

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

JOHN COLE, as natural parent and
guardian of MEGAN COLE, a minor,

Plaintiff,

CASE NO.: 2004-30116-CIC

vs.

DIV. NO.: 32

HALIFAX HOSPITAL MEDICAL CENTER,
etc., et al.,

Defendants.

_____ /

SUZANNE SUTTON, P.A.

Third Party Plaintiff

v.

THE COMMUNITY MEDICAL CENTER
OF WEST VOLUSIA, P.A., etc., et al.,

Third Party Defendants

_____ /

MARC ANAYAS'S
AMENDED AND SUPPLEMENTAL
MOTIONS TO DISMISS AND TO STRIKE AND
FOR 766.206 FINDINGS REGARDING
DEFENDANT SUZANNE SUTTON'S THIRD-PARTY COMPLAINT
AND
MOTION FOR SUMMARY JUDGMENT

COMES NOW, Marc Anayas, appearing for a specific and limited purpose only, by and through his undersigned counsel and, pursuant to Rule 1.180 and other Rules of Florida Rules of Civil Procedure, files this amended motion in response to Defendant Suzanne Sutton's Third-Party Complaint, without waiving any objection or defense he may

have to improper service, lack of jurisdiction, or otherwise, and states:

BACKGROUND AND FACTS

1. The original complaint in this action is based on causes of action for medical malpractice naming a number of different defendants for the same act or acts of negligence. The events reflected in the underlying suit occurred on or about December 12 - 17, 2002.

2. On February 13, 2004, Defendant Suzanne Sutton, a physician's assistant (referred to herein as "Sutton"), served her answer and affirmative defenses on all parties. Exhibit "A."

3. Marc Anayas is the son of Marcelo Anayas, M.D.

4. Marc Anayas is a student at the University of North Florida.

5. Marc Anayas resides in Glenwood, Florida.

6. Marc Anayas is not a physician.

7. At no time relevant to this matter has Marc Anayas been an officer, director, employee or agent of Community Medical Center of West Volusia, P.A.

8. Missionaries of Hope, Inc., is a charitable Florida not-for-profit corporation, recognized as a charity by the United States Internal Revenue Service (IRS) pursuant to Section 501c(3) of the Internal Revenue Code (referred to as "Missionaries of Hope" herein).

9. Marc Anayas was appointed to the Board of Directors of Missionaries of Hope for the first time on or about March 11, 2004. Accordingly, Marc Anayas had no affiliation with Missionaries of Hope until long after the events giving rise to this law suit occurred.

10. Marc Anayas serves on the Board of Directors of Missionaries of Hope voluntarily. He does not receive compensation for serving on the Board of Directors of Missionaries of Hope.

11. Even if Marc Anayas had an affiliation with Missionaries of Hope he would be immune from liability pursuant to Section 768.1355, Florida Statutes, and other state and federal laws.

12. As a not-for-profit charitable corporation, Missionaries of Hope has no owners and has no shareholders.

13. As a not-for-profit charitable corporation, Missionaries of Hope does not and cannot own a for-profit professional service corporation such as Community Medical Center of West Volusia, P.A.

14. Community Medical Center of West Volusia, P.A., is a separate Florida for-profit professional service corporation (also known as a "professional association" or a "P.A.").

15. By law, the "owners" of a corporation are known as "shareholders."

16. By law, officers, directors and shareholders of a professional service corporation such as Community Medical Center of West Volusia, P.A., formed for the practice of medicine, can only consist of licensed medical doctors.

17. By law, the "owners" or shareholders of a professional service corporation such as Community Medical Center of West Volusia, P.A., can not be a non-physician such as Marc Anayas, or a corporation such as Missionaries of Hope.

18. Marc Anayas was not served with a notice of intent to initiate medical malpractice litigation pursuant to Chapter 766, Florida Statutes.

19. Marc Anayas has not been afforded an opportunity to participate in pre-suit investigation of this matter, pursuant to Chapter 766, Florida Statutes.

