Understanding Florida's Sweeping New Immunity Law for COVID-19 Claims

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Florida became one of the first states in the country last month to pass and sign into law a statute directed toward providing immunity to businesses for COVID-19 related lawsuits. To be clear, the law does not prevent all COVID-19 related lawsuits, but it does impose significant restrictions and hurdles to litigants seeking to bring such claims.

The statute applies to all "COVID-19-related claims," which is defined broadly to include any claim "which arises from or is related to COVID-19" and includes any type of damages one could seek in that regard. The law creates two new statutes: Sections 768.38 – applying to all businesses, governmental entities, and schools except health care providers; and 768.381 – applying to health care providers.

The effect of both statutes is to increase the burdens on potential plaintiffs in a case. As to Section 768.38 – the general statute – a plaintiff's complaint is required to be plead with particularity, including facts that would be sufficient to establish each element of the claim. Those elements are now different than a typical negligence case. Instead of proving mere negligence, such as a failure to use reasonable care that legally caused harm to the plaintiff, a plaintiff must now prove that the business, governmental entity, or school was "grossly negligent."

This term is not defined in the statute, nor in Section 768.381, but is a term defined and used in Florida's punitive damages statute Section 768.72. The new immunity statutes have a catch-all provision that notes they are to be read in conjunction with existing Florida statutes. Presumably, the definition of gross negligence as well as the attendant and extensive case law on the subject from Section 768.72 will apply to the standards and facts necessary for proof of these elements in a COVID-19-related claim.

The statute also requires the complaint to have attached to it an affidavit from a physician attesting that the alleged conduct of the defendant caused the COVID-19 damages alleged in the complaint, and the physician must state that this is an opinion reached within a reasonable degree of medical probability.

Section 768.38 creates a preliminary review process by the court, where the court will examine whether the complaint is sufficiently plead, has the required physician affidavit and also considers evidence (presumably in an evidentiary hearing similar to those required for punitive damages) on whether the

defendant failed to make a "good faith effort to comply with authoritative or controlling government-issued health standards or guidance at the time the cause of action accrued."

The burden is placed on the plaintiff at this hearing to demonstrate the defendant did not make this good faith effort as defined. If the plaintiff fails to meet that burden, the defendant is immune from liability. Even if the plaintiff does meet that burden, the plaintiff still has to prove gross negligence of the defendant with the higher standard of "clear and convincing evidence."

The statute's language suggests that the preliminary stage is decided by the court, but if a plaintiff can get past that stage, they would be able to try the gross negligence component of the claim to a jury as well as damages.

While a failure to plead with particularity or failure to attach the required affidavit is supposed to result in a dismissal of the lawsuit without prejudice under the statute, a finding by the court as to whether the plaintiff has proven that the defendant failed to make a good faith effort appears to be potentially dispositive with prejudice. In other words, if the court rules at this preliminary hearing that the plaintiff has failed to meet their burden to prove that the defendant failed to make a good faith effort, the court's ruling under the language of the statute suggests immunity from that lawsuit, which in turn would arguably prevent the plaintiff from reasserting the claim in the future.

In cases where the court makes such a finding, the interpretation of the statute could become a future focus of litigation.

The hurdles for potential claimants as to claims against health care providers are somewhat lower than they are for the other entities covered by Section 768.38, but they are similar.

Lastly, both statutes provide a very limited window of opportunity to bring claims, providing for a one-year statute of limitations from either the date of enactment of the statute or the date the cause of action accrues (whichever is later).

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