

HOUSE BILL REPORT

SSB 5271

As Passed House:

April 9, 2021

Title: An act relating to amending the necessary elements of proof of injury during the state of emergency declared due to the COVID-19 pandemic.

Brief Description: Amending the necessary elements of proof of injury during the state of emergency declared due to the COVID-19 pandemic.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Wagoner, Pedersen and Dhingra).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 3/16/21, 3/19/21 [DP].

Floor Activity:

Passed House: 4/9/21, 93-4.

Brief Summary of Substitute Bill

- Establishes specific factors that must be considered in a civil action when determining whether a health care provider followed the required standard of care during the period of the COVID-19 state of emergency.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass. Signed by 17 members: Representatives Hansen, Chair; Simmons, Vice Chair; Walsh, Ranking Minority Member; Gilday, Assistant Ranking Minority Member; Graham, Assistant Ranking Minority Member; Abbarno, Davis, Entenman, Goodman, Kirby, Klippert, Orwall, Peterson, Thai, Valdez, Walen and Ybarra.

Staff: Edie Adams (786-7180).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Background:

A civil tort action against a health care provider for the recovery of damages for injury or death resulting from the provision of health care must be based on one of the following grounds:

- The health care provider failed to follow the required standard of care.
- The health care provider promised that the injury suffered would not occur.
- The injury resulted from health care to which the patient did not consent.

In a civil action based on failure to follow the required standard of care, the plaintiff must show not only that the provider failed to follow the accepted standard of care, but also that the failure was a proximate cause of the injuries suffered. Failure to follow the accepted standard of care means that the health care provider failed to exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the same profession or class, and acting in the same or similar circumstances.

On February 29, 2020, the Governor proclaimed that a state of emergency exists in all counties in the State of Washington due to the outbreak of COVID-19. During the course of the pandemic, federal, state, and local agencies have issued guidance and recommendations addressing clinical and treatment protocols for health care providers, and the Governor has issued proclamations addressing the provision of health care services, including imposing restrictions on nonemergent medical and dental procedures.

Summary of Bill:

New provisions are established governing the necessary elements of proof in a civil tort action based on a health care provider's failure to follow the standard of care for acts or omissions occurring during the period of the COVID-19 state of emergency.

In a civil tort action against a health care provider that is based on acts or omissions occurring during the period of the COVID-19 state of emergency, the determination of whether the provider failed to follow the standard of care must take into account whether the act or omission:

- was in good faith based on guidance, direction, or recommendations, including in interim or preliminary form, published by the federal government, the State of Washington or its departments, divisions, agencies, or agents, or local governments in the state, or departments, divisions, agencies, or agents thereof, in response to the COVID-19 pandemic and applicable to the health care provider; or
- was due to a lack of resources including, but not limited to, available facility capacity, staff, and supplies, directly attributable to the COVID-19 pandemic.

These factors apply only if relevant to the determination of whether the health care provider followed the standard of care, as determined by the court. If a provider presents evidence of these factors, the injured patient or the patient's representative is permitted to present

rebuttal evidence, so long as the evidence is otherwise admissible.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) The bill provides support to providers and hospitals during the response to the COVID-19 pandemic. It was a scary time as COVID-19 took hold and caregivers were responding to the pandemic. There were few clinical protocols for COVID-19 treatment and what did exist changed frequently as things unfolded. Practitioners used best available evidence while learning to adapt and modify practices based on the emergence of new information and protocols. Then the Governor issued a proclamation prohibiting nonemergency procedures, which was appropriate in order to build bed capacity and to preserve staffing and supplies, but it led to delays in diagnoses and treatment that impacted patient care. This created uncertainty and concern about potential liability from providers across the state.

Providers who rely on protocols based on the best available information about how to treat and prevent novel infections such as COVID-19 should be afforded liability protections. Washington is on a short list of states that have not provided protections to providers who have been on the front lines of this pandemic for the past year. The law continues to hold them accountable for outcomes that are not within their control.

The bill is a negotiated agreement between the Washington State Hospital Association and the Washington State Association for Justice. It acknowledges the extraordinary circumstances in which caregivers are operating during the COVID-19 pandemic and provides a modest degree of protection within the existing medical malpractice statute. This new standard applies only during the state of emergency.

(Opposed) None.

Persons Testifying: Senator Wagoner, prime sponsor; Taya Briley, Washington State Hospital Association; Timothy Dellit, University of Washington Medicine; and Pam Kohlmeier.

Persons Signed In To Testify But Not Testifying: None.