20. On November 23, 2004, **approximately 283 days after serving her answer and affirmative defenses**, Defendant Sutton has now filed an unauthorized Third-Party Complaint, naming Marc Anayas, an unrelated non-party, alleging claims for common law indemnification and statutory indemnification. **Defendant Sutton's Third-Party Complaint is nothing more than a frivolous attempt to share her blame for her own negligence with other individuals pursuant to the Fabre case.**

21. The claims alleged against Missionaries of Hope and Marc Anayas in the Third-Party Complaint arose out the same set of facts and circumstances in the Plaintiff's (John Cole as the natural parent and guardian of Megan Cole, a minor) Complaint.

22. Defendant Sutton is trying to assert claims that should have been raised long ago in this litigation and are now untimely.

23. Defendant Sutton's Third-Party Complaint is a thinly veiled attempt to personally harass and intimidate Concepcion Anayas, M.D., and her family members, including Marc Anayas, her son, by filing vexatious, frivolous and meritless litigation against them.

24. Defendant Sutton's Third Party Complaint is improper and unauthorized in that she did not move the court for leave prior to filing her Third-Party Complaint, perhaps an admission that the Court would not have authorized it. Furthermore, Defendant Sutton did not provide any notice to any other party or to Marc Anayas of the Third-Party Complaint prior to filing it.

25. Additionally, any liability that would fall on Marc Anayas would only arise as a result of the negligence of Defendant Sutton, a physician's assistant. There is no cause of action under Florida law that would allow a negligent Defendant to be indemnified for her own negligence.

MOTION TO DISMISS

Marc Anayas moves to dismiss Defendant Sutton's Third-Party Complaint, incorporating the foregoing paragraphs, and stating as follows:

A. Sutton's Third-Party Complaint Is Improper and Is Not Authorized by the Florida Rules of Civil Procedure

26. Rule 1.180 (a), Florida Rules of Civil Procedure states, in part:

The defendant need not obtain leave of court if the defendant files the third-party complaint not later than 20 days after the defendant serves the original answer. Otherwise, the defendant must obtain leave on motion and notice to all parties to the action. . . . (Emphasis added.)

27. Defendant Sutton did not obtain permission from the Court to file or serve her Third-Party Complaint against Marc Anayas. Therefore, the Third-Party Complaint is unauthorized and a nullity.

28. The Third-Party Complaint must be dismissed for violating Rule 1.180(a), Florida Rules of Civil Procedure, which required Defendant Sutton to file a motion and obtain permission from the Court prior to filing or serving a Third-Party Complaint.

B. The Service of an Improper, Unauthorized Pleading is a Nullity and the Court Lacks Jurisdiction Over Marc Anayas as a Result

29. Moreover, although she may have served Marc Anayas long after he filed his initial motion to dismiss, Defendant Sutton has served an unauthorized pleading. Such service is improper and renders such service a nullity. Service of an improper, unauthorized pleading cannot serve to bring a party before the Court.

30. Accordingly, the Court lacks jurisdiction over Marc Anayas.

C. Marc Anayas, as a Voluntary Director of a Charitable Not-For-Profit Corporation, Has Immunity

31. Marc Anayas serves as a director of Missionaries of Hope, without compensation.

32. At all relevant times hereto, Marc Anayas has served and acted in good faith within the course and scope of his duties as a member of the Board of Directors of Missionaries of Hope.

33. At all relevant times hereto, Marc Anayas has acted as a reasonable and prudent person would act under similar circumstances in serving as a member of the Board of Directors of Missionaries of Hope.

34. At all relevant times hereto, Marc Anayas has neither breached any duty of or failed to perform any act required as a member of the Board of Directors of Missionaries of Hope.

35. The injuries or damages alleged were not caused by any wanton or willful misconduct in serving as a member of the Board of Directors of Missionaries of Hope.

36. Missionaries of Hope is a not-for-profit corporation as defined in Section 501c(3), of the Internal Revenue Code of the United States.

