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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

ANGEL TOMAS,

Appellant,

vs.

CASE NO.: 3D23-2157

DMITRY SANDLER, D.P.M., SOUTHERNMOST FOOT & ANKLE SPECIALISTS, P.A., MARINERS HOSPITAL, INC. d/b/a MARINERS HOSPITAL, and THE GOOD HEALTH CLINIC,

Appellees.
_____/

ANSWER BRIEF

Zachary D. Trapp
Florida Bar No.: 0119805
ztrapp@mmdorl.com

Rafael E. Martinez
Florida Bar No.: 0243248
rmartinez@mmdorl.com

McEwan, Martinez, Dukes, Hall & Vancol, P.A.
Post Office Box 753
Orlando, FL 32802-0753
Telephone:(407) 423-8571
Facsimile: (407) 423-8637
E-Service: NOS@mmdorl.com
Attorneys for Appellees/ Defendants, DMITRY SANDLER, DPM and SOUTHERNMOST FOOT & ANKLE SPECIALISTS, PA

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PRELIMINARY STATEMENT

In this Answer Brief, the Appellant, Angel Tomas, will be referred to as "Appellant", "Plaintiff" or "Mr. Tomas." Appellees, Dmitry Sandler, D.P.M. and Southernmost Foot & Ankle Specialists, P.A. will be individually referred to as "Dr. Sandler" and "Southernmost Foot & Ankle," respectively, and collectively as "Defendants" or "Appellees."

The Record on Appeal will be referred to as (R. __). Appellant's Initial Brief, filed May 10, 2024, will be referred to as (I.B. __).

STATEMENT OF THE CASE AND FACTS

Appellant provides an 8-page Statement of Case and Facts that is unduly argumentative and fails to differentiate between the facts at issue and the arguments of counsel. *See Sabawi v. Carpentier,* 767 So. 2d 585, 586 (Fla. 5th DCA 2000) ("[T]he purpose of providing a statement of case and of the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but inform the appellate court of the case's procedural history and the pertinent record fact underlying the parties' dispute."). Consequently, Appellees provide this limited Statement of the Case and Facts to direct the Court's attention to the pertinent factual and procedural issues.

The underlying case is a medical malpractice action that stems from podiatry care provided by Dr. Sandler to Mr. Tomas for his left ankle complaints. (R. 24-34). The crux of the allegations surround Mr. Tomas' left ankle replacement surgery performed by Dr. Sandler at Mariners Hospital on September 18, 2018, as well as the treatment by Dr. Sandler to Mr. Tomas leading up to the surgery. *Id.* All of the treatment provided to Mr. Tomas by Dr. Sandler

occurred at Southernmost Foot & Ankle or Mariners Hospital. (R. 948-950). Additionally, all of the treatment provided by Dr. Sandler to Mr. Tomas was through The Florida Department of Health Volunteer Healthcare Provider Program. *Id.* Plaintiff contends Dr. Sandler was negligent in the care provided prior to surgery at Southernmost Foot & Ankle, and that the ankle replacement at Mariners Hospital was performed inappropriately. (R. 24-34). Plaintiff further contends that Mariners Hospital did not properly credential Dr. Sandler to perform the ankle replacement surgery at its hospital.[1] *Id.*

Mr. Tomas began treatment with Dr. Sandler at Southernmost Foot & Ankle on September 21, 2017. (R. 171). Prior to beginning treatment with Dr. Sandler, Mr. Tomas presented to The Good Health Clinic. (R. 171, 952). The Good Health Clinic is a state-run and funded facility for indigent patients with no health insurance. (R. 948). Plaintiff sued The Good Health Clinic and the entity is a named defendant in the underlying lawsuit per each of Plaintiff's Complaints, in which Plaintiff alleges The Good Health Clinic is

[1] The negligent credentialing claim is an allegation made against Mariners Hospital, and thus not addressed in this Answer Brief on behalf of Dr. Sandler.

vicariously liable for Dr. Sandler. (R. 24, 44, 772, 1014). However, Plaintiff never served The Good Health Clinic with a summons and complaint. (R. 946).

