

A-99176-4

IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANGEL TOMAS,

Appellant,

CASE NO. CASE NO. 3D23-2157

L.T. Case No. 22-34-CA-P

v.

DMITRY SANDLER, et al.,

Appellees.

_____ /

ANSWER BRIEF OF APPELLEE, MARINERS HOSPITAL, INC.

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TABLE OF CONTENTS

TABLE OF CITATIONS.....iii

STATEMENT OF THE CASE AND FACTS.....1

 I. Introduction.....1

 II. Factual Background.....2

 III. Procedural Background.....3

SUMMARY OF THE ARGUMENT.....15

ARGUMENT.....17

 I. Standard of Review.....17

 II. The Trial Court Correctly Applied the Pre-Suit Statutes in Dismissing Count IV Based on Plaintiff’s Failure to Corroborate the Claim.....17

 a. Chapter 766’s Reasonable Investigation and Expert Corroboration Requirements.....18

 b. Plaintiff’s Failure to Provide Corroboration of Count IV Against Mariners Hospital Mandated Dismissal of that Count.....21

 c. Corroboration of One Theory of Negligence Against Mariners Hospital Does Not Open the Doors to “Any and All” Claims.....25

 d. The Plaintiff’s Case Law is Inapposite.....27

III. The Trial Court Correctly Dismissed the Action for Plaintiff's Failure to Join an Indispensable Party.....	33
CONCLUSION.....	33
CERTIFICATE OF SERVICE.....	35
CERTIFICATE OF COMPLIANCE.....	35

TABLE OF CITATIONS

Case Law

<i>Adventist Health System/Sunbelt, Inc. v. Machalek,</i> 383 So. 3d 534 (Fla. 5th DCA 2023).....	28
<i>Clare v. Lynch,</i> 220 So. 3d 1258 (Fla. 2d DCA 2017).....	20
<i>Columbia/JFK Medical Center Ltd. Partnership v. Brown,</i> 805 So. 2d 28 (Fla. 4th DCA 2001).....	30, 31
<i>Davis v. Orlando Reg'l Med. Ctr.,</i> 654 So. 2d 664 (Fla. 5th DCA 1995).....	29, 30
<i>Duffy v. Brooker,</i> 614 So. 2d 539 (Fla. 1st DCA 1993).....	23, 24
<i>Fla. Health Scis. Ctr., Inc. v. Jackman,</i> 358 So. 3d 810 (Fla. 2d DCA 2023).....	27
<i>Ham v. Portfolio Recovery Assocs., LLC,</i> 308 So. 3d 942 (Fla. 2020).....	20
<i>Hawks Nest Condo., Inc. v. Westchester Surplus Lines Ins. Co.,</i> 366 So. 3d 1184 (Fla. 3d DCA 2023).....	9
<i>Jackman v. Fla. Health Scis. Ctr., Inc.,</i> No. SC2023-0547, 2024 WL 397608 (Fla. Feb. 2, 2024).....	27
<i>Jackson v. Morillo,</i> 976 So. 2d 1125 (Fla. 4th DCA 2007).....	31, 32
<i>Kukral v. Mekras,</i> 679 So. 2d 278 (Fla. 1996).....	18

<i>Largie v. Gregorian</i> , 913 So. 2d 635 (Fla. 3d DCA 2005).....	18, 19
<i>Oliveros v. Adventist Health Sys./Sunbelt, Inc.</i> , 45 So. 3d 873 (Fla. 2d DCA 2010).....	17
<i>Rafferty v. Martin Mem’l Med. Ctr., Inc.</i> , 335 So. 3d 144 (Fla. 4th DCA 2022).....	26, 27
<i>Shands Teaching Hosp. & Clinics v. Barber</i> , 638 So. 2d 570 (Fla. 1st DCA 1994).....	32
<i>Univ. of Fla. Bd. of Trustees v. Carmody</i> , 372 So. 3d 246 (Fla. 2023).....	20, 28
<i>Univ. of S. Fla. Bd. of Trustees v. Mann</i> , 159 So. 3d 283 (Fla. 2d DCA 2015).....	25
<i>Watkins v. Rosenthal</i> , 637 So. 2d 993 (Fla. 3d DCA 1994).....	23
<i>Wolfsen v. Applegate</i> , 619 So. 2d 1050 (Fla. 1st DCA 1993).....	19
<i>Yocom v. Wuesthoff Health Sys., Inc.</i> , 880 So. 2d 787 (Fla. 5th DCA 2004).....	20, 32

Statutes

§ 766.104, Fla. Stat.....	18
§ 766.201, Fla. Stat.....	19, 32
§766.203, Fla. Stat.....	32
§ 766.206, Fla. Stat.....	21

STATEMENT OF THE CASE AND FACTS

I. Introduction

The Plaintiff/Appellant, Angel Tomas, filed the underlying medical malpractice action against several defendants, including Mariners Hospital, arising out of podiatry care provided to him by Dmitry Sandler, DPM. (R. at 44, 1014).

The Plaintiff appeals the trial court's dismissal with prejudice of the negligent credentialing count asserted against Mariners Hospital. (R. at 1182-85, 1193). Specifically, the count was dismissed with prejudice due to the Plaintiff's failure to comply with the mandatory pre-suit investigation requirements of Chapter 766 of the Florida Statutes prior to the expiration of the statute of limitations. (R. at 1182-85). Additionally, the Plaintiff appeals the trial court's dismissal of the action for the Plaintiff's failure to join the State of Florida (or the Florida Department of Health) as an indispensable party. (R. at 1182-85, 1193). This Court should affirm the decision of the trial court.

