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No Shirt, No Shoes, No Mask, No Entry, and (hopefully) No Lawsuits under the Georgia COVID-19 Business Safety Act!

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I. INTRODUCTION

The COVID-19 Pandemic continues to send shockwaves throughout the United States and all other nations by impacting much more than just the way we live and go about our normal day. Today, in most states, it is considered a common norm to see someone wearing a mask, frequently using sanitizer, or even stocking up on an abnormal amount of household items like toilet paper. Globally, over a million lives have been lost, businesses have become bankrupt, and the economy initially fallen substantially due to the Pandemic. Prominent retailers such as Brooks Brothers, J. Crew, and JCPenney have all filed for bankruptcy and more retailers and businesses will likely follow.[1]

Our society is highly dependent on businesses staying open and remaining operational. Ironically, our dependence on these businesses is likely one of the major reasons that COVID-19 is spreading at such an alarming rate. Take our dependence on Amazon for example, our nation uses Amazon every day and this company delivers millions of packages each day. It has been estimated that just one Amazon driver delivers over 200 packages per day,[2] but what if this one Amazon driver had COVID-19 while delivering packages? This one Amazon driver could infect over a thousand people per week. Thankfully, businesses have increased safety precautions such as routine testing, checking employees' temperatures, and requiring employees to wear masks.

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[1] Jordan Valinsky, *Brooks Brothers files for bankruptcy*, CNN BUSINESS (July 8, 2009, 10:55 AM), https://www.cnn.com/2020/07/08/business/brooks-brothers-bankruptcy/index.html.

[2] Brittain Ladd, *Amazon Is Hell On Wheels For Delivery Drivers,* FORBES (Sep. 13, 2018, 12:11 PM), https://www.forbes.com/sites/brittainladd/2018/09/13/hell-on-wheels-what-its-like-to-be-a-delivery-driver-for-amazon/#3d8091ea219a.

However, due to the difficulty of actually detecting if one has COVID-19, there is no 100% guarantee that employees are free of COVID-19. This creates fear in all employers that they could be liable to customers for transmitting COVID-19 and ultimately be subject to an unbearable number of lawsuits.

In response to these concerns, states have begun to implement measures to reduce the number of lawsuits a business may face due to COVID-19 and to reduce the long-term effects of COVID-19 in order for our society to start moving in a positive direction. In Georgia, Governor Brian Kemp signed a new Act, the Georgia COVID-19 Business Safety Act, on August 5, 2020 and this law was put into effect immediately.[3] In essence, the Georgia COVID-19 Business Safety Act encourages businesses to continue operation without facing liability for possibly transmitting COVID-19, which, in return, should reduce the number of COVID-19 related lawsuits, benefit the economy, reduce unemployment, and decrease the likelihood of more businesses going bankrupt. While it is clear that the Act, on paper, has a substantial impact from a legal and economic view, is it even possible to sue for the transmission of a disease? Will this Act truly be effective in reducing the number of COVID-19 related cases? Will this Act benefit Georgia as a whole or are there other factors that such as increasing the likelihood of COVID-19 cases that give reason to avoid legislation such as this?

This Comment first analyzes an overview of the Georgia COVID-19 Business Safety Act. Part II analyzes prior Georgia case law relevant to COVID-19 related claims. Part III discusses the legislative history to the Georgia COVID-19 Business Safety Act's codification. Part IV outlines the Georgia COVID-19 Business Safety Act itself and discusses key components within the Act. Part V focuses on what other jurisdictions are implementing and how the Georgia COVID-19 Business Safety Act is similar and/or different. Part VI explores the prior rights that certain businesses already and the oft notion of discrimination claims related to COVID-19. Lastly, Part VII, is a discussion on what types of impacts the Georgia COVID-19 Business Safety Act will have, whether positive, negative, or both, and how the Act may be amended in the future to provide further protection.

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[3] Ga. S. Bill 359, Reg. Sess. (2020).

II. HISTORICAL CASE LAW IN GEORGIA REGARDING THE TRANSMISSION OF DISEASES AND OTHER INJURY TRANSMITTED THROUGH THE AIR PARTICLES

The idea of taking legal action against another party for contracting a "disease through air particles" is one that Georgia, at a state-level, has not yet specifically addressed. Many might wonder if a claim such as this even has enough merit to survive all the way to trial. To help understand the validity of filing a claim for the transmission of a disease through air particles or—a COVID-19 related claim—Georgia's historical case law outlines a strong argument that creates a presumption that one can take legal action against another party for contracting COVID-19.

A. Disease related Civil Actions in Georgia Case Law

Under Georgia law, it is possible to bring a valid legal claim based on contracting a disease. For example, in *Long v. Adams*,[4] the Georgia Court of Appeals held that, on its face, one who has contracted a sexually transmitted disease does have a valid claim.[5] Plaintiff Long claimed that Defendant Adams was negligently liable for infecting Long with herpes.[6] The trial court, however, granted summary judgment to Adams for Long's "fail[ure] to state a claim upon which relief could be granted."[7] On appeal, the court turned to case law relevant in other jurisdictions, citing *Duke v. Houston*,[8] a Washington Supreme Court case that stated, "[o]ne who negligently exposes another to an infectious or contagious disease, which such other person thereby contracts, can be held liable in damages for his actions."[9] Ultimately, the court recognized that Long did state a valid cause of action based on the theory of negligence.[10]

This case establishes the basis for a disease-related civil claims. However, a sexual transmitted disease, such as herpes, is not spread through airborne particles, but spread through physical contact. This distinction is important because COVID-19 is known for spreading primarily through airborne particles. Although, while no Georgia case law has addressed a specific disease that is spread through air particles, *Long* did not place a limit on disease-related claims that are

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[4] 175 Ga. App. 538, 333 S.E.2d 852 (1985).

