**CASE NO. 3D2023-2157**

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT**

ANGEL TOMAS,

Appellant,

v.

DMITRY SANDLER, M.D. et. al.
Appellees.

APPEAL FROM THE SIXTEENTH CIRCUIT COURT OF FLORIDA,
MONROE COUNTY

LOWER TRIBUNAL CASE NO. 22-CA-00034-P

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# INITIAL BRIEF OF APPELLANT

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## Statement of the Case and Facts

Appellant and Plaintiff below ANGEL TOMAS required treatment for a left ankle fracture. In an attempt to treat Mr. TOMAS, Appellee DMITRY SANDLER, D.P.M., a podiatrist and podiatric surgeon, performed a total left ankle replacement surgery on him on September 18, 2018, at the facilities of Appellee MARINERS HOSPITAL, INC. d/b/a MARINERS HOSPITAL. (R. 46, 51, 774, 788, 1016, 1033). During the surgery, Dr. SANDLER used a specific type of total ankle replacement equipment known as the "STAR" system. He had taken a training course regarding the "STAR" system, and received a certificate of completion on August 16, 2018, approximately one month before he used the system to operate on Mr. TOMAS. (R. 586, 590, 1016, 1046). There is no indication in the record that Dr. SANDLER had used this product and surgical technique on any patient before Mr. TOMAS.

After the surgery, Mr. TOMAS developed serious complications, including chronic infection and wound dehiscence. He has been left with



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permanent pain, loss of function, and loss of range of motion in his left ankle. (R. 48, 776, 1018).

Mr. TOMAS instituted medical malpractice pre-suit proceedings against Dr. SANDLER, MARINERS and related entities pursuant to Section 766.106, Florida Statutes, claiming negligence by Dr. SANDLER in his diagnosis and treatment of Mr. TOMAS and in his post-surgical care. (R. 1047-60). As required by Section 766.106, he sent written pre-suit notices, in the form of letters, to Dr. SANDLER and MARINERS on December 14, 2020. (R. 1047-53). As required by Section 766.203, Florida Statutes, he sent with the pre-suit notice letters a corroborating affidavit from an expert in foot and ankle surgery, Matthew D. Sorenson, D.P.M., documenting the various ways in which Dr. SANDLER had deviated from the applicable standard of podiatric medical care. (R. 146-52, 1054-60).

In his affidavit Dr. Sorenson lists seventy-one (71) providers whose records he reviewed in support of his opinion. (R. 146-48, 575-77,1054-56).


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Based on his review of these records and his "knowledge, training and experience in the fields of medicine and surgery, and in particular the fields of foot and ankle surgery …." Dr. Sorenson explicitly opined that Dr. SANDLER fell below the "applicable standards of reasonable care for foot and ankle surgeons …." and was thereby negligent in fourteen listed respects. (R. 148-49, 577-78, 1056-57). Also, based on the same information, i.e. both his experience in foot and ankle surgery and the records of the seventy-one providers reviewed by him, Dr. Sorenson explicitly concluded that Dr. SANDLER lacked sufficient qualification, training, and experience to undertake the total ankle replacement procedure. (R.150, 579, 1058).

With regard to MARINERS, Dr. Sorenson opined that the hospital "fell below applicable standards of care for credentialing surgeons in credentialing and authorizing Dr. Sandler to perform a total ankle replacement procedure" and therefore "fell below applicable standards of



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care in their supervision and credentialing of Dr. Sandler and was therefore negligent, and that this negligence resulted in injury to Mr. Tomas as summarized above." (R. 150, 579, 1058).

After the Appellees denied liability and pre-suit ended, Mr. TOMAS filed a Complaint and Amended Complaint. He sued Dr. SANDLER, MARINERS and others. (R. 44-60).

In the Amended Complaint, Mr. TOMAS alleged in Count I that Dr. SANDLER had been negligent in treating Mr. TOMAS in fourteen listed respects (R. 47-48). He also sued MARINERS, under two distinct theories; in Count II he alleged that MARINERS had been negligent in its credentialing of Dr. SANDLER, while in Count III he alleged that Dr. SANDLER at the material times had been acting under the apparent authority of MARINERS. (R. 50-53, 54-60).