37. Mark Anayas is personally immune from liability for civil damages in this matter pursuant to 42 U.S.C. Section 14503(a) ("The Federal Volunteer Protection Act"), Section 617.0834, Florida Statutes, and Section 768.1355, Florida Statutes ("The Florida Volunteer Protection Act").

D. Sutton's Third-Party Complaint Should be Dismissed for Failing to Allege Required Elements for Causes of Action

38. The Third-Party Complaint must be dismissed for failing to properly plead a cause of action for common law indemnification.

39. The Third-Party Complaint must be dismissed for failing to properly plead a cause of action for statutory indemnification.

40. The single statute cited in the Third-Party Complaint does not authorize indemnification by Marc Anayas.

41. In effect, Defendant Sutton is attempting to obtain indemnification for her own negligence. As Defendant Sutton was the one negligent, she cannot receive indemnification from a party who is only vicariously liable or who would not otherwise be liable if Defendant Sutton were not negligent. Any such cause of action against Marc Anayas is improper.

E. Failure to Plead Sufficient Ultimate Facts

42. Defendant Sutton has failed to plead sufficient ultimate facts to support her allegations. Her allegations contain conclusory statements and opinions.

43. Defendant Sutton has failed to plead any specific statute that would entitle her to "statutory indemnification" for her own negligence.

F. Defendant Sutton Has Failed to Comply with Mandatory Pre-suit Notice

and

Pre-suit Investigation Procedures as Required by Chapter 766, Florida Statutes

44. This case arises out of alleged medical negligence. Defendant Sutton appears to be alleging in her Third-Party Complaint that the Third-Party defendants are negligent together with her in this matter.

45. Yet Marc Anayas has never been served with a notice of intent to initiate medical malpractice litigation, nor has he been allowed his statutory right to participate in mandatory pre-suit investigation activities, as required by Chapter 766, Florida Statutes.

46. Accordingly, any claims of medical negligence against Marc Anayas must be dismissed.

G. Defendant Sutton Has Failed to Comply with Conditions Precedent to Suit

47. Defendant Sutton has failed to perform required conditions precedent to filing her Third-Party Complaint. Accordingly, it should be dismissed.

H. Equitable Estoppel Bars Defendant Sutton From Obtaining Indemnification for her Own Acts of Negligence

48. Defendant Sutton is equitably estopped from pleading or obtaining indemnification from others for her own acts of negligence.

I. The Third-Party Complaint Impermissibly Intertwines Different Causes of Action Against Different Parties

49. The Third-Party Complaint violates Rule 1.110(f), Florida Rules of Civil Procedure, in that it impermissibly confuses and intertwines different unrelated causes of action against different parties into two vague, general Counts.

50. The Third-Party Complaint fails to specify the facts and actions that may support liability against the specific named party.

51. The Third-Party Complaint also fails to specify clearly which legal cause of action is pleaded against which individual named party and fails to set forth different claims in different numbered counts.

52. Confusion appears to be the tactic employed by Sutton in her Third-Party Complaint rather than clarification of the issues or a desire to set forth clearly any legitimate cause of action that might exist.

53. As a result, Marc Anayas has not been provided with sufficient notice to properly prepare a defense and Sutton has violated Rule 1.110(f).

J. The Third-Party Complaint Does Not Contain the Certificate Required by Sect. 766.104, Florida Statutes

54. The Third-Party Complaint fails to contain the certificate required by Section 766.104, Florida Statutes. Accordingly, it must be dismissed.

K. The Statutes of Limitations Bars the Claims

55. The statute of limitations bars some or all of the claims alleged in the Third-Party Complaint.

L. **Res Judicata or Collateral Estoppel Bars Sutton's Third-Party Complaint**

56. The Third-Party Complaint must be dismissed on the ground of res judicata, or, alternatively, collateral estoppel.

57. It appears that Defendant Sutton is attempting to re-litigate, indirectly, the issue of Dr. Anayas's negligence after Dr. Anayas was adjudged not negligent. This is merely a veiled attempt to impute Dr. Anayas's negligence to these two individuals, again attempting to re-litigate the issue previously litigated.