[5] *Id.* at 541, 333 S.E.2d at 854.

[6] *Id.* at 539–540, 333 S.E.2d at 854.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 539, 333 S.E.2d at 854 (citing Duke v. Housen, 589 P.2d 334, 340 (1979)).

[10] *Long*, 175 Ga. App. at 540, 333 S.E.2d at 855.

only contracted through physical contact. The Washington Supreme Court's case that *Long* relied on was extremely broad. The word choice used in *Duke*, such as "exposed" and "infectious or contagious," places no limitation that would imply one can only have a disease-related claim through physical contact. In addition, Georgia case law has established valid civil claims related to injury by harmful air particles.

B. Civil Actions related to Air Particles under Georgia Case Law

In *Harper v. Barge Air Conditioning, Inc.*,[11] the Plaintiff had a valid cause of action against the Defendant for essentially transmitting harmful air particles that procured a need for medical treatment.[12] Defendant's employee serviced Plaintiff's air conditioning unit.[13] Later that same day, the Plaintiff passed out and was rushed to the hospital.[14] The Plaintiff's blood test showed high levels of carbon monoxide, and the fire department's testing within the building showed high levels of carbon monoxide as well.[15] The trial court granted Defendant's motion for a directed verdict and the Plaintiff appealed.[16] The court held that "this case would support a theory of res ipsa loquitur," which is a variation of negligence.[17] This theory leaves a permissible inference of negligence left to the jury to accept or reject.[18] Therefore, this case illustrates that a Plaintiff may have a valid claim for harmful air particles and this type of action is likely a question for the jury.[19]

Long established the validity of disease-related claims while not expressly limiting the scope of these disease-related claims to merely physical contract[20] and *Harper* showed the validity of civil claims from exposure to harmful air particles.[21] These cases, coupled together, demonstrate the validity of a claim for a COVID-19 related case. Especially while in the midst of a Pandemic, many of the Georgia Legislature likely realized the validity, or at least the plausibility, of a

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[11] 300 Ga. App. 901, 686 S.E.2d 668 (2009).

[12] *Id.* at 901, 686 S.E.2d at 669.

[13] *Id.*

[14] *Id.* at 903, 686 S.E.2d at 670.

[15] *Id.*

[16] *Id.* at 901–02, 686 S.E.2d at 669.

[17] *Id.* at 906–07, 686 S.E.2d at 672.

[18] *Id.* at 907, 686 S.E.2d at 673.

[19] *See Id.*

[20] *Long*, 175 Ga. App. at 540, 333 S.E.2d at 852.

[21] *Harper*, 300 Ga. App. at 901, 686 S.E.2d at 668.

COVID-19 related case and the likelihood of businesses being berated with these types of suits. Thus, the Georgia COVID-19 Business Safety Act was introduced to the Legislature in anticipation of deterring an alarming volume of COVID-19 related cases.

III. THE LEGISLATIVE HISTORY OF THE GEORGIA COVID-19 BUSINESS SAFETY ACT

In response to the rapid spread and impact of COVID-19, it had become apparent to the Georgia Legislature that businesses were at a substantial risk of facing vast amounts of lawsuits related to COVID-19 and required certain protection in order to continue any level of operation. The origin of the Georgia COVID-19 Business Safety Act, prior to codification, is found in Senate Bill 359.[22] Senators Chuck Hufstetler, Blake Tillery, Brian Strickland, John Albers, Kay Kirkpatrick, and Ben Watson all, collectively, sponsored Senate Bill 359.[23] For Georgia's House of Representatives, Senate Bill 359 was sponsored by Trey Kelley.[24]

Shortly thereafter on June 26, 2020, Senate Bill 359 was passed by both the Georgia Senate and the Georgia House of Representatives during the last minutes of the 2020 legislative session.[25] The Georgia Senate voted 34 to 16 in favor of passage and the Georgia House of Representatives voted 104 to 56 in favor of passage.[26] Then, Senate Bill 359 was sent to the Georgia Governor's office to await the Governor's signature, thus enacted it into law.

On August 5, 2020, Governor Brian Kemp signed Senate Bill 359, thereby creating and enacting the Georgia COVID-19 Business Safety Act.[27] Not only did Governor Kemp sign the Georgia COVID-19 Business Safety Act, but Governor Kemp made the effective date or enforceability of the Georgia COVID-19 Business Safety Act on the very same day, August 5, 2020.[28] This demonstrates the level of significance both Governor Kemp and the Georgia General Assembly placed on the Georgia COVID-19 Business Safety Act, the immense concern they shared for businesses operating during the pandemic, and the growing

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[22] Ga. S. Bill 359, Reg. Sess. (2020).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

need to offer some type of protective relief for businesses from liability.[29]

IV. AN OVERVIEW AND DISCUSSION ON THE APPLICATION OF THE GEORGIA COVID-19 BUSINESS SAFETY ACT

A The Immunity

The Act was amended and codified in Title 51 of the Official Code of Georgia Annotated.[30] The first protection is found in O.C.G.A. § 51-16-2(a)[31], which states, "[n]o healthcare facility, healthcare provider, entity, or individual, shall be held liable for damages in an action involving a COVID-19 liability claim . . . unless the claimant proves that the actions . . . showed: gross negligence, willful and wanton misconduct, . . . or intentional infliction of harm."[32]

While the Act is generally referred to as an immunity, this is not an absolute immunity for any COVID-19 related cases. The Act does not bar or prevent any claimants from bringing an action against a business that may have transmitted COVID-19 to the claimant. Instead, this Act raises the burden on the claimant by requiring them to prove "gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm," instead of requiring the claimant to prove ordinary negligence.[33] This immunity does not eradicate the filing of lawsuits against businesses, but the Act does afford a sense of security to businesses that it is doubtful any claimants will have a favorable outcome. The immunity should be stated as a form of limited immunity because the Act is specifically tailored—barring claimants from suit for COVID-19 related claims under the theory of ordinary negligence—not to function as an outright prohibition against claimants from filing a COVID-19 related claim.

