IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 33,087

SARA CAHN,

Plaintiff/Appellee,

v.

JOHN D. BERRYMAN, M.D.,

Defendant/Appellant.

Second Judicial District
No. CV 2009-4198

ANSWER BRIEF

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
THE HONORABLE NAN G. NASH

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(F)(3) the body of this Answer Brief consists of 6,050 words and does not exceed 11,000 words. The word count was obtained from Microsoft Word.

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

This lawsuit arises out of Dr. John Berryman's misdiagnosis of Plaintiff Sara Cahn. Ms. Cahn met with Dr. Berryman, whom she believed to be a Lovelace doctor, one time only on August 8, 2006 at his office which she entered through the Lovelace Women's Hospital. During that meeting, the doctor diagnosed Ms. Cahn with endometriosis despite an ultrasound report identifying an 8cm mass on Ms. Cahn's ovary and indicating a malignancy needed to be excluded. It was not until September 22, 2008 that Ms. Cahn learned from another physician that what Dr. Berryman had diagnosed as endometriosis was actually ovarian cancer. By that point, Ms. Cahn's malignant tumor had spread to the extent that she needed surgically induced menopause to save her life. She was twenty nine years old.

Ms. Cahn filed a medical malpractice lawsuit on April 10, 2009. When she filed, Ms. Cahn did not know Dr. Berryman's identity so she included "Dr. John Doe" as a defendant in his stead. On July 10, 2010, Ms. Cahn amended her complaint to name Dr. Berryman. Dr. Berryman moved for summary judgment arguing that the three-year statute of repose of the Medical Malpractice Act (MMA), NMSA 1978, §§ 41-5-1 to -29 (1976, as amended through 2013) expired on August 8, 2009 and thus barred her

claim. The District Court denied his motion, ruling that applying the statute of repose in Section 41-5-13 violated Ms. Cahn's due process rights because the ten and half months between the time she discovered her condition and the expiration of the statute of repose did not afford Sara Cahn a constitutionally reasonable amount of time to bring her claim against Dr. Berryman.

Prior to trial, Ms. Cahn and Dr. Berryman entered into a Stipulated Conditional Directed Verdict and Final Judgment Against John D. Berryman, M.D. The Stipulation is an admission by Dr. Berryman that he was negligent and caused Sara Cahn significant damage. In the Stipulation the parties agreed that if the District Court's ruling is upheld on appeal and Ms. Cahn's claims are not time barred, then Dr. Berryman is liable to Ms. Cahn on her claims of medical negligence and he will pay Sara Cahn damages in the amount of $700,000.00. Because of Dr. Berryman's stipulation to liability and agreement to pay damages, the case will not be tried to a jury should the ruling of the District Court be affirmed or overturned.

B. A Supplemental "Summary of Facts" is Necessary.

A supplemental summary of facts is necessary because Appellant's summary of facts (BIC 3-7) does not include "citations to the record proper,

transcript of proceedings or exhibits supporting each factual representation." Rule 12-213(A)(3) NMRA. Rule 12-213 requires citation to specific pages of the record proper for each fact. "The Court of Appeals is not obligated to search the record on a party's behalf to locate support for propositions a party advances or representations of counsel as to what occurred in the proceedings." *Muse v. Muse*, 2009-NMCA-003, ¶ 42, 145 N.M. 451, 200 P.3d 104 (citing *Bintliff v. Setliff*, 75 N.M. 448, 450, 405 P.2d 931, 932 (1965) holding the court would not consider appellant's arguments for failure to specifically cite the record).

With no citation to the record proper, the onus of substantiating what is a fact versus what is an argument falls on this Court, which would have to comb the over one-thousand, eight-hundred page record to do so. But the obligation to find evidence in the record proper is not this Court's duty and it may decline doing so. See *Murken v. Solv–Ex Corp.*, 2005–NMCA–137, ¶14, 138 N.M. 653, 124 P.3d 1192 ("[W]e decline to review ... arguments to the extent that we would have to comb the record to do so."); see also *In re Estate of Heeter,* 1992-NMCA-032, ¶ 15, 113 N.M. 691, 831 P.2d 990 ("This [C]ourt will not search the record to find evidence to support an appellant's claims.")

