OHIO ALLIANCE FOR CIVIL JUSTICE

House Civil Justice Committee
House Bill 606
Proponent Testimony
Tuesday, May 19, 2020

Chairman Hambley, Vice Chair Patton, Ranking Member Brown and members of the House Civil Justice Committee, thank you for the opportunity to provide testimony in support of House Bill 606.

My name is Anne Marie Sferra and I am here on behalf of the Ohio Alliance for Civil Justice (OACJ). I am an attorney with Bricker & Eckler who serves as counsel to the OACJ. By way of background, the OACJ was founded in the mid-1980s to stop lawsuit abuse and promote a common-sense civil justice system in Ohio. The OACJ is comprised of representatives of dozens of Ohio trade and professional associations, small and large businesses, medical groups, farmers, non-profit organizations and local government associations — for a combined representation of more than 100,000 individuals and businesses. The OACJ's leadership team includes representatives from the following organizations: NFIB/Ohio, Ohio Chamber of Commerce, Ohio Council of Retail Merchants, Ohio Hospital Association, Ohio Manufacturers' Association, Ohio Society of CPAs, and the Ohio State Medical Association.

House Bill 606 has two primary parts — the first part amends R.C. 2305.2311 and pertains specifically to health care providers and services The second part proposes a new Ohio law — R.C. 3701.26 – which provides Ohio's businesses and others protection against liability from the transmission of coronavirus.

We appreciate this committee's work and recognition of this crucial issue, which Ohio's health care providers and businesses are facing during this pandemic. House Bill 606 will protect our health care providers while they care for Ohioans.

The need to protect our health care providers for their essential work during this pandemic is necessary to ensure providers take all steps necessary to adequately respond to this health crisis. In the midst of a statewide pandemic, disaster, or emergency, Ohioans cannot afford to have their health care providers inhibited from necessary action due to fear of litigation or liability. We need our health care providers to provide necessary care without fear that their actions will result in liability.

The current pandemic has exposed shortcomings in the existing law that we are seeking to amend (RC 2305.2311). Those shortcomings include:

- The existing law only applies to declared disasters but should include declared emergencies. For example, in this case, Governor DeWine declared a statewide emergency on March 9, 2020; President Trump did not declare Ohio a disaster until March 31, 2020. The demands on health care providers necessitating the protections did not change in

between declarations; only the technical nature of the declaration changed. The bill would apply protections in declared emergencies as well.

- The protection provided in current law is insufficient because it applies only to emergency care, rather than also including other necessary services patients may need. The bill expands the protection to include other health care services delivered in response to the disaster or emergency.

- Current law does not contemplate the fact that a significant volume of health care services have been delayed pursuant to Director Acton's March 17 order suspending non-essential procedures. Pursuant to that order, providers made very difficult judgments about which procedures to delay, which could result in adverse outcomes to patients, and subsequent lawsuits, in the future. Providers who made such decisions in good faith adherence to the Director's order should be protected.

- Current law does not cover skilled nursing facilities, assisted living facilities, or other health care facilities that are providing care during the pandemic. This bill would provide that needed protection.

- Current law expressly excludes protection for wrongful death claims. Given the high risk of mortality associated with COVID-19 patients, and that wrongful death claims are likely to make up a significant number of the claims against health care providers in the wake of the pandemic, this exclusion renders this statute deficient. Note, also, that it is not unconstitutional to treat wrongful death claims the same as other tort claims when it comes to the standards that must be met for proving such a claim. The constitutional limitation regarding wrongful death claims relates to the inability to limit damages that can be recovered in wrongful death claims; the constitution does not prohibit the establishment of standards that must be met in support of such a claim.

We understand there have been some questions about the standard of protection included in H.B. 606. It is important to note that there are several existing liability protection statutes in the health care context in which immunity is granted unless the harm is caused due to willful and wanton misconduct. For example:

- **ORC 2305.23 –** Ohio's "Good Samaritan" statute provides immunity for emergency care or treatment provided by volunteers at the scene of an emergency outside of a health care setting.
- **R.C. 2305.234 –** provides immunity for volunteer health services provided to indigent and uninsured persons.
- **R.C. 4765.49 –** provides immunity in connection with the provision of "emergency medical services," which are defined as the type of services performed by first responders, EMTs, and paramedics.
- **R.C. 5502.30 –** provides immunity for acts carrying out, complying with, or attempting to comply with a federal, state, or local law, arrangement, or order relating to emergency management.

All of these existing statutes protect health care providers except when the harm results from willful and wanton misconduct. Thus, we believe that is the appropriate standard for health care providers called to duty during declared disasters and emergencies, and especially in pandemics, when there is a significant risk of liability due to the provision of care in an environment where many conditions are beyond the provider's control. In a pandemic, health care providers are dealing with shortages of supplies like test kits, personal protective equipment (PPE), and ventilators, managing with reduced staffing and staffing changes due to staff illness and outbreaks within facilities, and other factors inherent in a disaster or emergency. In such situations, health care providers are essentially "deputized" to respond to the public health crisis and should be granted the same level of protection as those individuals who provide care in the situations contemplated by the statutes noted above. Health care providers have stepped up in the face of an unprecedented pandemic and should be protected from an avalanche of lawsuits resulting from circumstances beyond their control.