II. Factual Background

The Plaintiff began treating with Dr. Sandler, a foot and ankle surgeon, on September 21, 2017 at the Tavernier office of Southernmost Foot & Ankle Specialists. (R. at 137, 955, 1099). The Plaintiff was initially referred to Dr. Sandler by the Good Health Clinic—a facility that provides healthcare to low-income and uninsured residents of the Florida Keys. (R. at 948). Through its partnership with the Volunteer Health Care Provider Program (“VHCPP”), the Good Health Clinic referred the Plaintiff to Dr. Sandler for orthopedic care. (R. at 948). VHCPP is operated by the Florida Department of Health (“DOH”) and provides charity care to indigent patients. (R. at 948-950).

On September 18, 2018, a year after he initially began treating with Dr. Sandler through VHCPP, the Plaintiff underwent an elective outpatient total ankle replacement. (R. at 46, 1016). Dr. Sandler performed the surgery at Mariners Hospital. (R. at 46, 1016). The Plaintiff was discharged home the same day, and subsequently received post-operative care at Dr. Sandler’s office from September 21, 2018 through January of 2019. (R. at 137).

III. Procedural Background

The Plaintiff served Mariners Hospital with a Notice of Intent to Initiate Litigation for Medical Malpractice (“NOI”) on December 19, 2020. (R. at 144, 1053). Attached to the NOI was an affidavit signed by Matthew D. Sorensen, DPM. (R. at 146). Based on his review of the Plaintiff’s medical records, Dr. Sorensen claimed Dr. Sandler fell below the standard of care with regard to the podiatry care he provided to the Plaintiff. (R. at 146-149). Specifically, Dr. Sorensen was critical of Dr. Sandler’s conservative management of the Plaintiff’s podiatric complaints prior to recommending surgery; Dr. Sandler’s performance of the ankle replacement surgery at Mariners Hospital, including his surgical technique; and the post-operative care provided by Dr. Sandler in his office. (R. at 148-149).

Then, without outlining any factual basis or demonstrating any reasonable investigation, Dr. Sorensen’s affidavit also concluded Dr. Sandler was not qualified to perform the left ankle replacement surgery, and Mariners Hospital fell below the standard of care in credentialing Dr. Sandler to perform the procedure. (R. at 150). Dr.

Sorensen did not cite any materials reviewed in connection with these conclusions. (R. at 146-151).

The opinions set forth in Dr. Sorensen's pre-suit affidavit were based solely on his review of the Plaintiff's medical records. (R. at 456, 622, 1218). Dr. Sorensen did not review Dr. Sandler's curriculum vitae, Dr. Sandler's delineation of privileges with Mariners Hospital, or Dr. Sandler's Certification of Training issued by Stryker to perform the STAR total ankle replacement (which is the method he used on September 18, 2018). (R. at 1216-18); (Supp. R. at 10, 16, 25, 28).¹ And, despite the statutory scheme providing for informal discovery during the pre-suit investigatory phase, the Plaintiff did not propound any pre-suit discovery requests on the prospective defendants. (R. at 1216-18); (Supp. R. at 10, 16, 25, 28).²

¹ On February 23, 2024, the Appellant filed a Supplemental Record that was not consecutively paginated as required by Florida Rule of Appellate Procedure 9.200. Thus, the citations to the Supplemental Record are to the page numbers as indicated on the PDF reader.

² The affidavit of the Co-Defendants' pre-suit expert, Dr. Southerland, listed review of Dr. Sandler's curriculum vitae and the Stryker Ankle Reconstruction Training Certificate in connection with the Co-Defendants' respective pre-suit investigation. (R. at 269). The Co-Defendants' denial of the claim, accompanied by Dr. Southerland's affidavit, was dated April 9, 2021. (R. at 265). At that time, the

Had the information or materials been requested by the Plaintiff during pre-suit, the following information would have been available to Dr. Sorensen:

- Dr. Sandler, like Dr. Sorensen, is a board certified foot and ankle surgeon. (R. at 585, 582).
- Dr. Sandler, like Dr. Sorensen, has been board-certified by the American Board of Podiatric Surgeons since 2005. (R. at 585, 582).
- Dr. Sandler, like Dr. Sorensen, completed a three-year podiatric surgical residency. Dr. Sandler completed residency in 2002, and Dr. Sorensen completed residency in 2008. (R. at 585, 582).
- Dr. Sandler, like Dr. Sorensen, is a credentialed Fellow in the American College of Foot and Ankle Surgeons (“FACFAS”). (R. at 585, 582).
- Dr. Sandler obtained the Stryker Certification of Training for the STAR Total Ankle Replacement. (R. at 586).

Following the conclusion of pre-suit with Mariners Hospital, the Plaintiff filed an Amended Complaint against Dr. Sandler, the Good Health Clinic, Southernmost Foot & Ankle Specialists, and Mariners Hospital alleging medical negligence arising out of the podiatry care

Plaintiff and Mariners Hospital were still engaged in the pre-suit process. (R. at 455). The Plaintiff did not issue any pre-suit discovery requests to Mariners Hospital related to Dr. Sandler’s surgical privileges, training, or certifications.

provided by Dr. Sandler. (R. at 44).³ The Plaintiff asserted two counts against Mariners Hospital, one count for vicarious liability of Dr. Sandler based on a theory of apparent agency, and one count for negligent credentialing of Dr. Sandler. (R. at 50, 54). The negligent credentialing count asserted the following allegations:

29. On September 18, 2018, DMITRY SANDLER, DPM performed total left ankle replacement surgery on Plaintiff ANGEL TOMAS at the hospital facilities of Defendant MARINERS HOSPITAL.