Dr. SANDLER moved to dismiss the Amended Complaint, arguing among other matters that he was immune from negligence liability as a state


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agent, pursuant to Section 768.28(9)(a), Florida Statutes. Dr. SANDLER claimed that at all material times he had been acting as a statutory agent of the State of Florida, Department of Health, pursuant to the Volunteer Healthcare Provider program instituted under Section 766.1115, Florida Statutes. (R. 94-95, 107). MARINERS also moved to dismiss, arguing among other matters that Dr. Sorenson's affidavit was insufficient to support the negligent credentialing claim because it was "conclusory" regarding that claim. (R. 139-41).

On Dr. SANDLER's motion, the court below dismissed with leave to amend to cure what the court considered to be a flaw in the formatting of the Amended Complaint, a commingling of causes of action. This order did not address Dr. SANDLER's claim of statutory immunity. (R. 961-63).

The trial court ruled on MARINERS' motion on December 5, 2022. In this order, the court accepted MARINERS' argument that Dr. Sorenson's affidavit had been conclusory as to the negligent credentialing claim but did


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not address the alternative apparent authority claim against MARINERS. (R. 769-71). The court dismissed as to Count II, the negligent credentialing claim, only, with leave to amend. Count III, the apparent authority claim, was not affected, and MARINERS remained a defendant in the action. (R. 769-71).

Mr. TOMAS filed a Second Amended Complaint, as required by the court, on December 30, 2022. (R.772-808). The Second Amended Complaint again alleged the negligence of Dr. SANDLER. With respect to MARINERS, the Second Amended Complaint again alleged negligent credentialing, in Count IV, and an alternative claim in Count V that Dr. SANDLER had been acting as the apparent agent of MARINERS. (R. 787-96).

On January 12, 2023, MARINERS moved to dismiss Count IV of the Second Amended Complaint, the negligent credentialing count, with prejudice. (R. 821-919). MARINERS in the motion acknowledged the


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pendency of Count V, the alternative apparent authority count against it, but did not seek dismissal of that count. (R. 823).

Dr. SANDLER also moved to dismiss the Second Amended Complaint, renewing his argument that he was immune from suit as a statutory state agent and also arguing that the State of Florida, or the Florida Department of Health as the material state agency, was an indispensable party Mr. TOMAS had failed to join. (R. 947-53).

On April 12, 2023, the trial court granted MARINERS' motion and entered an order dismissing Count IV, the negligent credentialing claim against MARINERS. The order indicated that the dismissal of Count IV was with prejudice. (R. 994-95). The order did not address Count V, the apparent authority count against MARINERS, which again remained pending. (R. 994-95).

On June 26, 2023, the trial court entered an order granting the Appellee's motion to dismiss the Second Amended Complaint on the ground


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that the State of Florida was an indispensable party. This order merely granted the motion and did not actually dismiss the complaint. (R. 1009-10). The order granting the motion was followed on July 25, 2023, with an order dismissing without prejudice the Second Amended Complaint "due to Plaintiff's failure to join the State of Florida as party to the action." (R. 1011). The dismissal was without prejudice, and Mr. TOMAS was given thirty days to file a further amended complaint. (R. 1012).

On August 24, 2023, within the thirty-day period provided by the trial court, Mr. TOMAS filed a Third Amended Complaint. (R. 1014-1081). Mr. TOMAS alleged Dr. SANDLER's negligence in Count I, negligent credentialing by MARINERS in Count IV, and the apparent authority claim against MARINERS in Count V. (R. 1014-19, 1033-43).

The Appellees moved to dismiss the Third Amended Complaint on various grounds. (R. 1082-1173). On November 6, 2023, the trial court granted the Appellees' motions and dismissed the Third Amended Complaint


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with prejudice, citing two grounds. (R. 1182-86). The trial court ruled in Paragraph 8 of the order that it was dismissing the Third Amended Complaint, in its entirety and with prejudice, "in light of the Plaintiff's failure to add a party necessary to a determination of the merits of the case." (R. 1184-85). The court thereby dismissed the case as to all claims and parties, based on the Appellees' asserted defense that the State of Florida and/or Florida Department of Health was an indispensable party. The court additionally noted that it was reaffirming its previous ruling that the negligent credentialing claim was deficient. (R. 1185). The court included no other grounds for dismissal and did not rule on other matters that had been raised in the previous motions to dismiss, such as the claim that Dr. SANDLER was immune from suit as a statutory state agent. (R. 1184-85). This timely appeal followed. (R. 1190-92).