Furthermore, without proper citation, unsupported facts are arguments

of counsel. See *Murken,* 2005–NMCA–137, ¶ 14. Arguments of counsel are not evidence. *Wall v. Pate*, 1986-NMSC-014, ¶ 104 N.M. 1, 715 P.2d 449 (1986); *Henning v. Rounds*, 2007–NMCA–139, ¶ 2, 142 N.M. 803, 171 P.3d 317. Thus, the summary of facts in Appellant's Brief should be disregarded. Ms. Cahn respectfully submits a revised Summary of Facts for the Court's consideration.

C. Summary of Facts

The Occurrence Date of the Malpractice

1. In May 2006, twenty seven year old elementary schoolteacher Sara Cahn was insured with Lovelace Health Plan and sought treatment at Lovelace Women's Hospital for ongoing symptoms of pelvic pain. (R.P. 392, 403, 719).
2. A pelvic ultrasound was performed at Lovelace Women's Hospital on May 19, 2006. (R.P. 795).
3. Lovelace thereafter referred Ms. Cahn to gynecologist John D. Berryman, MD who she understood was a Lovelace Health System physician. (R.P. 463-464, 786)
4. Ms. Cahn went to Lovelace Women's Hospital on August 8, 2006 to see Dr. Berryman, in part to hear results from her recent pelvic ultrasound. (R.P. 786, 808)

5. Ms. Cahn entered Dr. Berryman's office through the Lovelace Women's Hospital. (R.P. 792).

6. The August 8, 2006 appointment was the only time Dr. Berryman provided medical treatment to Ms. Cahn. (R.P. 1839).

7. Ms. Cahn's claims arise out of medical care provided by Dr. Berryman on that day. (R.P. 1839).

8. During their one appointment, Dr. Berryman did not disclose to Ms. Cahn that the pelvic ultrasound report described an 8-centimeter complex left ovarian mass. He also did not schedule a biopsy even though the report noted that "a malignancy needed to be excluded." Instead, Dr. Berryman diagnosed Ms. Cahn as having endometriosis, did not request a follow-up and never saw her again. (R.P. 401-403, 405).

The Discovery Date of the Malpractice

9. Subsequently, Ms. Cahn moved to Wyoming for graduate school for an advanced degree in education. In Wyoming, she continued to seek treatment for pelvic pain. (R.P. 708, 719).

10. On September 22, 2008, Ms. Cahn saw Dr. Mary Girling and for the first time learned that Dr. Berryman had misdiagnosed her as having endometriosis in August 2006 and that Dr. Berryman had failed to inform

her that she had an eight-centimeter tumor on her left ovary that needed to be tested for malignancy. (R.P. 375, 393).

11. Thus, Ms. Cahn became aware of her potential malpractice claim on September 22, 2008. (R.P 393, 708).

12. On October 15, 2008, Sara Cahn underwent a total abdominal hysterectomy to remove her uterus and ovaries at Memorial Sloan Kettering in New York. She also received treatment at the Dana Farber Institute in Boston. Sara Cahn spent approximately three and a half months in treatment with these providers. (R.P. 4, 344, 776, 796).

13. Ms. Cahn spent approximately eight months in New York recovering from her surgery. (R.P. 797)

14. The hysterectomy caused Ms. Cahn to enter menopause at the age of twenty-nine years old. (R.P. 796).

15. During discovery, an expert opined to a reasonable degree of medical probability that if Ms. Cahn had been properly diagnosed in August 2006, less extensive treatment would have been necessary and she may have retained the ability to bear children. (R.P. 548-549).

Locating the identity of Dr. John Doe

16. Having only met with him once years earlier, Ms. Cahn did not remember the identity of the doctor that misdiagnosed her. (R.P. 192).

17. Dr. Berryman's supervisor testified that "frequently [] patients do not recall their physician's names. I see it all the time ... they have no idea." (R.P. 790).

18. Ms. Cahn's efforts to identify Dr. Berryman were hampered by her need for medical treatment in New York, the time necessary for her to recover from surgery, her need for follow-up care and the ongoing menopause-related symptoms that she had following her surgery. (R.P. 797)

19. The documents provided by Lovelace Health System did not include a record of the August 8, 2006 visit to Lovelace Women's Hospital. (R.P. 393, 396).

20. Ms. Cahn discovered that the Lovelace Sandia Health System had assigned her three different medical record numbers. (R.P. 396).

21. Ms. Cahn made multiple attempts to obtain medical records but her attempts were complicated by the need for continuing out of state medical treatment and because she had multiple unknown record numbers with Lovelace and because the medical records she requested were stored in multiple locations. (R.P. 777, 798-800).