In order for Mr. Tomas to be able to see a specialist, such as a podiatrist like Dr. Sandler, he was required to obtain a referral from a provider at The Good Health Clinic. (R. 948-949). Thus, each time Mr. Tomas treated with Dr. Sandler, he first went to The Good Health Clinic, received a Volunteer Health Care Provider Program Patient Referral Form ("Referral Form"), completed and signed the Referral Form, and physically brought the Referral Form with him to Southernmost Foot & Ankle for Dr. Sandler to also execute prior to providing medical treatment. (R. 947-948, 954, 1099-1128). The Referral Form was completed and signed by a "DOH Referring Person" at The Good Health Clinic at each visit, and every visit, to The Good Health Clinic, before being able to see Dr. Sandler. (R. 1099-1128).

The Volunteer Health Care Provider Program is a program operated by The Florida Department of Health ("DOH"), which is a

subdivision of The State of Florida. (R. 948).[2] The Referral Forms included The Florida Department of Health logo/emblem at the top of each form. (R. 949).

Each Referral Form that Mr. Tomas executed expressly stated that Dr. Sandler was an agent of The Florida Department of Health by virtue of his participation in the Volunteer Healthcare Provider Program. (R. 948, 954, 1099-1128). Further, each Referral Form contained the following language:

> The health care providers are providing care on behalf of the State of Florida and each serves as an agent of the State.

(R. 989-949, 954, 1099-1128).

Dr. Sandler was a participating volunteer physician in the Florida Department of Health Care Volunteer Provider Program, and entered into a written contract with The Florida Department of Health indicating same on December 15, 2015. (R. 955 – 959). The contract was for a term of 5 years, and thus was active throughout the time of Dr. Sandler's treatment of Mr. Tomas. (R. 957).

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[2] This Program was enacted in section 766.1115, Florida Statutes, to improve the access of indigent residents to health care by offering health care providers immunity from suit for their agreement to offer free health to indigent residents. *See* § 766.1115(2), Fla. Stat.

Plaintiff filed his initial Complaint on June 7, 2021, which named The Good Health Clinic as a defendant. (R. 24). After transferring venues and various motions to dismiss filed by Defendants, Plaintiff filed his Second Amended Complaint on December 30, 2022. (R. 772). The Second Amended Complaint similarly named The Good Health Clinic. *Id.* Defendants filed their Motion to Dismiss Plaintiff's Second Amended Complaint on January 17, 2023, which argued Plaintiff's action should be dismissed because: (I) Plaintiff failed to join The State of Florida as an indispensable party; and (II) Defendants were not proper parties to the lawsuit because they are sovereign and thus immune from liability under Section 768.28, Florida Statutes. (R. 945-960). Co-defendant, Mariners Hospital, joined Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint on May 15, 2023. (R. 997). The Trial Court heard Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint on May 19, 2023. (R. 1006). At the hearing, the Trial Court granted Defendants' Motion to Dismiss finding that The State of Florida is an indispensable party, and ordered Plaintiff to file an amended complaint within 30 days of the order. (R. 1006, 1009-1013).

On August 24, 2023, Plaintiff filed a Third Amended Complaint, which essentially mirrored Plaintiff's prior versions of his complaints, but still did not name The State of Florida as a party. (R. 1014-1044). As a result, Defendants filed a Motion to Dismiss Plaintiff's Third Amended Complaint with Prejudice on September 1, 2023, which argued: (I) Plaintiff again failed to join The State of Florida as an indispensable party; and (II) Plaintiff violated the court's order by failing to join The State of Florida as a party. (R. 1082-1128). Co-defendant, Mariners Hospital, filed their own Motion to Dismiss with Prejudice on September 5, 2023, which raised the same arguments as well as an argument for dismissal of the re-asserted negligent credentialing claim. (R. 1129-1173).