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## SUMMARY OF ARGUMENT

### I.

**Where Adjudication Of The Claims and Defenses Among Mr. TOMAS, Dr. SANDLER And MARINERS, Including Mr. TOMAS' Claims Of Negligence And Dr. SANDLER's Claim Of Immunity, Would Not Affect The Interests Of Or Prejudice The State Of Florida Or Any State Agency, Neither The State Nor Any State Agency Was An Indispensable Party And The Trial Court Erred In Dismissing Due To Nonjoinder Of The State.**

The court below granted the Defendants' motion to dismiss for failure to join an indispensable party, ruling that Plaintiff had failed "to add a party necessary to a determination of the merits of the case," i.e. the State of Florida. (R. 1183). Nothing either in the substantive background of Mr.



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TOMAS' claim or the procedural history of this case, however, makes joinder of the State or any State agency indispensable or even necessary to its just resolution.

Florida law does not require a claimant to sue all potentially liable parties simply because the claimant has chosen to sue some of them. An absent potential party is only "indispensable" to an action when the nature of the claims and defenses is such that a final adjudication between the parties that have been joined will inevitably affect or prejudice the interests of the absent party. If the absence of a potential party does not make it "impossible" to adjudicate completely the claims of those parties that were joined and to reach a final decision regarding their claims and defenses, the absent potential party is not "indispensable."

In this case, Mr. TOMAS has brought claims against Dr. SANDLER for medical negligence. Dr. SANDLER has, among other defenses,


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asserted immunity as a statutory state agent, as well as denying his negligence.

The determination as to whether Dr. SANDLER is or is not immune as a state agent will not affect or prejudice the State or any State agency. While Appellees claim that Mr. TOMAS could have proceeded against the State or State Department of Health and should have proceeded against the State instead of Dr. SANDLER, Mr. TOMAS chose not to do so, and the statute of limitations for any potential action against the State has expired. Whether Dr. SANDLER is ultimately found immune or not, and whether he is ultimately found to have been negligent in treating Mr. TOMAS or not, Mr. TOMAS has no current enforceable claim against the State. The adjudication of the claims as between Mr. TOMAS and Dr. SANDLER therefore will not and cannot prejudice or affect the State, and it is certainly not impossible to adjudicate the claims between Mr. TOMAS and Dr. SANDLER without affecting the interests of the State.


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The potential liability of MARINERS arises out of Dr. SANDLER's underlying negligence; Mr. TOMAS has asserted that Dr. SANDLER acted under the apparent authority of MARINERS and that MARINERS was negligent in authorizing Dr. SANDLER to perform the total ankle replacement procedure on him. As is the case with Mr. TOMAS' claims against Dr. SANDLER, no determination on the merits as to either of Mr. TOMAS' claims against MARINERS will affect or prejudice the State or any State agency. As is the case with Dr. SANDLER, it is hardly "impossible" to adjudicate the claims between Mr. TOMAS and MARINERS without affecting the State.

It is certainly not "impossible" to adjudicate the claims against Dr. SANDLER and MARINERS without affecting the rights of the State. Neither the State or any State agency such as the Department of Health is an indispensable or necessary party in this case, and the court below erred in ruling that they were and dismissing the action on that basis.

**II.**

**Where Mr. TOMAS' Pre-Suit Notice And Corroborating Affidavit Indicated That Mr. TOMAS Was Seeking To Hold MARINERS Liable For The Underlying Medical Negligence Of Dr. SANDLER, The Notice And Affidavit Complied With The Statutory Pre-Suit Requirements In Medical Negligence Actions, So The Trial Court Erred In Dismissing The Negligent Credentialing Claim Due To An Erroneously Alleged Insufficiency Of The Affidavit.**

The trial court also erred by dismissing the negligent credentialing claim against MARINERS on the ground that the pre-suit corroborating affidavit of Dr. Sorenson was insufficient to support that claim.