30. At the time referenced in the preceding paragraph, Defendant MARINERS HOSPITAL knew or should have known that DMITRY SANDLER, DPM lacked adequate qualification, training and experience to perform the total left ankle replacement surgery he was performing on the Plaintiff, but had nonetheless provided DMITRY SANDLER, DPM with credentials and authorization to perform that surgery and was thereby negligent.

31. As a direct and proximate result of the negligent credentialing by Defendant MARINERS HOSPITAL alleged above, DMITRY SANDLER, DPM on September 18, 2018 performed a total left ankle replacement surgery on the Plaintiff that he lacked adequate qualification, training, experience or skill to perform properly.

³ Despite naming the Good Health Clinic as a defendant in every iteration of the complaint, the Plaintiff never served that entity with a summons and complaint. (R. at 946). Therefore, contrary to the Plaintiff's argument at the underlying hearings, the Good Health Clinic was not "in the case." (Supp. R. at 94, 95).

32. As a direct and proximate result of the lack of qualification, training and experience by DMITRY SANDLER, DPM, and hence of the negligent credentialing of DMITRY SANDLER, DPM by Defendant MARINERS HOSPITAL, DMITRY SANDLER, DPM negligently performed the total ankle replacement surgery, through use of improper techniques, improper choice of surgical procedure, inadequate post-surgical monitoring and follow up care, or a combination thereof.

(R. at 51-52).⁴

Mariners Hospital moved to dismiss the negligent credentialing count due to the Plaintiff's failure to reasonably investigate or corroborate the claim prior to filing suit. (R. at 136). The Plaintiff opposed the motion to dismiss, arguing corroboration was sufficient or, alternatively, corroboration was not required because the Plaintiff sufficiently corroborated a different claim for vicarious liability against the hospital. (R. at 623-25).

At the conclusion of an hour-long evidentiary hearing held on November 4, 2022, the trial court granted Mariners Hospital's

⁴ The Third Amended Complaint added, for the first time, allegations related to the timing of Dr. Sandler's Stryker Certificate of Training of the STAR Total Ankle Replacement System. (R. at 1032).

motion, and dismissed the negligent credentialing claim. (R. at 769-70). The trial court explained its rationale on the record:

[T]he statute means something and it means it requires some pre-suit investigation. Dr. Sorenson's [sic] affidavit is mere conclusion. It doesn't state any facts, any process that he went through, any sort of research, any sort of – any factual basis for his conclusory opinion that the doctor did not have qualifications, training, or experience without indicating what records he reviewed or anything . . . I don't believe the pre-suit requirement has been satisfied as far as Mariners Hospital.

(Supp. R. at 21).

The trial court formalized its ruling in an Order dated December 5, 2022, which stated:

Defendant, Mariners Hospital, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint is GRANTED and Count II of the Amended Complaint is hereby DISMISSED without prejudice. The Plaintiff failed to comply with the mandatory presuit investigation requirements outlined in Chapter 766 of the Florida Statutes. The presuit expert affidavit proffered by the Plaintiff is entirely conclusory as to the negligent credentialing claim. The affidavit fails to provide a factual basis for Dr. Sorenson's [sic] opinion that Dr. Sandler lacked the requisite training, qualifications, and/or experience to perform the subject ankle replacement procedure. Further, the affidavit fails to explain how Dr. Sorenson [sic] reached this conclusion; it does not even indicate what records or materials he reviewed in connection with his investigation.

(R. at 769-770).

Thereafter, on December 30, 2022 the Plaintiff filed a Second Amended Complaint wherein he reasserted the same negligent credentialing claim against Mariners Hospital in count IV, and the same vicarious liability claim against Mariners Hospital in count V. (R. at 772, 787, 791).

Attached to the Second Amended Complaint was an unsigned and unverified “Supplemental Affidavit of Matthew D. Sorensen.” (R. at 801-08). The Plaintiff subsequently filed a “corrected” version of Dr. Sorensen’s Supplemental Affidavit, which was apparently signed by Dr. Sorensen in Illinois and attested to by a notary in Florida. (R. at 809-819).⁵ Dr. Sorensen’s Corrected Supplemental Affidavit was filed over a year after litigation commenced, and well after the expiration of the statute of limitations. (*Id.*). For the first time, Dr.

⁵ At the time, the remote notarization administrative orders adopted by the Florida Supreme Court in response to the COVID-19 pandemic had been terminated. *See In Re: Termination of Specified Covid-19 Emergency Operational Measures to Account for New Rules on Remote Conduct of Court Proceedings*, Admin. Order No. AOSC22-51 (Oct. 3, 2022). In any event, the Plaintiff abandoned reliance on the belated affidavit both below and on appeal. (R. 1221: 21-25). *See e.g., Hawks Nest Condo., Inc. v. Westchester Surplus Lines Ins. Co.*, 366 So. 3d 1184, 1187 n.2 (Fla. 3d DCA 2023) (noting arguments not raised in initial brief are waived).

Sorensen stated he reviewed Dr. Sandler's curriculum vitae. (R. at 816-17).

On January 17, 2023, Mariners Hospital filed a Motion to Dismiss the negligent credentialing claim of the Second Amended Complaint with prejudice. (R. at 821). The expiration of the statute of limitations precluded the Plaintiff from curing this pre-suit deficiency. (R. at 827-31).

Also on January 17, 2023, Co-Defendants, Dr. Sandler and Southernmost Foot & Ankle Specialists filed a Motion to Dismiss the Second Amended Complaint in its entirety based on the Plaintiff's failure to join the State of Florida as an indispensable party. (R. at 945). Specifically, Dr. Sandler provided care to the Plaintiff as an agent of the DOH through his participation in VHCPP. (R. at 948, 1099-1128). The Referral Forms executed by the Plaintiff expressly stated the State would be solely liable for any alleged damages resulting from treatment with Dr. Sandler. (R. at 1099-1128). Mariners Hospital filed a Notice of Joinder in the Co-Defendants' Motion. (R. at 945, 997).