B. Who may be protected under Georgia COVID-19 Business Safety Act

In terms of who may be protected under the Act, this act applies broadly. Notably, "entity" is defined as:

> any association, institution, corporation, company, trust, limited liability company, partnership, religious or educational organization,

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[29] *See id.*

[30] *See* O.C.G.A. § 51-16-1–5 (2020).

[31] O.C.G.A. § 51-16-2(a).

[32] *Id.*

[33] *Id.*

> political subdivision, county, municipality, other governmental office or governmental body, department, division, bureau, volunteer organization; including trustees, partners, limited partners, managers, officers, directors, employees, contractors, independent contractors, vendors, officials, and agents thereof, as well as any other organization other than a healthcare facility.[34]

While the name of the Act, the Georgia COVID-19 Business Safety Act, may be misleading, this Act further applies to schools, churches, and other entities that may not necessarily be perceived as a business.[35] The Act was likely named the Georgia COVID-19 Business Safety Act because businesses, in general, are primarily the most susceptible to a COVID-19 related claim.

In spite of offering a broad definition of entities, the Act includes "individual," but fails to define "individual."[36] By incorporating an individual into the Act, it appears this protection should or, at least, may be applicable to everyone, not just businesses or entities. Perhaps it was the Georgia General Assembly's intent for the Georgia COVID-19 Business Safety Act to be applicable to everyone. Yet, it is possible the legislature meant "individual" to apply only to specific employers and employees within these businesses or entities.

For example, by interpreting the Georgia COVID-19 Business Safety Act, as is, it seems that if Party A were to have Party B over to their house and Party B contracted COVID-19 on Party A's property, Party A would be encompassed within the Georgia COVID-19 Business Safety Act. Then, if Party B were to file a COVID-19 related case, the standard would not be ordinary negligence. Instead of ordinary negligence, Party B would need to prove there was "gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm."[37] Thus, without knowing the true intent of the Georgia General Assembly on who an "individual" is, this could likely be a topic litigated in the future.

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[34] O.C.G.A. § 51-16-1(4).

[35] *Id.*

[36] *See* O.C.G.A. § 51-16-1.

[37] O.C.G.A. § 51-16-2(a).

C. The Presumption of Assumption of the Risk and how businesses may apply the Presumption of Assumption of the Risk[38]

1. Receipts, Tickets, Wristbands using Disclaimers

Next, in O.C.G.A. § 51-16-3,[39] the Act creates a presumption of assumption of the risk defense for contracting COVID-19 when entering the premise of a building by encouraging businesses to post warning signs and add disclaimers to receipts, tickets, or wristbands.[40]

> Except for gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm, in an action involving a COVID-19 liability claim against an individual or entity for transmission, infection, exposure, or potential exposure of COVID-19 to a claimant on the premises of such individual or entity, there shall be a rebuttable presumption of assumption of the risk by the claimant when: (1) Any receipt or proof of purchase for entry, including but not limited to an electronic or paper ticket or wristband, issued to a claimant by the individual or entity for entry or attendance, includes a statement in at least ten-point Arial font placed apart from any other text . . . .[41]

The disclaimers within these receipts, tickets, and wristbands must encompass a warning that reads:

> 'Any person entering the premises waives all civil liability against this premises owner and operator for any injuries caused by the inherent risk associated with contracting COVID-19 at public gatherings, except for gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm, by the individual or entity of the premises.'[42]

Typically, tickets and wrist bands are heavily geared towards larger events such as concert, plays, or even movies. With the alarming rate at which COVID-19 spreads, these major events generally have sizeable quantities of people, which actually increase the chances of one contracting COVID-19 due to the exposure of more people. While the Act, as a whole, is needed for society to move forward and the economy

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[38] *See* O.C.G.A. § 51-16-3. The section is reciprocal to O.C.G.A. § 51-16-4 but O.C.G.A. § 51-16-4 applies to healthcare facilities and providers.

[39] O.C.G.A. § 51-16-3.

[40] *Id.*

[41] O.C.G.A. § 51-16-3(a)(1).

[42] *Id.*

to fully bounce back, this presumption of assumption of risk exception could be encouraging a step in the wrong direction.

2. Posting Warning Signs

The presumption of assumption of risk exception also provides that, "[a]n individual or entity of the premises has [the option to] post[] at a point of entry, if present, to the premises, a sign in at least one-inch Arial font placed apart from any other text, a written warning[.]"[43]

The warning should state the following:

> 'Warning
>
> Under Georgia law, there is no liability for an injury or death of an individual entering these premises if such injury or death results from the inherent risks of contracting COVID-19. You are assuming this risk by entering these premises.'[44]

Drawing significance to the phraseology used in O.C.G.A. § 51-16-3 for the warning sign, it is important to note the word choice: "at a point of entry."[45] The Georgia General Assembly could have used a phrasing like the "main point of entry" or "all points of entry," however the language used has strong significance for businesses. This phrasing, "at a point of entry,"[46] does not require a business to post the warning sign on every entrance to the premises, it suggests that the business only needs to post the warning sign at one entrance. This entrance does not even need to be a popular or frequently used entrance. Lastly, another reasoning for allowing businesses to have great discretion in where to post the warning sign could be the overall effect the warning sign may have to a lay person[47] reading it.

On August 12, 2020, just a week after the law went into effect, the 11 Alive News covered a story about a teacher who encountered this warning sign at their school.[48] Essentially, seeing and reading this warning sign made them worrisome or fearful about attending the

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[43] O.C.G.A. § 51-16-3(a)(2).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] For the purpose of this Comment, a "lay person" means a person who is without specialized knowledge in the law.