On October 25, 2023, the Trial Court heard Defendants' Motions to Dismiss Plaintiff's Third Amended Complaint and granted each Motion, with prejudice. (R. 1181-1186). In its Order dated November 6, 2023, the Trial Court noted that it stood by its prior rulings and specifically found that The State of Florida is an indispensable party because it is a party necessary to a determination of the merits of the case. (R. 1182-1186). On

November 6, 2023, the Trial Court entered a Final Judgment dismissing the case in its entirety, with prejudice. (R. 1187-1188).

Mr. Tomas appeals the Trial Court's ruling that The State of Florida (or an agency thereof) is an indispensable party to the lawsuit, as well as the dismissal of the negligent credentialing claim against Mariners Hospital for failure to comply with presuit under Chapter 766 of the Florida Statutes.

SUMMARY OF ARGUMENT

The Trial Court correctly concluded The State of Florida, or a subdivision thereof, such as The Florida Department of Health ("DOH"), is an indispensable party necessary to a determination of the merits of this case.

Mr. Tomas began treatment at The Good Health Clinic, which is a State of Florida owned and operated facility for indigent patients, prior to ever treating with Dr. Sandler. At the Good Health Clinic, Mr. Tomas received Referral Forms from a "DOH Referring Person," who referred him to Dr. Sandler for podiatric care because Dr. Sandler was a volunteer healthcare provider through the Florida Department of Health Volunteer Healthcare Provider Program. Each Referral Form included the Florida Department of Health logo/emblem. Each Referral Form also clearly stated that all treatment was being provided by healthcare providers on behalf of The State of Florida. Execution and completion of each Referral Form was necessary in order for Mr. Tomas to receive treatment from Dr. Sandler.

Thus, the Trial Court properly followed the law by finding that The State of Florida is an indispensable party. The State's presence

is necessary and proper to a complete determination of the cause because Dr. Sandler was acting as an agent of the State throughout his treatment of Mr. Tomas. Dr. Sandler was never an appropriate party to the suit, and Plaintiff's failure to timely include or otherwise substitute the State before the undisputed expiration of the statute of limitations required dismissal with prejudice.

ARGUMENT

I. Standard of Review

The standard of review is *de novo*. *See Fla. Dep't of Revenue v. Cummings,* 930 So. 2d 604, 607 (Fla. 2006) (ruling whether a party is indispensable under the applicable statute is a question of law reviewed de novo, on appeal of the trial court's ruling on a motion to dismiss a complaint for failure to join an indispensable party).

II. The Trial Court Correctly Determined the State of Florida is an Indispensable Party in Dismissing Plaintiff's Complaint

Pursuant to Florida Rule of Civil Procedure 1.210(a), "[a]ny person may at any time be made a party if that person's presence is necessary or proper to a complete determination of the cause." An indispensable party is a person or entity with a particular interest in the subject matter of the action such that a final adjudication cannot be made without affecting their interests or without leaving the controversy in such a situation that its final resolution may be inadequate. *Palafrugell Holdings, Inc. v. Cassel*, 825 So. 2d 937 (Fla. 3d DCA 2001). In other words, an indispensable party is one whose interest in the subject matter of the action is such that if they are

not joined, a complete and efficient determination of the equities and rights and liabilities **of the other parties** is not possible. *Grammer v. Roman*, 174 So. 2d 443, 445 (Fla. 2d DCA 1965) (emphasis added).

Indispensable parties must be included in an action either as plaintiffs or defendants for the lawsuit to proceed. *Oakland Properties Corp. v. Hogan*, 117 So. 846 (Fla. 1928) (holding the general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, must be made parties either as complainants or defendants, so that a complete decree may be made binding upon all parties); *see also Abramson v. Beer*, 936 So. 2d 1208 (Fla. 4th DCA 2006) (holding that an election official was an indispensable party to proceedings seeking injunctive ballot relief by a registered voter to remove a candidate from the ballot); *Baynard v. City of St. Petersburg*, 178 So. 150 (Fla. 1938) (ruling that all persons materially interested either legally or beneficially in the subject matter of a suit must be made parties either as complainants or defendants, so that a complete decree may be made binding upon all parties).