The trial court conducted a special-set hearing on April 6, 2023 on Mariners Hospital's Motion to Dismiss the negligent credentialing claim. (R. at 1209); (Supp. R. at 58). At the conclusion of the hearing, the trial court dismissed Count IV with prejudice. (R. at 1224); (Supp. R. at 73). The court stated on the record as follows:

It seems that my December 5th order should have been with prejudice, but did find that the presuit investigation requirements were not followed. So – and it was error for the Court to allow an amendment that is not supported by the case law, so the motion to dismiss is granted with prejudice.

(R. at 1224); (Supp. R. at 73).

On April 12, 2023, the trial court entered an order formalizing its ruling, wherein it stated:

As to the negligent credentialing claim (Count IV), the Plaintiff failed to comply with the mandatory presuit investigation requirements outlined in Chapter 766 of the Florida Statutes prior to the expiration of the statute of limitations Defendant, Mariners Hospital, Inc.'s Motion to Dismiss Count IV of Plaintiff's Second Amended Complaint With Prejudice is GRANTED and Count IV is hereby DISMISSED WITH PREJUDICE.

(R. at 994-95).

Then, by separate order dated July 25, 2023, and after conducting another hearing, the trial court dismissed the Second

Amended Complaint in its entirety for the Plaintiff's failure to join the State of Florida (DOH) as an indispensable party to the action. (R. at 1009-12). The trial court permitted the Plaintiff thirty days to amend for the limited purpose of adding the State of Florida as a defendant. (R. at 1012).

On August 24, 2023, without adding the State of Florida (DOH) as a party as directed by the court, the Plaintiff filed a Third Amended Complaint, which was nearly identical to the Second Amended Complaint. (R. at 1014). The Third Amended Complaint reasserted the negligent credentialing claim against Mariners Hospital that was previously dismissed with prejudice. (R. at 1031).

Another hearing was conducted by the trial court on these issues on October 25, 2023, (Supp. R. at 114, 127-28), resulting in dismissal with prejudice of the Third Amended Complaint on November 6, 2023. (R. at 1182-85, 1187). The order stated as follows:

1. Plaintiff's Third Amended Complaint included the same claims against the Defendants as the prior iterations of the Complaint.
2. On November 4, 2022, the Court conducted an evidentiary hearing on Mariners Hospital's Motion to Dismiss Count II of the Amended Complaint for negligent

credentialing. On December 5, 2022, the Court entered an Order granting Mariners' motion and dismissing the negligent credentialing claim for failure to comply with the mandatory presuit investigation requirements of Chapter 766 of the Florida Statutes. The Court's findings are set forth in the December 5, 2022 order as well as the hearing transcript.

3. On December 30, 2022, Plaintiff filed a Second Amended Complaint with an identical count for negligent credentialing, which Mariners Hospital again moved to dismiss. The Court conducted a special-set hearing on April 6, 2023, and entered an Order on April 12, 2023, granting Mariners' motion and dismissing with prejudice the negligent credentialing claim (Count IV of the Second Amended Complaint).

4. On May 19, 2023, the Court conducted a hearing on Dr. Sandler and Southernmost Foot & Ankle Specialists, P.A.'s Motion to Dismiss the Second Amended Complaint. On June 26, 2023, the Court entered an Order *granting* the motion for Plaintiff's failure to join the State of Florida as an indispensable party. Thereafter, the Court entered another Order on July 25, 2023, *dismissing* the Second Amended Complaint for Plaintiff's failure to join an indispensable party. The July 25, 2023 Order permitted the Plaintiff an opportunity to amend to join the indispensable party.

5. On August 24, 2023, Plaintiff filed a Third Amended Complaint, which reasserted the same negligent credentialing claim against Mariners Hospital that was previously dismissed with prejudice. The Third Amended Complaint failed to join as a party the State of Florida (or a department or agency of the State of Florida).¹

[FN1] In the first iteration of the Complaint and in every subsequent version, the Plaintiff named The Good Health Clinic as a Defendant. However, the Plaintiff never served The Good Health Clinic. The Plaintiff did not advise the Court of any attempts, or intent, to serve The Good Health Clinic.

6. The Defendants met the Plaintiff's Third Amended Complaint with Motions to Dismiss with Prejudice. The Court conducted a special-set hearing on the Motions to Dismiss the Third Amended Complaint on October 25, 2023. At the hearing, Plaintiff's counsel advised the Court he does not intend to add the State of Florida (or a department or agency of the State of Florida) as a party and was essentially seeking reconsideration of the Court's prior rulings on both negligent credentialing and indispensable party.

7. After hearing argument of counsel, and reviewing the relevant pleadings, prior orders, hearing transcripts, and legal authorities, the Court maintains its prior rulings.

8. The Court dismisses with prejudice the Plaintiff's Third Amended Complaint in light of the Plaintiff's failure to add a party necessary to a determination of the merits of the case. The Court maintains and reaffirms its ruling as to the negligent credentialing claim against Mariners Hospital.

9. As to all Defendants (Dmitry Sandler, DPM; Southernmost Foot & Ankle Specialists, P.A.; and Mariners Hospital, Inc.), the action is hereby dismissed with prejudice.

(R. at 1182-85) (emphasis in original).

On December 4, 2023, this appeal followed.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's dismissal with prejudice of the Plaintiff's negligent credentialing claim against Mariners Hospital. This Court should also affirm dismissal of the entire action for failure to join an indispensable party.