[48] Kaitlyn Ross, *VERIFY: Posting a COVID-19 warning sign limits liability for businesses, schools in Georgia*, 11 ALIVE (Aug. 12, 2020, 8:36 PM), https://www.11alive.com/article/news/verify/verify-covid-warning-signs/85-1185b5e5-2b41-4a84-af50-510479e8feff.

school and how this warning sign almost contradicts all the safety measures implemented within schools.[49] In light of a lay person's view on the warning sign, the legislature likely chose this exact phrasing of "at a point of entry," instead of requiring the warning sign on every entrance, so it is possible for the normal customer or person to enter the premises without actually seeing the sign.[50] Thus, allowing businesses to comply with the Act and avoid scaring potential customers or people who are entering the premises.

3. How do these technicalities apply within the Georgia COVID-19 Business Safety Act?

Another key highlight in O.C.G.A. § 51-16-3, are that the statements must be made in "at least ten-point Arial font" for receipts, tickets, and wristbands or "at least one-inch Arial font" for a warning sign.[51] Theoretically, if a business uses Times New Roman font or the business does not meet the minimum standard for the font size, will they be liable under the normal standard of care instead of the heightened standard of "gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm[?]"[52]

Obviously, this is not the true intent of the Georgia General Assembly to go to the trouble of giving businesses a liability protection, but then stripping this protection based off of a mere technicality such as not having the correct type of font or font size. According to O.C.G.A. § 5116-3(b),[53]

> [t]he provisions in this Code section shall not . . . limit or restrict the immunities from liability provided in [O.C.G.A.] 51-16-2; further failure to participate as provided in subsection (a) of this Code section shall in no way limit or restrict the immunities from liability provided in [O.C.G.A.] 51-16-2 nor shall such failure to participate be admissible.[54]

Essentially, even if businesses do not use these disclaimers or warning signs, the businesses are still protected to the extent of the limited immunity afforded in O.C.G.A. § 51-16-2.

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[49] *Id.*

[50] O.C.G.A. § 51-16-3(a)(2).

[51] O.C.G.A. § 51-16-3(a)(1)–(2).

[52] O.C.G.A. § 51-16-3(a)(1).

[53] O.C.G.A. § 51-16-3(b).

[54] *Id.*

When looking at O.C.G.A. § 51-16-3(b) (the presumption of assumption of risk), at first glance, the presumption of assumption of risk seems to hold little weight when coupled with O.C.G.A. § 51-16-2 (the limited immunity). However this is not true, because both O.C.G.A. § 51-16-2 and O.C.G.A. § 51-16-3 add two different components of protection for businesses.[55] The limited immunity is raising the claimant's burden to a much higher standard to prove their COVID-19 related case.[56] The presumption of assumption of risk creates an added defensive argument for the businesses if litigation were to ensue.[57] A business does not need to post a warning sign or provide notice to their customers in order for O.C.G.A. § 51-16-2's liability protection to apply. If a business fails to post a warning sign or provide notice to their customers, the business is simply giving up or waiving the presumption of assumption of risk defense as an added defense.

D. Exceptions to the Georgia COVID-19 Business Safety Act and why the Georgia legislature likely chose these exceptions.

Even though this Act extends strong protection to businesses, there are limits to how far the immunity and presumption of assumption of risk defense are available to protect the business. Pursuant to O.C.G.A. § 51-16-5,

> This chapter shall not modify or supersede the terms or application of:
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> (1) Title 16, relating to crimes and offenses;
>
> (2) Title 31, relating to health or any state regulations related thereto;
>
> (3) Chapter 9 of Title 34, relating to workers' compensation; and
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> (4) Chapter 3 of Title 38, relating to emergency management.[58]

Excluding "(1) Title 16, relating to crimes and offenses; [and] (2) Title 31, relating to health or any state regulations related thereto" from the protections provided in the Act may seem common knowledge to most.[59]

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[55] *Compare* O.C.G.A. § 51-16-2 *with* O.C.G.A. § 51-16-3.

[56] *See* O.C.G.A. § 51-16-2.

[57] *See* O.C.G.A. § 51-16-3.

[58] O.C.G.A. § 51-16-5.

[59] *Id.*

However, declining to extend the Act to workers' compensation related claims is highly important for businesses and for Georgians as a whole during the COVID-19 pandemic because, in theory, this will likely reduce the spread of COVID-19.

Generally, workers' compensation is well known as a form of insurance that covers lost wages and/or medical bills for employees that are injured in the scope of their employment. In a sense, this Act does not apply to employees, meaning they could potentially seek relief under ordinary negligence as opposed to the higher burden established by the Act.

The legislature likely chose workers' compensation as a specific exclusion because this will ultimately encourage and almost require businesses to abide by the multitude of COVID-19 related safety regulations. The employer has gained a sense of security to run their business knowing that customers will have a higher burden to meet if they were to file suit, but the employer must also realize that their employees are not subject to the Act's higher burden and may have a claim under ordinary negligence. By excluding workers' compensation, the employer will require their employees to practice these COVID-19 related safety regulations, such as wearing a mask, gloves, sanitizing or cleaning areas, and social distancing. In return, this adds a benefit to both the employees the customers of Georgia because these businesses are still highly encouraged to operate under safe conditions.