First, Dr. Sorenson in his affidavit did address the negligent credentialing issue. After listing the materials upon which he relied, citing



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his knowledge and experience in the fields of foot and ankle surgery, and explaining in detail the ways in which Dr. SANDLER fell below the applicable standard of care, Dr. Sorenson also expressly stated both that Dr. SANDLER was not qualified to perform the total ankle replacement surgery and that MARINERS had been negligent in authorizing him to do so. The pre-suit affidavit and notice informed MARINERS that its potential liability arose out of Dr. SANDLER's negligent performance of the total ankle replacement surgery and negligent post-surgical care, and this underlying negligence of Dr. SANDLER was the same whether the claim against MARINERS was based on vicarious liability for Dr. SANDLER's negligence, apparent authority, or active negligence in credentialing him.

Secondly and more importantly, Florida law does not require pre-suit corroborating affidavits such as Dr. Sorenson's to address exhaustively every permutation of every potential theory of malpractice against each potential defendant. The purpose of the pre-suit corroborating affidavit


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requirement is merely to ensure that the medical negligence claim is not baseless and that the claimant has investigated the potential claims against each potential defendant. If the affidavit supports proceeding against a potential defendant on at least one theory of medical negligence, the claimant, once suit begins, may assert any and all applicable theories of liability against that defendant, even if some of them were not expressly addressed in pre-suit.

The principle that pre-suit affidavits and notices need not document exhaustively every potential theory of negligence against a given defendant has been applied specifically to allow negligent credentialing actions against hospitals to proceed even in cases where the pre-suit notice and affidavit alleged other forms of vicarious hospital negligence without mentioning the negligent credentialing at all. Since negligent credentialing actions are allowed even in cases where the negligent credentialing issue was not addressed in pre-suit at all, they certainly should be allowed in


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cases such as the present one where negligent credentialing was actually addressed in pre-suit, albeit in a summary form. Dr. Sorenson's affidavit informed MARINERS that its potential liability arose out of Dr. SANDLER's negligence and hence was more than sufficient to document the claim and establish that it was legitimate. The trial court erred in dismissing the negligent credentialing claim, and that ruling should also be reversed.

## ARGUMENT

### I.

### Where Adjudication Of The Claims and Defenses Among Mr. TOMAS, Dr. SANDLER And MARINERS, Including Mr. TOMAS' Claims Of Negligence And Dr. SANDLER's Claim Of Immunity, Would Not Affect The Interests Of Or Prejudice The State Of Florida Or Any State Agency, Neither The State Nor Any State Agency Was An



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**Indispensable Party And The Trial Court Erred In Dismissing Due To Nonjoinder Of The State.**

The court below granted the Defendants' motion to dismiss for failure to join an indispensable party, ruling that Plaintiff had failed "to add a party necessary to a determination of the merits of the case," i.e. the State of Florida. (R. 1183). Nothing either in the substantive background of Mr. TOMAS' claim or the procedural history of this case, however, makes joinder of the State or any State agency indispensable or even necessary to its just resolution. Indeed, Mr. TOMAS had no cognizable claim against the State of Florida or its agencies. There was no remedy which would have had any effect on any potential party other than the named Appellees.

Under Florida law, an "indispensable party" is "a person with such an interest in the subject matter of the action that a final adjudication cannot be made without affecting his interests or without leaving the controversy in



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such a situation that its final resolution may be inequitable." *Palafrugell Holdings, Inc. v. Cassel*, 825 So.2d 937, 939 (Fla. 3d DCA 2001), *quoting W.R. Cooper, Inc. v. City of Miami Beach*, 512 So.2d 324, 325 (Fla. 3d DCA 1987), *citing National Title Ins. Co. v. Oscar E. Dooly Assocs.*, 377 So.2d 730, 731 (Fla. 3d DCA 1979). "Generally, an indispensable party is one whose interest in the controversy makes it impossible to completely adjudicate the matter without affecting either that party's interests or the interests of another party in the action." *Diaz v. Impex of Doral, Inc.*, 7 So.3d 591, 594 (Fla. 3d DCA 2009), *citing Fla. Dep't of Revenue v. Cummings*, 930 So.2d 604, 607 (Fla. 2006); *Hertz Corp. v. Piccolo*, 453 So.2d 12, 14 n.3 (Fla. 1984); *see Hertz*, 453 So.2d at 14 n.3 (indispensable parties are those "so essential to a suit that no final decision can be rendered without their joinder"). If the absence of a potential party does not make it "impossible" to adjudicate completely the claims of those parties that were joined and to reach a final decision regarding their claims and