22. Between the efforts of Ms. Cahn and the efforts of her attorneys there were at least sixteen requests made in an attempt to obtain Ms. Cahn's medical records. (R.P. 734)

23. As part of her attempts to identify Dr. Berryman Ms. Cahn also requested Explanation of Benefits from the Lovelace Health Plan and there was no record of her visit with Dr. Berryman in the records provided by the plan. (R.P. 783-785, 787)

24. Ms. Cahn called Lovelace Women's Clinic at Lovelace Women's Hospital and the Lovelace records person she spoke with told her there was no record of Ms. Cahn's August 8, 2006 visit. (R.P. 393).

25. Ms. Cahn described the doctor she had seen at Lovelace Women's Hospital to a person at the hospital and was told the doctor she described sounded like two different OB/GYN doctors on their medical staff. (R.P. 393, 396).

26. Ms. Cahn filed her Complaint for Medical Negligence on April 10, 2009 and named the two doctors that may have been the physician she saw on August 2006. (R.P. 1).

27. Ms. Cahn deposed Lovelace gynecologists employed by Lovelace Sandia Health System in August, 2006. (R.P. 109, 122).

28. Although she did not name Dr. Berryman in her April 10, 2009 Complaint, Ms. Cahn stated that there "may be a physician who provided care to Sara Cahn whose identity cannot be ascertained at this time and

who is named herein as Defendant John Doe...and that he told her that the small ovarian cyst on her ovary was "of no consequence." (R.P. 2).

29. It was only on July 1, 2010, Ms. Cahn determined that the true identity of Dr. John Doe was actually Dr. Berryman and that even though she entered his office via the Lovelace Women's Hospital, Dr. Berryman was actually an employee of Sandia OB-GYN Associates, not Lovelace Health System or Lovelace Sandia Health System. (R.P. 193, 718, 775, 794).

30. In 2006, Lovelace Health System was using the name Lovelace Sandia Health System. (R.P. 462, 721)

31. Dr. Berryman's supervisor testified that the documents Ms. Cahn saw during the August 8, 2006 appointment had no reference on them to Dr. Berryman or his employer Sandia OB-GYN; he testified that there was nothing that would have put Ms. Cahn on notice that she was at Sandia OB-GYN and not Lovelace Sandia or Lovelace Women's Hospital. (R.P. 793).

32. On July 6, 2010, Ms. Cahn sought leave to amend her Complaint to add Dr. Berryman. (R.P. 192).

33. On July 9, 2010, Ms. Cahn filed her Amended Complaint which replaced John Doe with Dr. John Berryman. (R.P. 197, 1839).

Course of Proceedings Leading to Appeal

34. At all times relevant to the issues in this Appeal, Dr. John D. Berryman was a qualified Health Care Provider under the provisions of the MMA. (R.P. 1839).

35. The "occurrence date" of the malpractice is August 8, 2006. (R.P. 343).

36. The earliest "discovery date" of the malpractice is September 22, 2008. (R.P. 344, 393, 708).

37. Ms. Cahn filed her original Complaint on April 10, 2009; the lawsuit did not name Dr. Berryman. (R.P. 1.)

38. Ms. Cahn amended her Complaint to name Dr. Berryman on July 9, 2010. (R.P. 1839).

39. On January 13, 2011, Dr. Berryman filed a motion for summary judgment on the grounds that the three-year statute of repose, Section 41-5-13 of the MMA, barred her claims. (R.P. 1839).

40. The District Court denied Dr. Berryman's motion for summary judgment finding that "Plaintiff's claims against Dr. Berryman are not time barred by the three (3) year statute of repose contained in the [MMA] because such bar violates Plaintiff's substantive due process rights under the United States Constitution and the New Mexico Constitution." (R.P. 1840).

41. Dr. Berryman filed a motion for reconsideration of the District Court's ruling on his motion for summary judgment on March 30, 2012 on the basis that Plaintiff should have been able to identify him within the three-year statute of repose. (R.P. 1840).

42. The District Court denied Dr. Berryman's motion for reconsideration finding again that "Plaintiff's claims against Dr. Berryman are not time barred by the three (3) year statute of repose contained in the [MMA] because such bar violates Plaintiff's substantive due process rights under the United States Constitution and the New Mexico Constitution." (R.P. 1840).

43. The District Court certified its decision for interlocutory appeal and Dr. Berryman filed an Application for Interlocutory Appeal on September 27, 2012. (R.P. 1840).