V. WHAT ARE OUR NEIGHBOR STATES DOING AND HOW DOES THE GEORGIA COVID-19 BUSINESS SAFETY ACT COMPARE?

A. Alabama

Due to the impact of COVID-19, the Governor of Alabama, Kay Ivey, issued a Proclamation on March 13, 2020 that declared Alabama in a state of emergency.[60] The Proclamation first addresses the issue of COVID-19 related cases and the fear of these cases overwhelming the health care facilities. To prevent these cases from flooding courts, the proclamation changed the normal standard of care to the "alternative standards of care" for COVID-19 related claims on health care professionals and facilities by deeming them as emergency management

[60] *Eighth Supplemental State of Emergency: Coronavirus (COVID-19)*, STATE OF ALABAMA, (May 8, 2020), https://governor.alabama.gov/newsroom/2020/05/eighth-supplemental-state-of-emergency-coronavirus-covid-19/. Under the Alabama Emergency Management Act of 1955, the Governor is authorized to declare a state of emergency.

workers.[61] These alternative standards of care are outlined in Ala. Code § 31-9-16,[62] and replace the ordinary standard of care.

Pursuant to Ala. Code § 31-9-16, "[e]xcept in cases of willful misconduct, gross negligence, or bad faith, [no] emergency management worker . . . attempting to comply with this article or any order, rule, or regulation . . . shall be liable for the death of or injury to persons . . . ."[63] In addition, "[t]he provisions of this section shall not affect the right of any person to receive benefits . . . under the Workers' Compensation Law."[64] Essentially, like Georgia, Alabama has raised the standard of care from ordinary negligence to a higher degree such as gross negligence, but only for health care facilities and professionals, not for businesses. Alabama also has a similar exception for workers' compensation, even though this exception was already codified prior to COVID-19; this should result in a safer work environment for the employees and the entire state, as discussed prior.

On May 8, 2020, Governor Ivey issued a new proclamation.[65] This proclamation furthered the liability protection to health care providers and extended liability protection to businesses.[66]

> A business, health care provider, or other covered entity shall not be liable for the death or injury to persons or for damage to property in any way arising from any act or omission related to, or in connection with, COVID-19 transmission or a covered COVID-19 response activity, unless a claimant shows by clear and convincing evidence that the claimant's alleged death, injury, or damage was caused by the business, health care provider, or other covered entity's wanton reckless, willful, or intentional misconduct.[67]

In addition, the proclamation further extended a limitation on damages. Even if a party proves liability, the business or health care provider is limited to only paying actual economic compensatory damages, unless the COVID-19 related case resulted in serious physical

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[61] *Id.*

[62] ALA. CODE § 31-9-16 (2020).

[63] ALA. CODE § 31-9-16(b).

[64] *Id.*

[65] *Eighth Supplemental State of Emergency: Coronavirus (COVID-19)*, STATE OF ALABAMA, (May 8, 2020), https://governor.alabama.gov/newsroom/2020/05/eighth-supplemental-state-of-emergency-coronavirus-covid-19/.

[66] *See id.*

[67] *Id.*

injury or death.[68] In addition, a wrongful death claim due to COVID-19 "is only entitled to an award of punitive damages."[69]

Alabama has extended a very similar liability protection much like Georgia, but Alabama's proclamation gives greater liability protection to businesses and health care providers than Georgia's COVID-19 Business Safety Act. Alabama's liability protection is greater than Georgia because Alabama has raised the burden of proof for COVID-19 related cases and limited the damages recoverable.

The burden of proof is heightened through Alabama's proclamation that specifies the burden is clear and convincing evidence.[70] "Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."[71] Generally, civil trials are based on preponderance of the evidence, which means the claimant needs to show just enough evidence to make their claim more likely than not. However, Alabama has now raised the burden of proof significantly past preponderance of the evidence.

In contrast, the Georgia COVID-19 Business Safety Act makes no mention of raising the burden of proof for COVID-19 related civil cases. Therefore, while claimants from both Georgia and Alabama must prove their COVID-19 related case was caused by a business or health care provider's willful and/or wanton misconduct, Alabama's claimant must meet the burden of clear and convincing evidence while Georgia's claimant must meet the burden of preponderance of the evidence. In return, this heightened burden will deter Alabama claimants from filing suit and decrease the influx of COVID-19 related cases.

In addition, Alabama's Act limits the amount a claimant may recover from a COVID-19 related case.[72] This is also an exceptional avenue to not only protect the businesses and health care providers, but to reduce the amount of COVID-19 related cases filed. When money is taken out of the equation, this naturally decreases the incentive to pursue a claim, both from the claimant's perspective and from the lawyer's perspective. Georgia, however, has declined to extend further protection in the form of limiting damages.

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] ALA. CODE § 6-11-20 (2020).

[72] *Eighth Supplemental State of Emergency: Coronavirus (COVID-19)*, STATE OF ALABAMA, (May 8, 2020), https://governor.alabama.gov/newsroom/2020/05/eighth-supplemental-state-of-emergency-coronavirus-covid-19/.

B. North Carolina

On May 4, 2020, the Governor of North Carolina, Roy Cooper, signed Senate Bill 704.[73] This bill created N.C. Gen. Stat. § 66-470[74] by amending Chapter 66 of the North Carolina General Statutes. Pursuant to N.C. Gen. Stat. § 66-470, only certain entities have been given immunity from civil actions.[75]

> An essential business that provides goods or services in this State with respect to claims from any customer or employee for any injuries or death alleged to have been caused as a result of the customer or employee contracting COVID-19 while doing business with or while employed by the essential business.[76]

This immunity extends to emergency response entities as well.[77] However, "the immunity . . . shall not apply if the injuries or death were caused by an act or omission of the essential business or emergency response entity constituting gross negligence, reckless misconduct, or intentional infliction of harm."[78]

North Carolina has initially given this immunity to only essential businesses. This protection is drastically limited when compared to the Georgia COVID-19 Business Safety Act since the Georgia COVID-19 Business Safety Act defines "entity" broadly. Businesses such as restaurants, bars, and clothing stores were not protected by North Carolina's initial limited immunity. Similarly, North Carolina, Alabama, and Georgia have all demonstrated the same pattern of heightening the standard for COVID-19 related cases from ordinary negligence to a level of gross negligence or reckless, willful, and/or wanton misconduct.[79]

On July 2, 2020, Governor Cooper signed House Bill 118 to expand the immunity provided from Senate Bill 704.[80] House Bill 118 will soon amend Chapter 99E of the North Carolina General States by adding

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[73] N.C. S. Bill 704, Reg. Sess. (2020).

