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TESTIMONY SUBMITTED TO THE JUDICIARY COMMITTEE

On Behalf of LeadingAge Connecticut

MARCH 21, 2021

IN OPPOSITION TO RAISED BILL NO. 1029

AN ACT CONCERNING CAUSES OF ACTION AGAINST LICENSED NURSING HOME FACILITIES FOR FAILURE TO MEET STANDARDS OF CARE RELATED TO COVID-19

Thank you for this opportunity to provide written testimony in opposition to Raised Bill No. 1029. My name is Erika Amarante, and I am a partner at Wiggin and Dana, where I defend hospitals, physicians and other health care providers from claims of medical negligence. I also currently serve as President of the Connecticut Defense Lawyers Association. My testimony is submitted today on behalf of Wiggin and Dana's longstanding client LeadingAge Connecticut, and I incorporate by reference the comments that Leading Age Connecticut's President Mag Morelli has also submitted in opposition to this proposal.

Raised Bill No. 1029 is not in the best interests of your constituents, or the State of Connecticut. The Bill purports to create a civil cause of action against nursing homes for any "loss, damage, injury or death arising from exposure to or transmission of COVID-19 at a nursing home" due to the failure to comply with, or alleged negligence in complying with, any "standard of care" specified in guidance issued by the Department of Public Health (DPH) or the National Centers for Disease Control and Prevention (CDC). This cause of action is wholly unnecessary. A cause of action already exists, with a robust body of case law that describes the applicable legal theories, standards and requirements for a negligence cause of action against any health care provider, including a nursing home.

Governor Lamont recognized that there are existing causes of action that might be asserted against health care professionals and facilities, including nursing homes, related to COVID-19 when he issued Executive Orders 7U and 7V on April 5, 2020 and April 7, 2020 respectively. The Executive Orders recognized that COVID-19 presented an unprecedented public health emergency. Accordingly, the Governor provided limited immunity from suit to health care professionals or health care facilities (including nursing homes) for acts or omissions taken while providing health care services in support of the State's COVID-19 response. That limited immunity took effect on March 10, 2020 and lasted through March 1, 2021, when it expired pursuant to the terms of Executive Order 10A.

Going forward, there is no need to create a statutory cause of action against nursing homes specific to COVID-19, when a negligence cause of action already exists at common law. To the extent that Raised Bill No. 1029 is intended to apply retroactively and create a cause of action against

nursing homes for acts or omissions taken during the time that they had immunity from suit pursuant to the Executive Orders (March 10, 2020 to March 1, 2021), the Bill is even more problematic. The Bill does not mention the Executive Orders at all, or express an intent to overrule them. Generally, a statute does not apply retroactively when it "would impair vested rights and thus implicate considerations of good sense and justice." *State v. Nathaniel S.*, 323 Conn. 290. 298 n.4 (2016). At a minimum, legislation does not apply retroactively "absent a clearly expressed legislative intent." *Roberts v. Caton*, 224 Conn. 483, 488 (1993). Raised Bill No. 1029 does not express a clear intent to apply retroactively and create a cause of action based on acts or omissions that have already occurred. Nor should it; retroactive application would "implicate considerations of good sense and justice" for the many health care providers and facilities that were (and still are) on the forefront of an unprecedented public health emergency.

Assuming Raised Bill No. 1029 would apply prospectively only to acts or omissions that occur after the date of passage, it is likely to create confusion and needless litigation, with little added benefit to any potential plaintiffs who already have a clear path under the existing law to bring a negligence claim. As noted above, a cause of action for negligence against health care providers, including nursing homes, already exists. The Bill will create confusion because it contradicts existing statutes and caselaw, in several important respects:

- The Bill purports to define a "standard of care" as that which is specified in guidance issued by the DPH or CDC. However, existing caselaw and statutes define the "standard of care" for a given health care provider as "that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers." *See* Conn. Gen. Stat. 52-184c(a); *Grondin v. Curi*, 262 Conn. 637, 650 (2003). The standard of care is determined through expert testimony from similarly situated health care providers. *See, e.g.*, Conn. Gen. Stat. § 52-184c. It has never been driven by any one specific regulation or guideline. *See, e.g., Wendland v. Ridgefield Construction Services, Inc.*, 184 Conn. 173, 181 (1981) (OSHA regulations do not establish the standard of care and cannot be used as the grounds for a negligence *per se* claim). Although an alleged failure to comply with a statute or regulation may be admissible when determining the standard of care, it is not determinative of automatic liability. *Id*. Furthermore, as a practical matter, the applicable guidance from DPH and CDC changed rapidly during the COVID-19 pandemic and the agencies were not always in agreement with each other. Although the proposed bill does not mention it, the Centers for Medicare & Medicaid Services (CMS) also issued guidance for nursing homes regarding COVID-19, adding a third layer of potentially conflicting standards. These moving targets cannot realistically form the basis for any "standard of care."