58. Dr. Anayas was dismissed from this lawsuit with a Final Judgment in her favor. To the extent that the Third-Party Complaint alleges liability on the part of Marc Anayas because of the alleged negligence of Dr. Anayas, these claims are barred by the doctrine of res judicata or, alternatively, the related doctrine of collateral estoppel.

59. Res judicata is a judicially created doctrine designed to prevent re-litigation of matters and enforce the finality of a court's judgment. Hinchee v. Fisher, 93 So. 2d 351, 353 (Fla. 1957); Youngblood v. Taylor, 89 So. 2d 503, 505 (Fla. 1956).

60. "It seems inequitable to allow a third party complainant to assert his claim against a third party defendant after the main suit against the former by the injured party has concluded." Watson v. G & C Ford Co., 293 So. 2d 101, 103 (Fla. 1st DCA 1974).

61. Defendant Sutton's claims as stated in her Third-Party Complaint are **compulsory claims** which she was required to bring in the original action at the time she served her answer, pursuant to Rule 1.170(a), Florida Rules of Civil Procedure.

62. Defendant Sutton's Third-Party Complaint must be dismissed for failing to assert her claims prior to the Court's granting a Final Judgment in favor of Dr. Anayas.

Watson at 103; See also, Volkswagen Ins. Co. v. Taylor, 201 So. 2d 624, 628 (Fla. 1st DCA 1967).

63. The Final Judgment in Dr. Anayas's case, entered at the time when she had no counterclaims or third party claims against her ended the entire case as far as she was involved. She cannot be dragged back into this case, either directly or indirectly, at this late date. Osborne v. Shell Oil Co., 104 So. 2d 670 (Fla. 1st DCA 1958); Pena v. Tampa Fed'l Sav. & Loan Ass'n, 363 So. 2d 815 (2d DCA 1978), cert. den. 373 So. 2d 461.

64. Accordingly, to the extent liability is claimed against these parties because of the negligence of Dr. Anayas, Dr. Anayas was found through the entry of a Final Judgment to be not negligent in this matter.

65. Accordingly, the Third-Party Complaint against Marc Anayas should be dismissed.

WHEREFORE, for the reasons stated herein Marc Anayas respectfully requests that this Court enter an Order dismissing Defendant Suzanne Sutton's Third-Party Complaint with prejudice as to him. Additionally, Marc Anayas requests his reasonable attorney's fees and costs in defending this matter, pursuant to Sections 57.105 and 766.104(1), Florida Statutes, and the inherent authority of the Court.

MOTION TO STRIKE

66. In addition to the foregoing and in addition to any other grounds alleged elsewhere or in separate motions, incorporated herein by reference, this Defendant hereby moves to strike as follows:

67. Defendant Sutton's Third-Party Complaint was filed in violation of Rule 1.180(a), Florida Rules of Civil Procedure. It is unauthorized and should be stricken in its entirety.

68. Additionally, Defendant Sutton has failed to participate in pre-suit discovery and other actions as required by Chapter 766, Florida Statutes, in relation to Marc Anayas. Accordingly, her claims should be stricken pursuant to Section 766.106(7) and 766.206(3), Florida Statutes.

69. Additionally, Defendant Sutton has improperly claimed, in each of her two Counts: ". . . all costs and attorney's fees defending the claim brought by Plaintiff and any costs and attorney's fees incurred prosecuting this claim."

70. Defendant Sutton has cited no statutory or contract provision that would entitle her to collect attorney's fees and costs against Marc Anayas.

71. Accordingly, such language is redundant, immaterial, impertinent or scandalous, and must be stricken in accordance with Rule 1.140(f), Florida Rules of Civil Procedure.