[74] N.C. GEN. STAT. § 66-470 (2020).

[75] *Id.*

[76] *Id.*

[77] N.C. GEN. STAT. § 66-470 (a)(2). "An emergency response entity with respect to claims from any customer, user, or consumer for any injuries or death alleged to have been caused as a result of the COVID-19 pandemic or while doing business with the emergency response entity."

[78] N.C. GEN. STAT. § 66-470 (b).

[79] *See supra* notes 31, 62, 73.

[80] N.C. S. Bill 704, Reg. Sess. (2020).

N.C. Gen Stat. § 99E-70 through 72.[81] Pursuant to N.C. Gen. Stat. § 99E-71,[82] "[i]n any claim for relief arising from any act or omission alleged to have resulted in the contraction of COVID-19 . . . no person shall be liable for any act or omission that does not amount to gross negligence, willful or wanton conduct, or intentional wrongdoing."[83] A person is defined broadly by encompassing individuals and generally all types of businesses.[84] In addition, this limited immunity does not apply to the Worker's Compensation Act.[85]

Now, North Carolina's liability protection is equivalent to the liability protection offered in the Georgia COVID-19 Business Safety Act. Aside from Georgia's presumption of assumption of risk defense, both states have raised the standard to that of gross negligence instead of ordinary negligence. However, North Carolina has clearly identified that any ordinary person, not just a business, is protected under this new immunity. The Georgia COVID-19 Business Safety Act was silent on defining "individual" and on whether or not the ordinary person is entitled to the liability protection afforded in the Act.

C. Tennessee

Tennessee's COVID-19 Recovery Act originated from Senate Bill 8002.[86] On August 12, 2020, the Tennessee General Assembly passed the COVID-19 Recovery Act, in which the Tennessee Senate's vote resulted in 27 to 4 and the Tennessee House's vote resulted in 80 to 10. Once signed by Governor Bill Lee on August 17, 2020, Tennessee's COVID-19 Recovery Act became effective immediately providing much of the same protections afforded by the surrounding states, although Tennessee does have some distinct differences as opposed to other states.

Under Tennessee's COVID-19 Recovery Act, the protection provided applies broadly, defining "Person" as, "an individual, healthcare provider, sole proprietorship, corporation, limited liability company . . . ."[87] Here, Tennessee uses the same approach as North Carolina in defining who is protected. Again, this is a much safer

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[81] N.C. GEN. STAT. § 99E-70, 71, 72 (2020).

[82] N.C. GEN. STAT. § 99E-71(a) (2020).

[83] *Id.*

[84] N.C. GEN. STAT. § 99E-70 (2020).

[85] N.C. GEN. STAT. § 99E-71(c) (2020).

[86] *Tennessee COVID-19 Recovery Act*, TENNESSEE GENERAL ASSEMBLY, (Aug. 20, 2020), http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB8002&GA=111.

[87] TENN. CODE ANN. § 29-34-802(a)(4) (2020).

approach compared to Georgia's silence on who a person or individual is and whether or not the Georgia COVID-19 Business Safety Act will apply everyone or not.

Tennessee's COVID-19 Recovery Act first states, "there is no claim against any person for loss, damage, injury, or death arising from COVID-19, unless the claimant proves by clear and convincing evidence that the person proximately caused the loss, damage, injury, or death by an act or omission constituting gross negligence or willful misconduct."[88] This protection is identical to Alabama's approach by raising the burden of proof to that of clear and convincing evidence, while the COVID-19 Business Safety Act still retains the burden of proof by preponderance of the evidence. In uniformity with all other States listed above, Tennessee's COVID-19 Recovery Act raises the standard of ordinary negligence to that of gross negligence and/or willful misconduct.

In contrast, Tennessee's COVID-19 Recovery Act has enabled a different form of protection compared to Georgia's presumption of assumption of risk defense and Alabama's damages limitation. This protection is focused on how a claimant must bring forth a COVID-19 related case, specifically how the claimant must file a complaint.

> [T]he claimant must also file with the verified complaint pleading specific facts with particularity . . . a certificate of good faith stating that the claimant or claimant's counsel has consulted with a physician duly licensed to practice in the state or a contiguous bordering state, and the physician has provided a signed written statement that the physician is competent to express an opinion on exposure to or contraction of COVID-19 and, upon information and belief, believes that the alleged loss, damage, injury, or death was caused by an act or omission of the defendant or defendants.[89]

Thus, Tennessee has raised the overall difficulty of the actual filing of complaint to reduce the volume of COVID-19 related cases.

First, the complaint must be that of a verified complaint, meaning the claimant must procure an affidavit, under oath, stating that this claim is valid. By procuring an affidavit under oath, the claimant's verified complaint gives rise to possible liability against the claimant. If the claimant's verified complaint is found to be frivolous or inconsistent between documents produced later, such as an amended verified the

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[88] TENN. CODE ANN. § 29-34-802(b) (2020).

[89] TENN. CODE ANN. § 29-34-802(c)(1)–(2) (2020).

complaint, then the claimant may face sanctions in the form of attorney's fees and discretionary costs.[90]

Second, the complaint must also procure "a certificate of good faith stating that the claimant or claimant's counsel has consulted with a physician[.]"[91] This provision continues to raise the difficulty of filing a COVID-19 related case and increases the liability a claimant may face. The difficulty stems from having and finding a physician who is willing to sign a written statement stating they believe the claimant contracted COVID-19 from the "act or omission of the defendant or defendants."[92] From the contagiousness of COVID-19, the likelihood of a physician producing such a statement is slim to none.