44. This Court denied Dr. Berryman's Application on October 23, 2012. (R.P. 1840).

45. On June 19, 2013, Ms. Cahn and Dr. Berryman entered into a Stipulated Conditional Directed Verdict and Final Judgment Against John D. Berryman, M.D., agreeing that if the District Court's ruling is upheld on appeal, then Dr. Berryman is liable to Ms. Cahn on her claims of medical negligence in an amount of $700,000.00, which is consistent with the

limits afforded under the Medical Malpractice Act. (R.P. 1840).

D. Issues on Appeal

The issue raised on Appeal is whether the District Court erred when it ruled that Section 41-5-13 of the MMA did not bar Ms. Cahn's malpractice lawsuit against Dr. Berryman because the statute of repose did not provide a constitutionally reasonable amount of time for her to file the claim and therefore its application would deny due process.

II. ARGUMENT

A. Introduction

This appeal turns on a single question: whether, under the factual circumstances presented in this case, ten and a half months allowed Ms. Cahn a constitutionally reasonable amount of time to determine Dr. Berryman's identity and file a malpractice claim against him. Both the law and Ms. Cahn's diligent conduct in this case support the District Court's ruling that, under due process rights, ten and a half months is not enough time.

First, there is no law or precedent that supports applying a statute of repose where the plaintiff has less than one year to bring a claim. Our Legislature has never enacted a limitations period less than one year in

duration. Likewise, there are no New Mexico cases upholding a statute of repose where a claimant had less than one year to file. This demonstrates that neither New Mexico's legislative nor its judicial branches consider a period of less than one year to be a constitutionally reasonable amount of time in which to file a claim. Hence, the ten and a half months Ms. Cahn had was not reasonable.

Second, the circumstances of this case also support upholding the District Court's ruling. While Appellant argues that ten and a half months is "clearly" a reasonable amount of time (BIC 10), he ignores the facts of the case. For nearly a third of that ten and a half month period, Ms. Cahn was undergoing significant lifesaving medical treatment out of state, which left her only seven months to determine the identity of Dr. Berryman and file against him. Despite this, Sara Cahn was diligent in her attempts to identify the doctor who misdiagnosed her cancer as endometriosis on August 8, 2006. (See Summary of Facts Nos. 15-22, 24-26.) Ms. Cahn amended her Complaint to include Dr. Berryman within one week of learning his name.

Thus, considering both the absence of any legal precedent identifying a period less than one year as constitutionally reasonable, as well as these specific circumstances where Plaintiff diligently pursued her claim, the District Court correctly determined that applying the statute of repose would

violate due process.

B. Standard of Review

The standard of review on appeal from summary judgment is de novo. See *Martin v. West Am. Ins. Co.*, 1999-NMCA-158, ¶ 11, 128 N.M. 446, 993 P.2d 763. The issue on appeal presents a question of law arising out of undisputed facts that are set forth in the parties' "Stipulated Conditional Directed Verdict and Final Judgment Against John D. Berryman, M.D." and the record proper.

C. The District Court Declined to Apply the Statute of Repose Because Such a Bar Violates Ms. Cahn's Substantive Due Process Rights.

1. Section 41-5-13 applies to Medical Malpractice claims **so long as** its application does not deny the claimant's substantive due process rights.

Our Legislature may impose a statutory deadline for commencing an action so long as a reasonable time is provided for commencing suit consistent with due process. *Garcia on Behalf of Garcia v. La Farge*, 1995-NMSC-019, ¶ 33, 119 N.M. 532, 893 P.2d 428 (citations omitted). "Considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions dictate that when the [L]egislature enacts a limitations period it must allow a reasonable time within which existing or accruing causes of action may be brought." *Id.*

Ms. Cahn's claim is a malpractice claim subject to the MMA. Section 41-5-3 of the MMA requires that a malpractice claim be "filed within three years after the date that the act of malpractice occurred." Our Supreme Court has noted that "Section 41-5-13 operates as a statute of repose rather than a statute of limitation." *Tomlinson v. George*, 2005-NMSC-020, ¶ 8, 138 N.M. 34, 116 P.3d 105.

There are, however, exceptional circumstances in which the courts will not impose the statute of repose in a malpractice action. One of those exceptions is when imposing the statute would violate the claimant's right to due process. *Cummings v. X–Ray Assocs. of N.M*, 1996–NMSC–035, ¶ 54, 121 N.M. 821, 918 P.2d 1321 (stating "that only in very few exceptional circumstances may this strict three-year occurrence rule of Section 41–5–13 be relaxed," and a "due process argument" is one of the exceptions.) Therefore, even though Ms. Cahn's claim is a malpractice claim subject to the statute of repose in Section 41–5–13, she is also entitled to the due process analysis developed by our Supreme Court in *LaFarge* and *Cummings*.