The Plaintiff failed to corroborate the negligent credentialing claim with an expert opinion sufficient under Chapter 766. The affidavit of the Plaintiff's pre-suit expert, Dr. Sorensen, was devoid of any factual basis or support underlying his bare conclusion that Mariners Hospital negligently credentialed Dr. Sandler to perform the total ankle replacement procedure. The corroborating opinion was based solely on the expert's review of the Plaintiff's medical records; the expert did not review Dr. Sandler's curriculum vitae, his Stryker certification of training to perform the STAR total ankle replacement, or his delineation of surgical privileges with Mariners Hospital. Moreover, the Plaintiff chose not to issue any pre-suit discovery on the issue of negligent credentialing. As the Plaintiff failed to reasonably investigate or adequately corroborate a claim for negligent

credentialing prior to the expiration of the statute of limitations, the trial court correctly dismissed the claim with prejudice.

Second, the trial court correctly concluded the State of Florida (DOH) was an indispensable party necessary to a determination of the merits of the underlying case. All of the treatment provided to the Plaintiff by Dr. Sandler was as an agent of the State, through the Florida Department of Health's Volunteer Health Care Provider Program. Mariners Hospital adopts and incorporates herein the arguments set forth in Co-Appellees' Answer Brief related to the trial court's dismissal of the action for the Plaintiffs' failure to join an indispensable party.

ARGUMENT

I. Standard of Review

This Court reviews de novo a trial court's ruling that a corroborating expert affidavit fails to comply with Chapter 766. See *Oliveros v. Adventist Health Sys./Sunbelt, Inc.*, 45 So. 3d 873, 876 (Fla. 2d DCA 2010).

II. The Trial Court Correctly Applied the Pre-Suit Statutes in Dismissing Count IV Based on Plaintiff's Failure to Corroborate the Claim

The Plaintiff argues "detailed" corroboration by a pre-suit expert is not required, and an opinion in "summary form" is sufficient. (I.B. at 35, 39). Alternatively, the Plaintiff argues corroboration of a vicarious liability claim against the hospital is sufficient to corroborate "any and all" claims against the hospital, regardless of the theory of negligence. (I.B. at 24). The plain language of Florida's Medical Malpractice Act refutes both of the Plaintiff's arguments, and the trial court correctly dismissed Count IV with prejudice.

a. Chapter 766's Reasonable Investigation and Expert Corroboration Requirements

Chapter 766 sets forth a complex pre-suit investigation procedure that both the claimant and prospective defendant must follow before a medical negligence claim may be brought in court. See *Kukral v. Mekras*, 679 So. 2d 278, 280 (Fla. 1996). The pre-suit requirements are “more than mere technicalities.” *Largie v. Gregorian*, 913 So. 2d 635, 638 (Fla. 3d DCA 2005) (quoting *Correa v. Robertson*, 693 So. 2d 619, 621 (Fla. 2d DCA 1997)).

The statutory scheme requires a claimant to determine whether reasonable grounds exist to believe a prospective defendant acted negligently and caused the claimant's injury. See *Largie*, 913 So. 2d at 638. “This requires both investigation and corroboration of the results of the investigation by ‘a verified written medical expert opinion.’” *Id.*; see also § 766.104(1), Fla. Stat. (providing that no medical malpractice action may be filed “unless the attorney filing the action has made a reasonable investigation . . . to determine that there are grounds for a good faith belief that there has been negligence in the care and treatment of the claimant.”).

An “investigation,” consists of the following: “(1) review of the case against each potential defendant; (2) consultation with a medical expert; and (3) written corroboration of negligence by a medical expert.” *Largie*, 913 So. 2d at 638 (citing § 766.202(4), Fla. Stat.) (emphasis omitted). The pre-suit investigation must be “verifiable.” § 766.201(2)(a)(1), Fla. Stat.

The expert corroboration requirement assures the defendant, and the court, that a medical expert has determined “there is justification for the Plaintiffs’ claim, i.e., *that it is not a frivolous medical malpractice claim.*” *Largie*, 913 So. 2d at 639 (quoting *Kukral*, 679 So. 2d at 282) (emphasis in original) (“The purpose of the medical expert opinion is to corroborate that the claim is legitimate, not to give notice of it.”); *see also* *Wolfsen v. Applegate*, 619 So. 2d 1050, 1054-55 (Fla. 1st DCA 1993) (stating the purpose of a corroborating affidavit is to “ensure that a claim or denial has been preceded by a ‘reasonable investigation,’ and that it ‘rests on a reasonable basis’- i.e., ‘to eliminate *frivolous* claims and defenses”) (quoting § 766.201(2)(a), Fla. Stat.) (emphasis in original). In other words, “[t]he purpose of a corroborating medical opinion is to assure the legitimacy

of the claim and to prevent the filing of baseless claims.” *Yocom v. Wuesthoff Health Sys., Inc.*, 880 So. 2d 787, 789 (Fla. 5th DCA 2004).

These provisions of Chapter 766 are mandatory, and courts are not at liberality to modify the express language. *See, e.g., Clare v. Lynch*, 220 So. 3d 1258, 1261 (Fla. 2d DCA 2017) (“[W]hile [plaintiff] is correct that the presuit requirements are to be interpreted liberally to provide access to the courts . . . courts are not at liberty to ignore the plain language of the statute.”), *disapproved of on certiorari jurisdictional grounds in Univ. of Fla. Bd. of Trustees v. Carmody*, 372 So. 3d 246 (Fla. 2023). *See also Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020) (“In interpreting [a] statute, [this Court] follow[s] the ‘supremacy-of-text principle’—namely, the principle that ‘[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.’”) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)).