In sum and keeping in mind the overall goal of these types of acts is to deter the initial filing of COVID-19 related case, Tennessee has produced the utmost protection for businesses compared to Georgia, Alabama, and North Carolina. Tennessee's approach of raising the difficulty in the original filing a complaint, requiring a verified complaint and certificate of good faith for COVID-19 related case, is arguably the most effective way to avoid flooding the court system. In theory, this provision is geared towards deterring the claimant's counsel, rather than the actual claimant themselves because the verified complaint and certificate of good faith impose a greater liability on the claimant's counsel as well as the claimant. Surprisingly, Georgia and the other states have omitted implementing a provision like Tennessee.

D. Florida

With Florida having some of the highest rates of COVID-19 cases in the country, strangely enough, Florida has yet to provide any type of protection for businesses for COVID-19 related cases. As businesses have started to fully reopen, many have concerns with the threat of being sued.[93] Interestingly enough, one of the requests for liability protection is to provide an absolute immunity for essential businesses and that these essential businesses should be exempt from any and all COVID-19 related cases. However, this absolute immunity will likely

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[90] Estate of Elrod v. Petty, 2016 Tenn. App. LEXIS 424 (2016).

[91] TENN. CODE ANN. § 29-34-802(c)(2) (2020). c

[92] *Id.*

[93] Renzo Downey, *Florida businesses ask for COVID-19 liability protections including exempting essential businesses*, FLAPOL (Sep. 30, 2020), https://floridapolitics.com/archives/370810-florida-businesses-ask-for-covid-19-liability-protections-including-exempting-essential-businesses.

not occur because this will decrease the level of safety at which an essential business operates and increase the spread of COVID-19. For acts of this nature to be effective, there must be a balance between the protection given to businesses and the protection to citizens as a whole for decreasing the spread of COVID-19. If Florida does draft some form of protection, they may turn to Georgia and the other states for guidance and ideas to effectuate this type of balance between their businesses and citizens.

VI. RIGHTS BUSINESSES HAD PRIOR TO THE GEORGIA COVID-19 BUSINESS SAFETY ACT AND OTHER LIABILITY BUSINESSES MAY FACE

Businesses, especially private businesses, have a right to deny access and/or entry into the business for a multitude of reasons. Generally, consumers are not heavily protected under discrimination laws, so businesses face little liability when denying a consumer entry or a service. As the Georgia COVID-19 Business Safety Act does preserve the growing need for businesses to continue to practice certain COVID-19 safety provisions. However, there is a frivolous notion that businesses may face liability through practicing these COVID-19 safety provisions.

Currently, many businesses have implemented a requirement to wear a mask if a consumer enters the premises of the business. Many citizens have contested this requirement and refuse to comply with wearing a mask. However, these businesses have a right to refuse service or entry for not wearing a mask. This is the same concept as the well-known sign, "No Shoes, No Shirt, No Service" or the same concept as a restaurant having a dress code.

The only incident that could create the basis for a discrimination claim would be if a business enforced the mask policy on a certain race or any others protected under discrimination laws, but then declined to enforce the mask mandate on another.

VII. THE IMPACT OF THE GEORGIA COVID-19 BUSINESS SAFETY ACT

A. Will the Georgia COVID-19 Business Safety Act reduce the number of COVID-19 related lawsuits?

Yes, the Georgia COVID-19 Business Safety Act will reduce the number of COVID-19 related lawsuits for a multitude of reasons.

First, a lay person will be much less inclined to even think about filing suit because of the presence and enactment of the Georgia COVID-19 Business Safety Act and, more specifically, through the

warning signs and notices that businesses will provide to their customers. Normally, individuals are not constantly paying attention to new laws set in place, but the Georgia Legislature's use of these warning signs and other notices will educate the public substantially. However, the education a lay person will perceive is simply that a business is not liable if a customer contracts COVID-19. These businesses will likely not mention anything about still having a right to sue and the heightened standard of gross negligence.

Second, the heightened standard of gross negligence will likely deter lawyers from taking these cases on. Gross negligence is "defined as equivalent to the failure to exercise even a slight degree of care or lack of the diligence that even careless men are accustomed to exercise."[94] This standard is substantially more difficult to prove than ordinary negligence, so even if an individual seeks out a lawyer, the lawyer will likely decline to pursue any type of relief.

B. Can the Georgia General Assembly improve the Georgia COVID-19 Business Safety Act through Amendments?

1. Possible Amendments from Alabama

The Georgia legislature can and may need to improve the Georgia COVID-19 Business Safety Act if this Act does not significantly decrease the number of COVID-19 related claims. For example, Alabama's liability protection is much greater than that of Georgia. The Georgia legislature may need to use some of the same liability protections Alabama has given such as the limitation on damages or raising the burden of proof to clear and convincing evidence, instead of preponderance of evidence.[95] These two extra liability protections would likely deter even the most persistent lawyer from taking these types of cases on.

2. Possible Amendments from North Carolina

In addition, the Georgia COVID-19 Business Safety Act has failed to identify who is considered an "individual."[96] The Georgia Legislature may need to identify this in order to decrease future COVID-19 related cases because it is arguably uncertain if the Act extends this liability

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[94] Wolfe v. Carter, 314 Ga. App. 854, 859, 726 S.E. 2d 122, 126 (2012).

[95] *See Eighth Supplemental State of Emergency: Coronavirus (COVID-19)*, STATE OF ALABAMA, (May 8, 2020), https://governor.alabama.gov/newsroom/2020/05/eighth-supplemental-state-of-emergency-coronavirus-covid-19/.