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defenses, the absent potential party is not "indispensable." "Under Florida law, it is not necessary to join all persons potentially liable for damages for an action to proceed." *Diaz*, 7 So.3d at 594, *citing W.R. Cooper,* 512 So.2d at 326, *Gonzalez v. MI Temps of Fla. Corp.,* 664 So. 2d 17, 18 (Fla. 4th DCA 1995). *See also Palafrugell*, 825 So.2d at 939 (Palafrugell's claims against attorneys and escrow agents for their alleged negligent breach of fiduciary duties were "separate and distinct" from claims against trustee for intentional torts of fraud and conversion, so that the trustee was not an indispensable party to Palafrugell's action against the attorneys).

In this case, Mr. TOMAS has brought claims against Dr. SANDLER for medical negligence. Dr. SANDLER has, among other defenses, asserted that at the material times he was acting as a statutory agent of the State of Florida Department of Health pursuant to Section 766.1115, Florida Statutes. If Dr. SANDLER were correct in this assertion, he would be immune from suit in his individual capacity as a constructive or statutory


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state agent, pursuant to Section 768.28(9), Florida Statutes. If, as Plaintiff has consistently maintained and continues to maintain, Section 766.1115 does not apply under the facts of this case, then Dr. SANDLER will not be immune.[1]

Neither determination as to the applicability of Section 766.1115 will affect the interests of the State of Florida or State Department of Health, however, for the simple reason that Mr. TOMAS has chosen not to join the State and at this point cannot do so. Under Sections 768.28(6)(a) and

[1] The court in the order of dismissal did not determine whether Dr. SANDLER was immune under Section 766.1115 and did not dismiss on that basis. The applicability of Section 766.1115 remains a question of fact. *See, e.g., Dinnerstein v. Florida Department of Health*, 254 So.3d 497, 502 (Fla. 4th DCA 2018)(*Dinnerstein* II)(whether Dr. Dinnerstein was acting pursuant to Section 766.1115 was "threshold factual issue."); *Florida Department of Health v. Allan J. Dinnerstein, M.D., P.A.*, 78 So.3d 26, 29-30 (Fla. 4th DCA 2011)(*Dinnerstein* I) (disputed issues of fact, precluding summary judgment, remained as to the procedure by which the patient had been referred to Dr. Dinnerstein and her capacity to consent to the terms of treatment).



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95.11(4)(c) of the Florida Statutes, the limitation period for any potential action by Mr. TOMAS against the State or the Department of Health has long since lapsed, so he cannot sue the State now whether or not the case is remanded. If the case is remanded and Dr. SANDLER is ultimately found to be immune from suit neither he nor the State will be liable. If on remand Dr. SANDLER is determined not to be immune, the action will proceed against him, while the State will still not be liable. Furthermore, the determination on the merits whether Dr. SANDLER was or was not negligent in his diagnosis and treatment of Mr. TOMAS will not and cannot affect the liability of the State; whether or not Dr. SANDLER is found negligent, the State will not and at this point cannot be found liable.

The same procedural bar to an action against the State of Florida applies to Mr. TOMAS' claims against Codefendant MARINERS. Whether or not MARINERS is ultimately determined to be liable under a theory of negligent credentialing, apparent authority or otherwise, the determination


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as to MARINERS' liability or nonliability will not and cannot affect the nonexistent liability of the State.

In this case, therefore, the final determinations as to Dr. SANDLER's and MARINERS' liability, regardless of the outcome, will not and cannot prejudice or affect the rights of the State or the Department of Health. Under the principles explained in *Palafrugell* and *Diaz*, the claims of Mr. TOMAS against Dr. SANDLER and MARINERS are separate and distinct from any hypothetical claim against the State, which in any event Mr. TOMAS has not asserted and cannot now assert. It is certainly not "impossible" to adjudicate the claims against Dr. SANDLER and MARINERS without affecting the rights of the State. Neither the State or any State agency such as the Department of Health is an indispensable or necessary party in this case, and the court below erred in ruling that they were and dismissing the action on that basis.