2. A claimant's due process rights are violated when she is not afforded a reasonable time period within which to bring a lawsuit.

Due process requires a limitations statute to provide a reasonable period within which an accrued right may be exercised. *LaFarge,* 1995-

NMSC-019, ¶ 33 (stating "It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts.") Without this opportunity, a statute of limitations is nothing more than "an unlawful attempt to extinguish rights arbitrarily." *Id.* As such, our Supreme Court has found that Section 41-5-13 violates the due process rights of those persons whose causes of action accrue shortly before this three-year statute of limitations runs. *Id.* ¶ 26, *see* also NMSA 1978, §41-5-13.

In *LaFarge*, the plaintiff did not discover he had been misdiagnosed until eighty-five days before the expiration of the limitations period in Section 41–5–13. *LaFarge*, 1995-NMSC-019, ¶¶ 37-38. He filed a malpractice claim seven months after the statute had run. *Id.* ¶ 8. Although filed outside the allowable window, our Supreme Court concluded that the plaintiff's due process rights would be violated if Section 41–5–13 was applied to preclude his claim because eighty-five days was an unreasonably short period of time within which to exercise his rights. *Id.* ¶¶ 37-38. Accordingly, in the instant case the Court declined to apply Section 41–5–13 because it violated Sara Cahn's substantive due process rights under the U.S. Constitution and New Mexico Constitution. The Court's determination left the "discovery based" personal injury statute of limitations in NMSA 1978,

Section 37–1–8 (1976) as the only statute of limitations applicable to Sara Cahn's case. *Id. see* also NMSA 1978, Section 37–1–8 (1976).

In *Cummings*, 1996–NMSC–035, 121 N.M. 821, 918 P.2d 1321, the Court declined to extend the *LaFarge* ruling where the plaintiff discovered the occurrence of malpractice one and one-half years before the limitation period expired. *Id.* ¶¶ 2, 6. The Court reasoned that the plaintiff could not complain that her due process rights were violated by the preclusive effect of Section 41–5–13 when she "sat on her rights" and did not act with diligence. *Id.* ¶¶ 57–58. The Court held that the plaintiff's lack of diligence coupled with the one and one-half year period of time gave that plaintiff an adequate amount of time to take action. *Id.*[1]

Had the Court in *Cummings* found that the plaintiff's due process rights were violated and instead ruled that the statute of limitations had accrued as of the date she discovered the malpractice, the plaintiff's complaint in *Cummings* was still untimely. The plaintiff in *Cummings* filed her complaint more than three years after she discovered the malpractice.

[1] The parties agree that these are the cases upon which this Court's decision will rest. Appellant also discusses a third case, *Tomlinson v. George*, 2005–NMSC–020, 138 N.M. 34, 116 P.3d 105, in which the Court rejected a due process argument where plaintiff had two years and eight months left in the statutory period when she discovered the malpractice. *Id.* ¶¶23–24. *Tomlinson* is only marginally helpful here because in that case the plaintiff had almost the entire statutory period in which to file, whereas in this matter Ms. Cahn had less than one third of the statutory period remaining when she discovered Dr. Berryman diagnosed her ovarian cancer as endometriosis.

Using this precedent, the District Court determined that the ten and a half months in this matter was unreasonably short and therefore to apply the statute of repose would "violate[s] her constitutional right to substantive due process." (R.P. 1841). For the reasons explained below, this Court should uphold that ruling.

3. Precedent and the specific facts of this case demonstrate that the ten-month time period did not afford Ms. Cahn a reasonable time within which to bring her lawsuit against Dr. Berryman.

While Dr. Berryman relies on the correct cases for his analysis, his conclusion that "Plaintiff... clearly had a constitutionally reasonable time" to file is flawed. (BIC 17-18). Dr. Berryman constructs a "spectrum of days" theory arguing that because the ten and a half months Ms. Cahn had "falls between" *LaFarge's* eighty-five days and *Cummings'* year and a half, it "should be deemed a reasonable amount of time." (BIC 20).

But questions of due process deserve more scrutiny than Dr. Berryman's arbitrary "tie goes to the runner" conclusions. In making a proper determination, this Court should consider the reasoning behind the *LaFarge* and *Cummings* outcomes, as well as our Legislature's intent, not simply employ a reductive day counting analysis as Dr. Berryman posits.