The failure to join an indispensable party is a ground for the dismissal of an action under Florida Rule of Civil Procedure 1.420. *See* Fla. R. Civ. P. 1.140(b)(7); *see also, GMI, LLC v. Asociacion del Futbol Argentino*, 193 So. 3d 60 (Fla. 3d DCA 2016) (holding that the trial court properly dismissed the action because the country of Argentina was an indispensable party as the buyer of media rights from the defendant in a breach of contract case).

In *GMI*, GMI, LLC filed a breach of contract, unjust enrichment, fraud in the inducement and tortious interference claim against Asociacion del Futbol Argentino ("AFA"). *Id.* at 61. The lawsuit centered around a contract for AFA's football media rights. *Id.* During the contract period, the country of Argentina purchased the media rights from AFA, which GMI alleged was a violation. *Id.* at 62. In the action brought by GMI against AFA, AFA moved to dismiss the complaint for GMI's failure to join the country of Argentina as an indispensable party. *Id.* The trial court granted AFA's motion to dismiss and ruled that the country of Argentina was an indispensable party, and the Third District Court of Appeal affirmed the ruling for two reasons.

First, the appellate court found that based upon the contract between AFA and Argentina, any decision rendered in the action would affect Argentina's interests. *Id.* at 63. Second, based upon the allegations in GMI's complaint; and because AFA and Argentina were partners, any judgment in favor of GMI would directly affect AFA and Argentina. *Id*. The appellate court ultimately went on to rule that because the trial court properly determined Argentina was an indispensable party, but could not be joined because of its sovereign immunity under the Foreign Sovereign Immunities Act, dismissal of the action in its entirety was required. *Id*.

Here, separate and apart from the fact that Dr. Sandler and Southernmost Foot & Ankle are likely sovereign under Sections §§ 766.1115 and 768.28, Florida Statutes, the reasoning and findings in *GMI,* as far as why Argentina was an indispensable party to that action, are analogous to why the State of Florida is an indispensable party in the present action.

The State of Florida (*i.e.* Florida Department of Health) is an indispensable party due to the fact Mr. Tomas received treatment with Dr. Sandler through the Department of Health Volunteer Provider Program, as evidenced by the Referral Forms. Through this

Program, Mr. Tomas expressly acknowledged that the State would be solely liable for any alleged damages resulting from his treatment with Dr. Sandler. (R. 1099-1128).

Additionally, not only did Mr. Tomas sign each and every Referral Form acknowledging that the State would be solely liable for any claimed damages that could occur from the treatment provided by Dr. Sandler, the Referral Forms also contained the following language, making it explicit that Dr. Sandler was an agent of the State:

> The health care providers are **providing care on behalf of the State of Florida and each serves as an agent of the State.**
>
> ---
>
> As needed, the above-named health care provider is referring this patient to the following health care providers who are under contract as outline in section 766.1115, Florida Statutes, **and are agents of the state.**

(R. 1099-1128) (emphasis added).

Thus, as supported by *GMI* and the record evidence, The State of Florida's interests are intertwined with Dr. Sandler's and would be directly affected by a potential judgment in favor of Mr. Tomas. The State is responsible for Dr. Sandler's treatment of Mr. Tomas,

and thus would be responsible for any potential judgment rendered to Mr. Tomas.

Further, and perhaps even more compelling, the matter of the State being joined as a party directly affects the interests of Dr. Sandler because it would, or should, resolve all individual liability against him as a sovereign actor as well as his individual participation in the lawsuit. It would be impossible to fully adjudicate the matter without affecting both the State's and, more importantly, Dr. Sandler's interests in the action. *See GMI*, 193 So. 3d at 63.