WHEREFORE, for the reasons stated herein, Marc Anayas respectfully requests that this Court enter an Order striking Defendant Suzanne Sutton's Third-Party Complaint or, alternatively, the portions of it containing offensive language set forth above. Additionally, Marc Anayas requests his reasonable attorney's fees and costs in defending this matter, pursuant to Sections 57.105 and 766.104(1), Florida Statutes, and the inherent authority of the Court.

MOTION FOR FINDINGS PURSUANT TO SECT. 766.206, FLORIDA STATUTES

72. The foregoing paragraphs 1-28, 44-46, 48, 54 and 55 are re-alleged and incorporated herein by reference.

73. Relating to Marc Anayas: Defendant Sutton has not made a reasonable investigation of this matter and her claims do not rest on a reasonable basis. Defendant Sutton did not obtain an expert review of her claim against this individual prior to filing her Third-Party Complaint. Defendant Sutton did not obtain a verified written medical expert opinion prior to filing her Third-Party Complaint.

74. The Court is requested to make the determination required by Section 766.206, Florida Statutes.

WHEREFORE, for the reasons stated herein, Marc Anayas respectfully requests that this Court make the findings required by Section 766.206, Florida Statutes, and enter an Order dismissing Defendant Suzanne Sutton's Third-Party Complaint as to him. Additionally, Marc Anayas requests his reasonable attorney's fees and costs in defending this matter, pursuant to Sections 57.105 and 766.104(1), Florida Statutes, and the inherent authority of the Court.

MOTION FOR SUMMARY JUDGMENT

75. Marc Anayas moves the Court to enter a summary judgment in his favor and against Defendant Suzanne Sutton, herein, pursuant to Rules 1.510 and 1.150(a), Florida Rules of Civil Procedure, and incorporates by reference paragraphs 1-25, 31-66, and 72-74 above.

76. In support of this motion for summary judgment, Marc Anayas refers to the

affidavits and verified motions of Concepcion Anayas, M.D., Marcelo Anayas, M.D., and Missionaries of Hope, Inc. and Gene Artrip filed in the Court's file. A copy of the Affidavit of Marcelo Anayas, President of Missionaries of Hope, Inc., is attached to this Motion as Exhibit "B" and is incorporated herein by reference.

WHEREFORE, for the reasons stated herein Marc Anayas respectfully requests that this Court enter a Judgment in his favor and against Defendant Suzanne Sutton. Additionally, Marc Anayas requests his reasonable attorney's fees and costs in defending this matter, pursuant to Sections 57.105 and 766.104(1), Florida Statutes, and the inherent authority of the Court.

CERTIFICATE OF SERVICE

[DELETED]

GEORGE F. INDEST III, ESQUIRE
Board Certified by The Florida Bar
in the Specialty of Health Care Law
Florida Bar No.: 382426
THE HEALTH LAW FIRM
220 East Central Parkway
Suite 2030
Altamonte Springs, Florida 32701
Telephone: (407) 331-6620
ATTORNEY FOR MARC ANAYAS

Attachments:

Exhibit "A - Suzanne Sutton's Answer and Affirmative Defenses served on February

13, 2004
Exhibit "B" - Copy of Affidavit of Marcelo Anayas, President, Missionaries of Hope,
Inc., Regarding Marc Anayas, dated February 9, 2005

GFI
A:\Motion To Dismiss - Volunteer Immunity.wpd

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

JOHN COLE, as natural parent and
guardian of MEGAN COLE, a minor,

Plaintiff,

CASE NO.: 2004-30116-CIC

vs.

DIV. NO.: 32

HALIFAX HOSPITAL MEDICAL CENTER,
etc., et al.,

Defendants.

_____ /

SUZANNE SUTTON, P.A.,

Third Party Plaintiff

v.