- The Bill creates a disjunctive test for liability, either for (1) a failure to comply with DPH and CDC guidance, or (2) negligence in complying with such guidance. The first prong of this test appears to create a strict liability standard, with automatic liability to "any person" for "any loss" due to the failure to comply with guidance. This is highly unusual and unprecedented for a statutory cause of action. There are very few statutes that provide for strict liability in a civil cause of action. *See* OLR Research Report, 2009-R-0336 "Strict Liability" (Sept. 15, 2009) (listing five statutes that impose strict civil liability), found at

found at www.cga.ct.gov/2009/rpt/2009-R-0336.htm. At common law, strict liability was generally reserved for ultrahazardous activities such as blasting and explosives (*Whitman Hotel Corp. v. Elliott & Watrous Engineering Co.*, 137 Conn. 562 (1951), pile driving (*Caporale v. C.W. Blakeslee & Sons, Inc.*, 149 Conn. at 85); research experiments involving highly volatile chemicals (*Green v. Ensign-Bickford Co.*, 25 Conn. App. 479, 482-83 (1991); or the illegal display of fireworks (*Lipka v. DiLungo*, 2000 Conn. Supp. 3894, 26 Conn. L. Rptr. 654 (2000). Imposing strict liability on nursing homes for the failure to comply with changing and often conflicting "guidelines" in the face of an unprecedented pandemic would be highly unusual and unjust.

- The second prong of the liability test appears to create a negligence *per se* standard, with automatic liability for negligence in complying with DPH or CDC guidance. "The doctrine of negligence *per se* serves to superimpose a legislatively prescribed standard of care on the general standard of care." *Staudinger v. Barrett*, 208 Conn. 94, 101 (1988). It is generally reserved for ***legislation***, which has been vetted and subject to public comment through the legislative process. In Proposed Bill No. 1029, the negligence *per se* standard is not based on the violation of a statute, but instead hinges on compliance with unidentified "guidance" from DPH and CDC. As noted above, that guidance was new and changing over time as the pandemic progressed, and was not subject to the same vetting procedures as legislation. At many points in time, there were conflicts between and among the guidance from different agencies. In my experience, it would be highly unusual to impose a negligence *per se* standard for civil liability based on unidentified agency "guidance."

- The phrase "notwithstanding any provision of the general statutes" in subsection (b) of the Bill is vague and open to interpretation. There are many procedural statutes applicable to litigation, including statutes of limitation (*See, e.g.*, Conn. Gen. Stat. § 52-584) and pre-filling requirements for negligence claims against health care providers (*See, e.g.*, Conn. Gen. Stat. § 52-190a). Creating a new cause of action that is exempted from these well-established procedures will create confusion and inconsistency throughout the courts.

- Further, the workers' compensation regime is also a creation of statute (*see, e.g.*, Conn. Gen. Stat. § 31-275 *et seq.*), which is arguably overruled by Proposed Bill No. 1029. Creating a cause of action for "any person" notwithstanding any provision of the general statutes would allow employees to file a civil action against their nursing home employer relating to COVID-19 exposure, would likely result in a flood of new lawsuits that otherwise would be directed to the workers' compensation system. The Bill would expand the worker's compensation regime substantially by also permitting the *family members* of nursing home employees to sue for emotional distress based on their alleged exposure to or transmission of COVID-19 from the employee. This far exceeds the scope of existing workers' compensation law.

- The Bill is also inconsistent with existing standards for causation and damages in a personal injury case. It broadly permits "any person" to sue for "any loss" due to exposure to COVID-19, without any requirement of a nexus between the exposure and the alleged loss. The bill is ambiguous, at best, regarding whether the person bringing the lawsuit must

in fact be the person injured by the alleged negligent conduct. The proposal does not limit the potential cause of action to an injured person who contracted COVID-19 at a nursing home. Instead, by its terms, the Bill would seem to allow every relative of every nursing home patient, or every friend of the patient, to sue for his or her own emotional distress for a resident's exposure to COVID-19, whether contracted or not. Given the prevalence of COVID-19 in Connecticut communities since March 2020, many of these prospective plaintiffs likely had exposure at their own jobs, or the grocery store, or other locations; yet this Bill would permit them to recover damages based on a theoretical exposure from contact with a nursing home resident or employee. And now that CMS has required, through recent revised "guidance," that nursing homes "allow indoor visitation at all times and for all residents (regardless of vaccination status)," except for "a few circumstances" where there is a high risk of COVID-19 transmission, prospective plaintiffs could also include visitors claiming exposure while in the facility to visit a resident. CMS QSO-20-39-NH (Revised 3/10/2021) "Nursing Home Visitation – COVID-19."

Raised Bill No. 1029 creates more questions than it answers. It contradicts existing caselaw and statutes and threatens to release a floodgate of potential lawsuits from a wide variety of possible plaintiffs under new and relaxed standards for causation and damages. If this Bill passes, our state courts – which are already backlogged and trying to catch up from the absence of jury trials since March 2020 – will face a new predicament in responding to these lawsuits and deciphering the meaning of the Bill's vague and contradictory claims. All with little added benefit to potential plaintiffs, who already have the right to file a negligence cause of action that has clear and well-established standards under our law. There is simply no need to open the Pandora's Box presented by Raised Bill No. 1029.

For the foregoing reasons, LeadingAge Connecticut voices its strong opposition to Raised Bill No. 1029. Although I am unable to testify in person at the March 22, 2021 hearing on this Bill, I would be happy to answer any questions from the Committee. Thank you for your consideration of this testimony.

Respectfully submitted,

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