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**II.**

**Where Mr. TOMAS' Pre-Suit Notice And Corroborating Affidavit Indicated That Mr. TOMAS Was Seeking To Hold MARINERS Liable For The Underlying Medical Negligence Of Dr. SANDLER, The Notice And Affidavit Complied With The Statutory Pre-Suit Requirements In Medical Negligence Actions, So The Trial Court Erred In Dismissing The Negligent Credentialing Claim Due To An Erroneously Alleged Insufficiency Of The Affidavit.**

The trial court's second ground for dismissal, applying to MARINERS only, was to reaffirm its previous ruling that the pre-suit notice sent by Mr. TOMAS and its accompanying corroborating affidavit[2] were insufficient to authorize a claim against MARINERS for its negligent credentialing of DR.

[2] As required by Sections 766.106 and 766.203, Florida Statutes.



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SANDLER. This claim is that MARINERS negligently failed adequately to review DR. SANDLER's qualifications to perform total ankle replacement surgery using the Stryker/"STAR" system before authorizing him to perform the surgery at its facility. The evidence to date, produced by the Appellees, demonstrates that DR. SANDLER was newly certified to perform the procedure, having completed the necessary training and received his certification only a month before performing the procedure on Mr. TOMAS. MARINERS below argued that the affidavit of Mr. TOMAS' pre-suit podiatric expert Matthew Sorenson, D.P.M., did not adequately address the negligent credentialing issue and therefore was insufficient to support a claim of negligent credentialing against MARINERS. This argument by MARINERS, adopted by the court below, reflects a misunderstanding both of Dr. Sorenson's affidavit and the law of Florida regarding the purpose and nature of pre-suit proceedings in medical negligence actions.



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First, Dr. Sorenson did include in his affidavit an explicit opinion that Defendant MARINERS "fell below applicable standards of care" "in credentialing and authorizing Dr. Sandler to perform a total ankle replacement procedure." In his affidavit Dr. Sorenson lists seventy-one (71) providers whose records he reviewed in support of his opinion. Based on his review of these records and his "knowledge, training and experience in the fields of medicine and surgery, and in particular the fields of foot and ankle surgery … ." Dr. Sorenson explicitly opined that Dr. SANDLER fell below the "applicable standards of reasonable care for foot and ankle surgeons … " and was thereby negligent in fourteen listed respects. Also, based on the same information, i.e. both his experience in foot and ankle surgery and the records of the seventy-one providers reviewed by him, Dr. Sorenson explicitly concluded that Dr. SANDLER lacked sufficient qualification, training and experience to undertake a total ankle replacement procedure and further that MARINERS fell below applicable



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standards of care in credentialing and authorizing Dr. SANDLER, an unqualified podiatric surgeon, to perform the procedure at its facility.

MARINERS below urged the trial court to hold that pre-suit expert affidavits documenting a physician's or provider's failure to meet the applicable standard of care, such as Dr. Sorenson's affidavit, must anticipate and exhaustively document every ancillary theory or cause of action potentially arising out of a provider's failure to meet the standard of care. This artificial and strained interpretation of the pre-suit screening requirement has been decisively rejected by Florida courts.

The purpose of submitting a corroborating expert affidavit with a pre-suit notice of intent served under Section 766.106, Florida Statutes is to "prevent the filing of baseless litigation, not to set forth in protracted detail the plaintiff's theory of the case." *Davis v. Orlando Regional Medical Center*, 654 So.2d 664, 665 (Fla. 5th DCA 1995). Accordingly, "nothing in


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the statute requires that the corroborating expert opinion identify every possible instance of medical negligence," especially given that in "many cases it would be virtually impossible for a medical malpractice plaintiff to identify every possible instance of medical negligence at the pre-suit stage." Id. *See Jackson v. Morillo*, 976 So.2d 1125, 1128 (Fla. 5th DCA 2007)("The statute's pre-suit screening requirements are broadly construed to favor access to the courts and do not require that the corroborating expert's affidavit give notice of every possible instance of medical negligence … . Hence, pre-suit notice to a hospital of medical malpractice that occurred during surgery is adequate to survive a pre-suit notice challenge to a claim against the hospital for post-operative medical malpractice because the purpose of the expert corroborative opinion is to prevent the filing of baseless litigation and not to set forth every possible instance of medical negligence."). While the pre-suit process "requires a claimant to investigate the claims against each defendant, it does not

require the affidavit to attest to the legitimacy of each claim against each defendant." *Michael v. Medical Staffing Network, Inc.*, 947 So.2d 614, 620 (Fla. 3d DCA 2007). Therefore, where a pre-suit affidavit provides enough information to comply with the statutory requirements as to at least one theory of negligence, the affidavit suffices to allow a medical negligence action to proceed. *See Columbia JFK Medical Center L.P. v. Brown*, 805 So.2d 28 (Fla. 4th DCA 2001)(negligent credentialing claim could proceed even though it had not been explicitly addressed in the plaintiff's pre-suit notice and affidavit – the "purpose [of the pre-suit notice and corroborating affidavit requirements] has been satisfied where, as here, the presuit requirements were complied with as to one theory of negligence against the hospital.").