[96] *See* O.C.G.A. § 51-16-1.

protection to the ordinary person. To do this, the Georgia Legislature may turn to North Carolina because North Carolina clearly outlined that any person is entitled to this immunity.[97]

3. Possible Amendments from Tennessee

Lastly, the Georgia Legislature may turn towards Tennessee's COVID-19 Recovery Act. The addition of raising the pleadings of a complaint by incorporating and requiring a verified complaint and a certificate of good faith is a protection none of the other surrounding states have pursued. This should have the greatest impact on deterring COVID-19 related cases because of the "bite" placed on the claimant and claimant's counsel of possibly facing sanctions.

C. Economic Impact

Around February 18, 2020 and prior to the COVID-19 Pandemic, the S&P 500 at around 3,380 and the Dow Jones at around 29,300, were both reaching all-time highs within the stock market.[98] In just a one-month time frame, around mid-March, the S&P 500 fell over a 30% to around 2,300, and the Dow Jones fell over 35% to around 18,000. This was the biggest crash in the stock market since the housing crisis back in 2008. While this crash did not reach the magnitude of the 2008 stock market crash, this crash did happen within a very rapid timeframe.

In spite of the quarantine, the impact of the Pandemic put a halt on businesses operating or at least operating at full capacity. As a result, businesses were forced to cut employees and it has been estimated that over 20 million jobs have been lost since mid-March because the COVID-19 Pandemic.[99]

Throughout this turmoil, President Trump even issued stimulus checks over the summer to provide some relief to individuals and assure that they can afford groceries, bills, and/or rent. These stimulus checks likely had an ulterior motive than just to provide relief to individuals. From the stimulus checks, individuals were much more willing to go out

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[97] *See* N.C. GEN. STAT. § 99E-70.

[98] *Dow Jones Industrial Average*, YAHOOFINANCE (Jan. 12, 2021, 5:06 PM), https://finance.yahoo.com/quote/%5EDJI?p=^DJI; ; *S&P 500*, YAHOOFINANCE (Jan. 12, 2021, 5:06 PM),, https://finance.yahoo.com/quote/%5EGSPC?p=^GSPC (last visited Oct. 15, 2020).

[99] Stephanie Soucheray, *US job losses due to COVID-19 highest since Great Depression*, CIDRAP (May 8, 2020), https://www.cidrap.umn.edu/news-perspective/2020/05/us-job-losses-due-covid-19-highest-great-depression.

and spend all or part of this stimulus check to businesses, thus stabilizing and increasing the stock market and economy.

For many of Georgia's business, the operational level was less than full capacity. Some businesses like bars and movie theaters closed down entirely, many restaurants only did takeout orders, and many other businesses started operating through online communications. The Georgia COVID-19 Business Safety Act allows businesses to operate as they did prior to the COVID-19 Pandemic, which is one of the initial steppingstones to drive the economy and the stock market back up. However, the Georgia COVID-19 Business Safety Act is just one state. For the United States to see significant results, many other states will need to pass Acts that are similar to Georgia. Therefore, the economic impact for the United States is relatively difficult to gauge, but the economic impact for Georgia is significant.

D. How the Georgia COVID-19 Business Safety Act will help the Legal System in the long run

From a lawyer's perspective, cases are a lawyer's business. Ironically, the Georgia COVID-19 Business Safety Act is essentially limiting and reducing the possible cases that a lawyer may take, thus hindering their business while benefiting all other types of businesses. Although, does a lawyer truly need these cases given the circumstances of the pandemic?

Currently, Georgia courts have been shut down, delayed, and back logged with cases. Courts have been faced with a perplexing issue of attempting to practice social distancing, but yet they need a twelve-man jury in order to hear a case. As a result, very few cases have been tried since the pandemic and many of the cases have been pushed back for a later date. However, this does not mean that more cases are not being filed during the pandemic. These new cases coming in are further flooding the legal system and it is likely that courts will be highly busy when the pandemic is over. Cases may not be heard in over several years from when they were filed.

Ideally, by reducing the COVID-19 related cases filed in Georgia courts, this will allow the courts some breathing room to catch up on trying all other types of cases. This is important for the underlying idea of the court system and the entire legal system. If an individual has to wait years or even a decade to decide their case, then the general public will lose faith in the court system. Not only does Georgia's COVID-19 Business Safety Act help the court system by decreasing the number of cases filed, but this helps lawyers and the practice of law in the long run. Lawyers need clients to believe in the legal system, so these clients

will seek a lawyer for representation, and that belief is derived from reaching a result or outcome at reasonable time frame.

VIII. CONCLUSION

Ultimately, the Georgia COVID-19 Business Safety Act will reduce the number of COVID-19 related cases and promote the economy. The Georgia General Assembly's use of the warning signs and other forms of notice can arguably have a strong impact in reducing the volume of COVID-19 related cases because a lay person will likely believe bringing a suit is impossible; however, Georgia may want to incorporate some of their neighbor's ideas towards liability protection for businesses if the volume of COVID-19 related cases is not reduced to the extent needed. Specifically, Georgia can turn towards our neighbors to increase liability protection such as Alabama's heightened burden of proof and damage limitation, North Carolina's clarity on how the statute applies and to whom the statute applies, and Tennessee's heightened pleading standard would all have exponential results in additionally decreasing the volume of COVID-19 related cases. Hopefully, the Georgia COVID-19 Business Safety Act, as is, will not need the added liability protection and will perform as the Georgia General Assembly intended by greatly reducing these COVID-19 related cases, which, in return, will allow the Courts to focus on the other civil and criminal matters currently back logged due to this pandemic and procure resolutions within a reasonable time frame.

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