After completion of a pre-suit investigation and any informal discovery, “any party may file a motion in the circuit court requesting the court to determine whether the opposing party’s claim or denial

rests on a reasonable basis.” § 766.206(1), Fla. Stat. If the court finds “that the notice of intent to initiate litigation mailed by the claimant does not comply with the reasonable investigation requirements of ss. 766.201-766.212 including a review of the claim and a verified written medical expert opinion . . . **the court shall dismiss the claim**[.]” § 766.206(2), Fla. Stat. (emphasis added).

b. Plaintiff’s Failure to Provide Corroboration of Count IV Against Mariners Hospital Mandated Dismissal of that Count

The Plaintiff’s failure to provide legally sufficient expert corroboration of the negligent credentialing claim asserted against Mariners Hospital (Count IV) mandated dismissal of that count.

The record demonstrates an insufficient investigation and lack of a reasonable basis for the negligent credentialing claim against Mariners Hospital. Dr. Sorensen, the Plaintiff’s pre-suit expert, issued a conclusory and unsupported affidavit stating Dr. Sandler lacked sufficient qualification, training, and/or experience to perform the total ankle replacement procedure on September 18, 2018, and stating Mariners Hospital negligently credentialed Dr. Sandler to perform the procedure. (R. at 146-151). The opinions set forth in Dr.

Sorensen's affidavit were based solely on his review of the Plaintiff's medical records. (R. at 456, 622, 1218). Dr. Sorensen did not review Dr. Sandler's curriculum vitae, Dr. Sandler's Stryker certification of training to perform the STAR total ankle replacement, or Dr. Sandler's delineation of surgical privileges with Mariners Hospital in connection with authoring his pre-suit opinion. (R. at 1216-18); (Supp. R. at 10, 16, 25, 28).⁶

The Plaintiff concedes Dr. Sorensen's pre-suit statement regarding negligent credentialing was "in a summary form" and "was not detailed." (I.B. at 25, 39). Nevertheless, the Plaintiff argues the conclusory statement was sufficient. In his brief, the Plaintiff states:

- "[N]egligent credentialing was actually addressed in pre-suit, albeit **in a summary form.**"
- "[Dr. Sorensen's] explanation on [negligent credentialing] was **not detailed**, but . . . it did not have to be."
- "Dr. Sorensen . . . did explicitly address the negligent credentialing issue, at least in a **summary form.**"

⁶ In his brief, the Plaintiff references "the evidence to date, produced by the Appellees" in connection with discussing his theories regarding lack of qualifications and negligent credentialing. (I.B. at 33). However, the Plaintiff's reference is to discovery requests and productions **during litigation.**

(I.B. at 25, 39) (emphasis added).

The trial court correctly rejected the Plaintiff's argument. As this Court previously stated: **"The corroboration statement must outline the factual basis for the opinion."** *Watkins v. Rosenthal*, 637 So. 2d 993, 994 (Fla. 3d DCA 1994) (citing *Duffy v. Brooker*, 614 So. 2d 539 (Fla. 1st DCA 1993)) (emphasis added). Dr. Sorensen's affidavit simply does not do this.

In *Duffy*, the corroborating expert opinion did not identify the "factual bases upon which [the expert's] ultimate legal conclusion rest[ed]." *Duffy*, 614 So. 2d at 542. This made it impossible to determine whether the expert made a reasonable investigation or, for that matter, whether he made *any* investigation of the claim. *See id.* The First District Court of Appeal concluded the affidavit was insufficient to satisfy the corroboration requirements of section 766.203:

The Academy of Florida Trial Lawyers, appearing as amicus curiae in this case on the side of appellee, argue that **"corroborate" has a plain, ordinary, and obvious meaning**, citing The American Heritage Desk Dictionary (1981) and Black's Law Dictionary, Fifth Edition (1979). It contends that **section 766.203(3) requires that the medical expert's "corroborating" statement contain**

“additional or supplemental information which strengthens the conclusions offered by the medical expert.” It asserts that Dr. Edgerton’s statement did not comply with the requirements of section 766.203(3) because it contained no additional facts or circumstances to confirm his **“conclusory allegations.”**

We agree that the Florida Legislature contemplated the type of “corroboration” urged by the Academy when it attempted to reform the Medical Malpractice Act, and **not merely a reiteration of the statement to be corroborated.**

* * *

We interpret sections **766.203(2) and 766.203(3) to require that the “corroboration” statements outline the factual basis for the medical experts’ opinions,** in keeping with the legislative purpose to permit early evaluation of the merit of claims and defenses and thereby encourage meaningful presuit negotiations.

Id. at 545 (emphasis added).

Dr. Sorensen’s “summary form” opinion—as characterized by the Plaintiff—did not outline a factual basis or provide additional information to support the conclusion that Mariners Hospital negligently credentialed Dr. Sandler to perform the ankle replacement procedure. Dr. Sorensen’s statement also did not confirm a reasonable investigation of the negligent credentialing claim. As such, the affidavit failed to satisfy the requirements of

section 766.203(2), and was insufficient to corroborate the Plaintiff's claim.

c. Corroboration of One Theory of Negligence Against Mariners Hospital Does Not Open the Doors to “Any and All” Claims

On the one hand, the Plaintiff argues Dr. Sorensen's “summary form” opinion was sufficient under the statutory scheme. (I.B. at 39). On the other hand, the Plaintiff argues, even if the “summary form” opinion was insufficient, he was entitled to proceed with the negligent credentialing claim because he adequately corroborated a different theory of negligence against Mariners Hospital during pre-suit (vicarious liability for Dr. Sandler), and that was enough to pursue “*any and all*” theories in litigation. (I.B. at 24). This flies in the face of the clear language of the Medical Malpractice Act.

