice claims in North Dakota involving COVID-19 despite being almost a year into the crisis. These claims will be difficult to prove and won't be taken lightly. However, they are still critically important. The few claims that have been filed in other states have exposed

grotesque working conditions and forced employers to provide adequate PPE—saving lives in the process. A blanket immunity included in this bill will make it impossible to protect workers and consumers from poor business practices.

Health care providers, first responders, and all the workers in critical industries are heroes working through extraordinary conditions, and no lawyer would bring a claim against a health care provider treating a COVID-19 patient who is doing the best he or she can under the circumstances.

In conclusion, HB1175 is legislation that is not needed to provide a blanket immunity to businesses or healthcare providers. Tort law - injury law - has at its base three core values. It should deter unsafe activities. It should compensate victims for their injuries. And it should be fair to all parties. Both State and Federal Constitutions protect the right to have a jury—not the legislature—decide if a defendant has acted unlawfully and caused harm. Because of this, I ask you to vote **DO NOT PASS** on HB 1175.