In addition, we have submitted some technical language for consideration that we believe is necessary to ensure certain providers and entities are afforded the protection set forth in the bill and are not inadvertently left unprotected because of the uniqueness of their corporate structure or business relationships. We urge the inclusion of this language in the bill.

Finally, we also note that many states in the Midwest have taken similar actions to provide immunities to their health care providers. Kentucky, Indiana, Michigan, Illinois, and Pennsylvania (as well as numerous other states around the country) have provided liability protection, either by legislation or executive order, to health care providers during declared disasters and emergencies such as the current COVID-19 pandemic. We ask that Ohio's health care providers be similarly protected.

Regarding the business community generally, House Bill 606 also recognizes the importance of reopening Ohio's businesses and the business community's concerns with potential liability. Under this provision, a business will be granted immunity against claims of transmission of COVID-19 and the OACJ is supportive of this provision. Businesses should be protected during this uncertain time, because a business has no way of truly knowing if the disease is in in its building or on its products. As we are well aware, this pandemic is caused by an unseen enemy. Businesses should not be held liable for something they cannot see or control, even when they take the recommended steps to provide a safe environment.

The Ohio Alliance of Civil Justice appreciates the time and effort spent on this bill to provide qualified immunity to Ohio's businesses so that the process can begin to get Ohio's economy back on track. The OACJ would like to make four suggestions to improve House Bill 606 and deliver stronger protections for Ohio businesses.

1. Many businesses in Ohio changed their business operations to manufacture products they do not ordinarily make in order to assist in Ohio's recovery. As drafted, House Bill 606 only protects businesses whose products are intended to prevent transmission of COVID-19, as opposed to those whose products are used to care for and treat patients with COVID-19. The OACJ believes protection from liability based on negligence should be afforded to these businesses as well. For example, auto manufacturers have begun producing parts for

ventilators and/or ventilators. Ventilators are used to treat patients with COVID-19, not to stop the transmission of COVID-19. The same is true for some diagnostic tests and equipment. The OACJ believes those who are making products in response to the declared emergency or disaster to treat, diagnose, mitigate, or cure COVID-19 should also be protected under House Bill 606 – not just those who are making products to prevent its transmission.

2. The standard used in R.C. 3701.26 (A) provides immunity "unless it is established by * * * evidence that the infection was transmitted by reckless or intentional conduct or with willful or wanton misconduct on the part of the person against whom the action is brought." The OACJ suggest that this standard should be changed to delete "reckless or intentional conduct."

   First, "intentional conduct" is entirely too broad because just about anything that anyone does consciously (or while awake) can be considered intentional conduct. They may not intend to do harm, but they intend to act. The OACJ suggests that this term be deleted or changed to "intentional misconduct" (which is the term used in Senate Bill 308).

   Second, "reckless disregard" is not as strong a standard as wanton or willful misconduct and the OACJ suggests a stronger standard should be used in this unusual circumstance where new rules and guidance for businesses are changing frequently and sometimes even daily. Lawsuits brought today will be tried down the road and, with the benefit of hindsight, actions taken today may seem reckless two years from now. To truly protect businesses under the scenario of a pandemic, the OACJ believes a higher standard than reckless disregard should be used.

   Third, "reckless disregard" as defined in R.C. 3701. 26 (B) means "heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a transmission." This pandemic paints most situations as a hefty risk, and there is no guaranteed method to avoid such a risk. OACJ does not believe this reckless conduct standard provides adequate protections for businesses against a civil action for damages due to the transmission of COVID-19. Instead, OACJ believes intentional, wanton or willful misconduct should be the standard because it provides clarity of the state of mind required for an exception to immunity.

3. Throughout COVID-19, several guidelines and orders have been issued by the federal and state government. These guidance documents and orders have sometimes changed daily making it difficult for all to interpret and comply in a timely fashion. The continuous barrage of rules and guidelines creates a constantly moving target. Therefore, OACJ believes House Bill 606 should be amended to state that federal, state or local government orders or guidance should not be used to create a duty for businesses. These orders should also be presumed to not be admissible as evidence that a duty of care or substantive legal right has been established.

4. Finally, OACJ believes the term "transmission" is not broad enough to encompass many of the claims that may be brought in civil lawsuits and thus will not provide qualified

immunity from them. Therefore, OACJ proposes that the term "exposure" be used in addition to the term "transmission." "Exposure" encompasses those cases that a plaintiff may bring because coronavirus led them to experience emotional distress stemming from fear of contracting the disease, the expense of visiting a doctor or testing, or economic loss due to quarantine, but the term "transmission" does not. Businesses should be protected against such lawsuits. Because the term "transmission" narrowly tailors this immunity to only one kind of fact pattern, the OACJ suggests adding immunity for exposure claims as well.

With these four suggestions, OACJ believes House Bill 606 will provide certainty and protection for businesses and health care providers during this unprecedented time. Thank you for allowing the OACJ to provide testimony on House Bill 606. We urge the committee to support the bill with favorable consideration. I am happy to answer any questions.