In *University of South Florida Board of Trustees v. Mann*, 159 So. 3d 283 (Fla. 2d DCA 2015), the Second District held that a pre-suit affidavit directed at some claims against a hospital was “plainly insufficient” to corroborate reasonable grounds to support a claim of medical malpractice arising out of alleged negligence by the hospital's nurses and their supervisors. *Mann*, 159 So. 3d at 285.

In *Rafferty v. Martin Memorial Medical Center, Inc.*, 335 So. 3d 144 (Fla. 4th DCA 2022), the Fourth District expressly followed *Mann* in holding that an affidavit that corroborated claims against a midwife who delivered a baby was insufficient to corroborate claims against the hospital and its nursing staff, requiring dismissal of those claims:

While the corroborating statements the plaintiff submitted with the notice of intent identified reasonable grounds to initiate medical malpractice litigation against the midwife who delivered the baby, nothing in the statements addressed any deficiencies in the care provided by the hospital and its nursing staff. Thus, dismissal is required pursuant to the plain text of section 766.206(2), Florida Statutes (2018). See *Univ. of S. Fla. Bd. of Trs. v. Mann*, 159 So. 3d 283, 284 (Fla. 2d DCA 2015) (“Because the affidavit is plainly insufficient as a statement to corroborate reasonable grounds to support a claim of medical malpractice as to the nurses and supervisors, the trial court departed from the essential requirements of law in denying [the hospital’s] motion to dismiss”); *Duffy v. Brooker*, 614 So. 2d 539, 545–46 (Fla. 1st DCA 1993) (**interpreting “sections 766.203(2) and 766.203(3) to require that the ‘corroboration’ statements outline the factual basis for the medical experts’ opinions” and rejecting as insufficient “conclusory allegations” that did not “sufficiently indicate the manner in which the [medical provider] allegedly deviated from the standard of care”**), abrogated on other grounds as recognized in *Archer v. Maddux*, 645 So. 2d 544, 547 (Fla. 1st DCA 1994).

Rafferty, 335 So. 3d at 144 (emphasis added).

d. The Plaintiff's Case Law is Inapposite

The decisions cited by the Plaintiff are both distinguishable and inapplicable because they are based on prior versions of Chapter 766 that have since been revised by the legislature. The Second District applied the current version of section 766.203 in *Florida Health Sciences Center, Inc. v. Jackman*, 358 So. 3d 810 (Fla. 2d DCA 2023). In *Jackman*, the court found the plaintiff failed to reasonably investigate or corroborate a claim regarding unsterile medical instruments causing bacterial infections where nothing in the pre-suit expert's affidavit suggested he evaluated bacterial cultures or otherwise reasonably investigated that claim. *See Jackman*, 358 So. 3d at 815. Although the Florida Supreme Court subsequently quashed *Jackman*, this was solely on jurisdictional grounds. *See Jackman v. Fla. Health Scis. Ctr., Inc.*, No. SC2023-0547, 2024 WL 397608, at *1 (Fla. Feb. 2, 2024).

Again, the decisions cited by the Plaintiff were decided under prior versions of the Medical Malpractice Act, before significant amendments were made in 2003 and 2013, and before the *Carmody*

decision in 2023. See *Carmody*, 372 So. 3d at 246. As observed by concurring Judge Kilbane in *Adventist Health System/Sunbelt, Inc. v. Machalek*, 383 So. 3d 534 (Fla. 5th DCA 2023):

When viewed in its context, the legislature made itself clear: the two-step presuit investigation process is mandatory to bring a medical negligence lawsuit in this state, and failure to participate in that process requires dismissal. See §§ 766.201, .206, Fla. Stat.; see also *Goode*, 830 So. 2d at 823 (noting that the proper “interpretation ‘depends upon the context in which [“shall”] is found and upon the intent of the legislature as expressed in the statute’ ” (quoting *S.R. v. State*, 346 So. 2d 1018, 1019 (Fla. 1977))).

In spite of this clear statutory language and Florida courts’ adherence to the supremacy-of-text principle, much of the case law stands in stark contrast due to what seems to be a perceived conflict between the clear Legislative directive and Florida’s constitutional protection for access to courts.

* * *

In essence, Florida courts have determined that because the presuit process restricts a plaintiff’s ability to bring medical malpractice claims, we “must construe the medical malpractice presuit screening requirements ‘in a manner that favors access to courts.’” *Morris*, 252 So. 3d. at 1146 (quoting *Patry v. Capps*, 633 So. 2d 9, 13 (Fla. 1994)). While this precept cannot be ignored, the act of construing statutory text still requires “analyz[ing] and explain[ing] the meaning of (a sentence or passage).” *Construe*, Black’s Law Dictionary (11th ed. 2019). Courts have instead relied on access to courts to right perceived wrongs thereby evading the statutory text altogether. While well intentioned, such decisions cannot stand.

* * *

In light of our directive to follow the supremacy-of-text principle and *Carmody*'s clear statement that the presuit requirements 'have a jurisdictional purpose' both before and after the 2013 amendments, *id.*, there no longer should be any doubt about their jurisdictional import and the legislative mandate to dismiss claims that fail to comply with the reasonable investigation requirements of section 766.202.

* * *

In sum, I perceive no jurisprudentially sound means of reconciling these past decisions with the supremacy-of-text principle in *Carmody*. As a result, their continued validity deserves a close reexamination.

Machalek, 383 So. 3d at 539 (J. Kilbane, concurring specially).