In his Initial Brief, Mr. Tomas's only argument is that the State does not have an interest in the action, and thus does not need to be a party. (I.B. 26). Mr. Tomas incorrectly analyzes the definition of an indispensable party from only the perspective of the State. He has failed to recognize that Florida law defines an indispensable party as one whose interest in the subject matter of the action is such that if they are not joined, a complete and efficient determination of the equities and rights and liabilities of **the parties** is not possible. *See Gonzalez v. MI Temps of Fla. Corp.*, 664 So. 2d 17, 18 (Fla. 4th DCA 1995). (emphasis added). Thus, Dr.

Sandler, by definition, has an interest in the State being a party, which the Trial Court agreed with on two occasions. *See* Fla. R. Civ. P. 1.210(a); *see also DeToro v. Dervan Investments Ltd. Corp.*, 483 So. 2d 717 (Fla. 4th DCA 1985) (each partner to an agreement is deemed to have an interest in the action and thus is an indispensable party to the suit, and that only by joinder of such party can the defendant be protected from possible double liability and the inconvenience and expense of additional litigation).

Mr. Tomas provides zero authority for the proposition that it is possible to adjudicate the claims between him and a State agent without affecting the State's interest, or the agent's interest, given the relationship between Dr. Sandler and the State via the Volunteer Healthcare Provider Program. Mr. Tomas also completely disregards the fact that The Good Health Clinic, a named defendant in the underlying lawsuit, is a state-run facility. These facts were communicated to Mr. Tomas' Counsel well before a lawsuit was ever filed, but the undisputed relationship between Dr. Sandler, The Good Health Clinic and the State has been continually disregarded, including in the Initial Brief. (R. 167 – 171).

In his Initial Brief, Mr. Tomas alludes to being unable to name the State as a defendant because the statute of limitations has expired. (I.B. 29-30). However, it had not lapsed at the time Mr. Tomas was initially put on notice about the sovereign relationship and immune status of Dr. Sandler. Plaintiff's error, and failure to heed that notice, does not provide some type of waiver or ability to circumvent the law and sue an individual state agent.

Mr. Tomas primarily relies on *Palafrugell* and *Diaz* for his assertion that the State's interest would not be affected because the claims against the Defendants "are separate and distinct from any hypothetical claim against the State, which in any event Mr. Tomas has not asserted and cannot now assert." (I.B. 31). However, *Palafrugell* and *Diaz* are distinguishable. First, *Palafrugell* analyzed the difference between an "intentional tortfeasor" and a "negligent tortfeasor", which does not apply to our case. Second, *Palafrugell* was a breach of fiduciary duty and legal malpractice action in which the plaintiff, Palafrugell Holdings, sued the defendant, Cassel, who was counsel for a business promoter, Hernandez, for improperly dispersing funds to Hernandez. *Palafrugell*, 825 So. 2d, at 938. Palafrugell Holdings was an investment group who agreed with

Hernandez to hire Cassel as their counsel, but, essentially, claimed that Cassel improperly appointed Hernandez as trustee without the entire group's authorization, and dispersed money to him directly rather than to Palafrugell Holdings. *Id.* Hernandez then used the funds to purchase a loan on the investment property in his own name instead of with Palafrugell Holdings. *Id.* After suit was filed, Cassel then moved to dismiss the plaintiff's second amended complaint, in part, arguing Hernandez was an indispensable party, which the trial court granted. *Id.* at 939.

The Third District Court of Appeals found the trial court erred in dismissing the complaint because Palafrugell's claims against Cassel arose out of a claim for negligent breach of its fiduciary duty, while any claim against Hernandez would rise out of Hernandez's intentional conduct (*i.e.* fraud or conversion). *Id.* In other words, the causes of action were completely separate and distinct. *Id.* The court went on to state, "Palafrugell's allegations regarding Hernandez sound in fraud and conversion, which are intentional torts. Palafrugell's allegations against [Cassel], on the other hand, are for negligence. Therefore, Hernandez is not an indispensable party." *Id.*

Here, the cause of action against Dr. Sandler and the State is one-in-the same. The action is for medical negligence by a State agent surrounding treatment of Plaintiff's foot. Unlike *Palafrugell* where the causes of action as well as the rights of the defendant and indispensable party were "separate and distinct", the causes of action and rights of Dr. Sandler and the State are identical. Further, a resolution of Plaintiff's claims against Dr. Sandler would affect the State's rights, and a resolution against the State would affect Dr. Sandler's rights, because a resolution for either would bar an action against the other.