The Fourth District Court of Appeal in *Brown* specifically applied *Davis* to a negligent credentialing claim against a hospital that had not been explicitly included in the pre-suit notice or affidavit. In *Brown* the claimant


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initially alleged during the pre-suit process that Columbia was vicariously liable to Brown for negligence on the part of its emergency room physicians and nurses and supported her pre-suit notice with a corroborating affidavit from an emergency room physician. In her complaint, Brown added a claim that the negligently provided emergency services had become necessary due to a surgical procedure negligently performed by a gynecologist at the hospital, and that Columbia had negligently granted staff privileges to that gynecologist. When the trial court denied Columbia's motion to dismiss the negligent credentialing count, Columbia sought certiorari. *Brown*, 805 So.2d at 28.

The Fourth District, applying *Davis*, denied certiorari and held that the negligent credentialing claim should proceed, even though it had not been explicitly addressed either in the pre-suit affidavit or pre-suit notice. The court, citing *Davis*, noted that "the purpose of the presuit notice and the requirement of an expert's affidavit to corroborate the claim is not to notify

the defendants as to how they were negligent, but rather is to demonstrate that the claim is legitimate." *Brown*, 850 So.2d at 29. The court reiterated that "nothing in the statute requires that the corroborating expert opinion identify every possible instance of medical negligence." Id., *citing* Davis, 654 So.2d at 665. Accordingly, the "purpose [of the pre-suit affidavit] has been satisfied where, as here, the presuit requirements were complied with as to one theory of negligence against the hospital." Id.

In this case, Dr. Sorenson's affidavit did explicitly address Mr. TOMAS' claim of negligent credentialing. His explanation on that point was not detailed, but under *Davis*, *Michael*, *Jackson* and in particular *Brown*, it did not have to be. Indeed, in *Brown* the negligent credentialing claim was allowed to proceed even though it had not been addressed at all in pre-suit, whereas Dr. Sorenson in this case did explicitly address the negligent credentialing issue, at least in a summary form. The pre-suit affidavit and notice informed MARINERS that its potential liability arose out of Dr.


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SANDLER's negligent performance of the total ankle replacement surgery and negligent post-surgical care, and this underlying negligence of Dr. SANDLER was the same whether the claim against MARINERS was based on vicarious liability for Dr. SANDLER's negligence, apparent authority, or active negligence in credentialing him.

Courts should not overlook the fact that at the pre-suit stage no formal discovery has yet taken place, and even informal discovery does not begin until pre-suit has commenced pursuant to Section 766.106, Florida Statutes. During the investigatory phase required under Section 766.203 before pre-suit can even be commenced, neither formal nor informal discovery has taken place and investigating claimants will not have access to a hospital credentialing file. In this case, for example, Mr. TOMAS knew the date of Dr. SANDLER's Stryker/"STAR" training certificate only once the Appellees had chosen to file it in support of their motions. As noted in *Davis*, the unavailability of even informal discovery before the corroborating



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expert must prepare the pre-suit affidavit makes it "virtually impossible" in most cases to "identify every possible instance of medical negligence at the pre-suit stage," and makes it particularly unrealistic to expect the expert's affidavit to identify definitively every conceivable theory of negligence. *See Davis*, 654 So.2d at 665.

Dr. Sorenson's affidavit was more than sufficient to document that Mr. TOMAS had a claim against MARINERS arising out of Dr. SANDLER's negligence and that this claim was not baseless, whether or not it documented to MARINERS' satisfaction every permutation of every potential theory of liability against MARINERS. Under *Brown, Davis*, and the other decisions cited above, Dr. Sorenson's affidavit more than complied with the statutory pre-suit requirements.