The *Davis v. Orlando Regional Medical Center*, 654 So. 2d 664 (Fla. 5th DCA 1995) case cited by the Plaintiff is distinguishable from the present case. In *Davis*, after the plaintiff's expert was deposed during litigation, the defendant filed a pre-trial motion in limine to exclude testimony about post-surgical negligence of a hospital nurse on the basis the theory was not corroborated during pre-suit. See *Davis*, 654 So. 2d at 665. *New* evidence became available during the discovery process that led to the expert formulating a *new* opinion. *Id.* at 666 (reasoning that under the defendant's position, a plaintiff could not amend a complaint "on the basis of **new evidence** of

negligence that is **found during pre-trial discovery**”) (emphasis added).

Here, the Plaintiff attempted to pursue the theory of negligent credentialing during pre-suit, but he failed to reasonably investigate or corroborate the claim prior to filing suit. This is not a case about newly discovered evidence. *Davis* does not support the Plaintiff’s suggestion that the provisions of section 766.203(2) can be ignored.⁷

The Plaintiff also cites *Columbia/JFK Medical Center Ltd. Partnership v. Brown*, 805 So. 2d 28 (Fla. 4th DCA 2001). In *Brown*, the plaintiff contended in pre-suit that the hospital was vicariously liable for the alleged negligence of its emergency room physicians and nursing staff. *See Brown*, 805 So. 2d at 28. During litigation, the

⁷ Contrary to the Plaintiff’s statement in his Initial Brief, the *Davis* opinion did not comment on the unavailability of informal discovery before the corroborating expert affidavit is prepared. (I.B. at 40-41). *See Davis*, 654 So. 2d at 665. In any event, the Plaintiff here did not propound pre-suit discovery and did not attempt to obtain information or materials that could have been cited in an amended notice of intent and supplemental affidavit prior to the expiration of the statute of limitations. (R. at 1221) (Plaintiff’s counsel: “We don’t file additional affidavits or amended affidavits unless within the statute of limitations somehow we are starting over with a new and different presuit.”).

plaintiff pursued an additional claim against the hospital for negligent credentialing. *See id.* The Fourth District held the new claim was not subject to dismissal despite the plaintiff's failure to identify the negligent credentialing claim in pre-suit. *See id.* at 29.

The *Brown* decision predated the legislature's 2003 revision to section 766.102 to include subsection (7), which now imposes a discrete corroboration requirement for nonclinical claims such as negligent credentialing. *See* § 766.102(7), Fla. Stat. Additionally, unlike in *Brown*, the Plaintiff here attempted to assert the claim during pre-suit, but failed to adequately investigate or corroborate it prior to filing suit or before the expiration of the statute of limitations.

In *Jackson v. Morillo*, 976 So. 2d 1125 (Fla. 4th DCA 2007), another case cited by the Plaintiff, the Fifth District only addressed whether it was necessary for the corroborating affidavit to state the defendant's name or specifically describe his negligence when it was undisputed the defendant received pre-suit notice that the plaintiff was asserting a claim against him. *Jackson*, 976 So. 2d at 1127-28. Unlike here, the expert's affidavit demonstrated he examined all of the records underlying his opinion, and his statement corroborated

reasonable grounds to support the claim of medical negligence (*i.e.*, a reasonable investigation). *See id.* at 1129.

The Plaintiff is proposing that section 766.203(2) does not mean what it says. However, the statute plainly states:

[C]orroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a verified written medical expert opinion . . . which statement shall corroborate reasonable grounds to support the claim for medical negligence.

§ 766.203(2), Fla. Stat. (emphasis added). It would be contrary to the clear language and legislative intent to excuse the Plaintiff's failure to provide adequate expert corroboration of a claim he identified during pre-suit, but failed to reasonably investigate or substantiate. This would result in a situation directly contrary to the Legislature's express intent "to provide a plan for prompt resolution of medical negligence claims" and "eliminate frivolous claims." § 766.201(2), Fla. Stat.

The underlying purpose of a corroborative medical opinion is to assure the legitimacy of the claim and to prevent the filing of baseless claims. *See Yocom*, 880 So. 2d at 789; *Shands Teaching Hosp. & Clinics v. Barber*, 638 So. 2d 570, 572 (Fla. 1st DCA 1994). As such,

the trial court correctly dismissed Count IV for Plaintiff's failure to provide statutorily compliant corroboration of his claim that Mariners Hospital negligently credentialed Dr. Sandler to perform the ankle replacement procedure at issue.

III. The Trial Court Correctly Dismissed the Action for Plaintiff's Failure to Join an Indispensable Party

To avoid redundancy, Mariners Hospital adopts and incorporates herein the arguments raised in Co-Appellees, Dr. Sandler and Southernmost Foot & Ankle Specialists', Answer Brief regarding the trial court's determination that the State of Florida (DOH) was an indispensable party to this action. The Plaintiff's failure to join this indispensable party warranted dismissal of the Third Amended Complaint with prejudice.

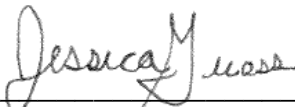
CONCLUSION

This Court should affirm the trial court's order dismissing with prejudice Count IV against Mariners Hospital for the Plaintiff's failure to comply with the mandatory pre-suit requirements prior to the expiration of the statute of limitations.

This Court should likewise affirm the trial court's order dismissing the entire action for the Plaintiff's failure to join an indispensable party (the State of Florida, DOH).

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy hereof has been filed and electronically served via Florida ePortal on this 9th day of September, 2024, to all counsel on the attached service list.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this document complies with the found and word count requirements of Florida Rules of Appellate Procedure 9.045 and 9.210.

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