In *Diaz*, the action was limited to damages, not liability, against the defendant, where the plaintiff alleged a violation of the Whistle Blower Act. The court ruled that an employee's leasing company was not an indispensable party because the action was against the leasing company's client. *Diaz v. Impex of Doral, Inc.*, 7 So. 3d 591, 594 (Fla. 3d DCA 2009). The Court looked to whether the leasing company of the defendants was an indispensable party pursuant to a leasing agreement, and had nothing to do with a sovereign entity, a medical negligence action, or cared provided by a State agent. *Id.* In Diaz, the plaintiff sued his employer for

retaliatory firing after he complained about an unsafe forklift. *Id.* at 592. The defendant was the owner of the forklift, and the company that allegedly violated the Whistle Blower Act. The Third District Court ruled that the defendant's leasing company was not a necessary party simply based on a lease agreement when it played no role in the alleged violation. *Id. Diaz* also did not discuss whether a non-named party is an indispensable party when ***liability***, in addition to damages, is an issue. Additionally, it was not a negligence action.

Here, again, whether the State is a party or not affects both the State's interest and Dr. Sandler's interest. The State is affected because it would, potentially, be responsible for the care and treatment of Dr. Sandler, as well as for the defense of the case. Dr. Sandler's interests are affected because he is, in essence, immune from liability and an unnecessary and improper party to the litigation. Failing to join the State as a party also subjects Dr. Sandler to possible double liability and the inconvenience and personal expense of litigation. There are also reporting requirements for doctors in Florida that would not come into play if Dr. Sandler were dismissed from the action, which also bears directly on his

personal interests. If the State was a party, as it should have been, Dr. Sandler would not be permitted to be sued directly because of his relationship with the State and the State would be solely responsible for defending the action and would be solely liable for any potential damages.

CONCLUSION

The Trial Court properly granted Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint based on its finding that the State of Florida is an indispensable party. Dr. Sandler was never an appropriate party to the action, and Plaintiff's failure to timely include or otherwise substitute the State within the statute of limitations appropriately required dismissal with prejudice. It is respectfully requested this Court affirm the opinion of the Trial Court.

RESPECTFULLY SUBMITTED,

McEwan, Martinez, Dukes, Hall & Vancol P.A.

/s/ Zachary D. Trapp
Rafael E. Martinez
Florida Bar No.: 0243248
rmartinez@mmdorl.com
Zachary D. Trapp
Florida Bar No.: 0119805
ztrapp@mmdorl.com
Post Office Box 753
Orlando, FL 32802-0753
Telephone: (407) 423-8571
E-Service: NOS@mmdorl.com
Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of September, 2024, the foregoing was electronically filed with the Clerk and furnished via e-mail to: Edward Schwartz, Esq. and Philip Gerson, Esq., Gerson & Schwartz, P.A., 1980 Coral Way, Miami, FL 33145 (eschwartz@gslawusa.com, pgerson@gslawusa.com, filing@gslawusa.com); and Jessica Gross, Esq., Wicker, Smith, O'Hara, McCoy, Graham & Ford, P.A., 2800 Ponce de Leon Blvd, Suite 800, Coral Gables, FL 33134 (JGross@wickersmith.com; miacrtpleadings@wickersmith.com); and that pursuant to AO5D18-02, the foregoing was e-mailed to Appellees, Dmitry Sandler, D.P.M. and Southernmost Foot & Ankle Specialists, P.A.

/s/ Zachary D. Trapp
Zachary D. Trapp
Florida Bar No.: 0119805

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this Answer Brief complies with the font and word count limit requirements of Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B).

/s/ Zachary D. Trapp
Zachary D. Trapp
Florida Bar No.: 0119805