THE COMMUNITY MEDICAL CENTER
OF WEST VOLUSIA, PA, etc., et al.,

Third Party Defendants

_____ /

AFFIDAVIT OF MARCELO ANAYAS, M.D.,
PRESIDENT, MISSIONARIES OF HOPE, INC.
REGARDING MARC ANAYAS

Having been sworn, the undersigned does hereby make the following statement:

1. I am the president of Missionaries of Hope, Inc., a Florida not-for-profit corporation.

2. I have personal knowledge of the matters stated herein.

3. Marc Anayas is not a physician. He is a college student.

4. At no time relevant to this matter has Marc Anayas been an officer, director, employee or agent of Community Medical Center of West Volusia, P.A.

5. Missionaries of Hope, Inc., is a charitable Florida not-for-profit corporation, recognized as a charitable not-for-profit corporation by the United States Internal Revenue Service (IRS) pursuant to Section 501c(3) of the Internal Revenue Code (referred to as "Missionaries of Hope" herein). See attached letter from the IRS.

6. The events at issue in this case involving the medical care of Megan Cole occurred from approximately December 12-17, 2002.

7. Suzanne Sutton's employment with Community Medical Center of West Volusia, P.A., ended on February 21, 2003.

8. Marc Anayas was appointed to the Board of Directors of Missionaries of Hope for the first time on or about March 11, 2004. Accordingly, Marc Anayas had no affiliation with Missionaries of Hope until long after the events giving rise to this law suit occurred.

9. Marc Anayas serves on the Board of Directors of Missionaries of Hope voluntarily. He does not receive compensation for serving on the Board of Directors of Missionaries of Hope.

10. As a not-for-profit charitable corporation, Missionaries of Hope has no owners and has no shareholders.

11. Community Medical Center of West Volusia, P.A., is a separate Florida for-profit professional service corporation (also known as a "professional association" or a "P.A.").

12. At all relevant times hereto, Marc Anayas has served and acted in good faith within the course and scope of his duties as a member of the Board of Directors of Missionaries of Hope.

13. At all relevant times hereto, Marc Anayas has acted as a reasonable and prudent person would act under similar circumstances in serving as a member of the Board

of Directors of Missionaries of Hope.

14. At all relevant times hereto, Marc Anayas has neither breached any duty of or failed to perform any act required as a member of the Board of Directors of Missionaries of Hope.

15. The injuries or damages alleged were not caused by any wanton or willful misconduct of Marc Anayas in serving as a member of the Board of Directors of Missionaries of Hope.

16. Even if Marc Anayas had an affiliation with Missionaries of Hope at the time the events in the law suit occurred, he would be immune from liability pursuant to Section 768.1355, Florida Statutes, and other state and federal laws.

17. Community Medical Center of West Volusia, P.A. does not own Missionaries of Hope, Inc.

18. Missionaries of Hope, Inc. is not involved in managing or operating Community Medical Center of West Volusia, P.A.

19. Missionaries of Hope, Inc. did not and does not supervise or have any other relationship with Suzanne Sutton.

20. Missionaries of Hope, Inc. was not involved in any way with the care and treatment of Megan Cole.

21. Marc Anayas was not served with a notice of intent to initiate medical malpractice litigation pursuant to Chapter 766, Florida Statutes.

22. Marc Anayas has not been afforded an opportunity to participate in pre-suit investigation of this matter, pursuant to Chapter 766, Florida Statutes.

23. Marc Anayas was unaware of and had no involvement in any aspect of the matters giving rise to the original law suit in this case for the alleged negligent treat of

Megan Cole.

AND FURTHER AFFIANT SAYETH NAUGHT.

MARCELO ANAYAS, M.D.

NOTARIZATION

SWORN TO AND SUBSCRIBED before me this _____ day of _____, 2005, by Marcelo Anayas, M.D., who is personally known to me/did produce the following identification and is the person who signed above.

- SEAL -

NOTARY SIGNATURE

NAME: _____

LICENSE NO.: _____

EXPIRATION: _____

Attachment: Internal Revenue Service letter dated March 31, 1997

A:\Motion To Dismiss - Volunteer Immunity.wpd