The trial court's entry of orders on December 5, 2022, and April 12, 2023, dismissing the negligent credentialing counts of the then operative


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complaints does not change the analysis. The earlier orders did not address Plaintiff's claims against MARINERS for vicarious liability based on apparent authority, which remained pending. The orders therefore left counts pending against MARINERS asserting MARINERS' liability for the consequences of Dr. SANDLER's negligence. Since the orders left claims pending against MARINERS that were factually and legally related to the dismissed claims, they did not terminate the judicial labor against MARINERS. They were neither final nor then appealable, notwithstanding the trial court's statement in the April 12, 2023, order that the dismissal of the negligent credentialing count was with prejudice. *See Harrison v. J.P.A. Enterprises, L.L.C.*, 51 So.3d 1217, 1219 (Fla. 1st DCA 2011), *citing Mendez v. West Flagler Family Association*, 303 So.2d 1, 5 (Fla. 1974) and *Swan v. St. Thomas University*, 592 So.2d 351, 352 (Fla. 3d DCA 1992)("partial dismissal of a complaint is only reviewable when it is established that the dismissed claims are not legally and factually


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interrelated with the remaining claims …). *See also Strader v. Carpenters Crest Owners Association,* 328 So.3d 383 (Fla. 2nd DCA 2021) ("Strader's appeal from the order on Fitterman's motion to dismiss is dismissed because count II remains pending. As a result, it is not a final appealable order because judicial labor has not ended."); *Buchanan v. Crossroads United Methodist Church*, 244 So.3d 1210 (Fla. 1st DCA 2018)("Appellant's complaint includes two pending counts alleging claims against the same defendant for damages stemming from the same conduct as Count VIII. Therefore, the claims are interrelated and the order on Count VIII is not independently appealable as a partial final judgment pursuant to *Florida Rule of Appellate Procedure 9.110(k)*").

The court below retained the authority to revisit the negligent credentialing claim against MARINERS until entry of the final judgment, which did not occur until entry of the order under appeal on November 6, 2023. *See Bettez v. City of Miami*, 510 So.2d 1242, 1243 (Fla. 3rd DCA


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1987)("It is well settled in this state that a trial court has inherent authority to reconsider, as here, any of its interlocutory rulings prior to the entry of a final judgment or final order in the cause.") The November 6, 2023, order of dismissal with prejudice was therefore the only final appealable order in this case, both expressly and by operation of law incorporating all of the previously entered orders dismissing some, but not all, of the claims against MARINERS.

Mr. TOMAS' pre-suit notice directed to MARINERS, and Dr. Sorenson's accompanying affidavit, complied with the requirements of the relevant statutes, Sections 766.106 and 766.203 of the Florida Statutes. The trial court erred by dismissing the negligent credentialing claim due to an alleged insufficiency of Dr. Sorenson's affidavit and accompanying pre-suit notices, so the order of dismissal on that ground should be reversed.


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## Conclusion

Mr. TOMAS' claims against the Appellees, including Dr. SANDLER and MARINERS, can be disposed of without affecting the rights of or prejudicing in any way the State of Florida or any State agency. The State and State agencies are therefore not indispensable parties to this action, and the court below erred by ruling that they were and dismissing on that basis.

Dr. Sorenson's pre-suit affidavit was more than sufficient under governing case law to support Mr. TOMAS' action against MARINERS, including his claims that MARINERS had negligently credentialed Dr. SANDLER to perform the total ankle replacement procedure leading to his injuries. The trial court therefore also erred by dismissing the negligent credentialing claim against MARINERS. The order of dismissal should be reversed and the case remanded for further proceedings on the merits.



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CASE 3D2023-2157

TOMAS v. SANDLER

INITIAL BRIEF OF APPELLANT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically on all attorneys of record on the attached Service List on this 10th day of May, 2024.

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CASE 3D2023-2157

TOMAS v. SANDLER

INITIAL BRIEF OF APPELLANT

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY pursuant to Rule 9.045(e), Florida Rules of Appellate Procedure, that the foregoing Response complies with applicable requirements regarding font usage and the applicable word limits set forth in Florida Rule of Appellate Procedure 9.210(a)(2)(B), having been prepared using Arial 14-point font and containing 6605 words in 48 pages, within the permissible maximum of 13,000 words and 50 pages for an initial brief.

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