Our Courts have focused primarily on two factors in determining whether the claimant had a "reasonable" amount of time to file: 1) if our

Legislature would consider the time period reasonable for purposes of a limitations statute; and 2) the level of the claimant's diligence once the injury was discovered. When a court finds that the time period was unreasonably short, it should not apply a statute of repose. *Terry v. Highway Comm'n*, 1982-NMSC-047, 98 N.M. 119, 645 P.2d 1375.

a. Our Legislature would not consider a ten and a half month period of time reasonable for purposes of a limitations statute.

Our Legislature has never enacted a statute of limitations period less than one year in duration. Likewise, there are no New Mexico cases upholding a statute of repose where a claimant had less than one year to file after discovering a cause of action. There is one case in which our Court upheld a limitations periods *as short as* one year when justified by specific considerations but never shorter than that. See *Espanola Housing Authority v. Atencio*, 1977-NMSC-074, 90 N.M. 787, 568 P.2d 1233 (1977). This demonstrates that neither New Mexico's legislative nor its judicial branches consider a period less than one year to be constitutionally reasonable for purposes of applying a statute of repose.

In this case, Ms. Cahn had only ten and a half months between the discovery of her malignancy and the expiration of the statute of repose. "While it is generally a matter for the legislature to establish limitations

periods, this Court may determine that the limitations period selected is unreasonably short." *LaFarge,* 1995-NMSC-019, ¶ *26.* The District Court correctly determined that applying the "occurrence based" statute of repose where the Plaintiff had less than a year would violate due process. Instead, the District Court followed *LaFarge,* and left in force the three-year "accrual based" limitation of NMSA 1978, § 37-1-8, which is the statute that would have applied if § 41-5-13 had not been enacted. This is proper because our Legislature has not otherwise specified a reasonable period of time within which to bring malpractice claims that accrue with less than one year of the period provided in Section 41-5-13. *Id.* ¶ *37.*

In sum, this Court should conclude that our Legislature never intended to enact a statute that allowed a period of less than one year in which to file.

b. Ms. Cahn acted with diligence once the injury was discovered but despite her diligence, she did not have a reasonable amount of time to file against Dr. Berryman.

Cases like *Tomlinson* and *Cummings* also indicate that this Court may rightfully consider the diligence of the claimant and the specific facts of the case when making a due process determination. While Appellant's argument boils down to the fact that Ms. Cahn had "almost four times longer" than the plaintiff in *LaFarge*, he ignores the fact that she lost the first three and a half of those ten and a half months undergoing significant,

lifesaving medical treatment in New York and Massachusetts, which consisted of a complete hysterectomy, removal of her omentum, excision of 54 lymph nodes and the implantation of an intraperitoneal chemotherapy port in her body. This left Ms. Cahn only seven months to pursue a claim here in New Mexico, with approximately five of those months spent recovering from surgery and receiving follow up care in New York. (R.P. 797) While those seven months did give her enough time to retain counsel and file a lawsuit, it did not give her enough time to discover the true identity of Dr. John Doe, the mystery doctor she met with at Lovelace Women's Hospital.

The reasons behind Ms. Cahn's inability to immediately identify Dr. Berryman are also important factors in the due process analysis because it goes to her level of diligence. Ms. Cahn requested documents on at least sixteen separate occasions prior to the expiration of the statute of repose to look for Dr. Berryman's name. (R.P 734). Her diligent attempts were hindered, however, because Lovelace Sandia Health System erroneously assigned her **three different** medical record numbers, (R.P. 396), and then stored her medical records in several separate locations across the county. (R.P. 777, 798-800). And while Appellant argues that Ms. Cahn should have looked at her bank records from 2006 to discovery Dr. Berryman's

identity, (BIC 6), the reality is such research would not have assisted in her search. The bank record states that payment was made to "Sandia OB-GYN Assoc". (R.P. 741). Lovelace Health System was using the name Lovelace **Sandia** Health System in 2006. (R.P. 721) Had Sara Cahn seen "**Sandia** OB/GYN" in her bank statement she would have believed it to be the same as "Lovelace **Sandia** Health System." Thus, she still would have had no reason to think she had seen a provider outside of Lovelace.

Further, while Ms. Cahn made multiple requests to all the named defendants, including multiple discovery requests, not a single document produced included a record of the August 8, 2006 appointment or information identifying the mystery doctor she saw during that visit. (R.P. 393, 396, 734, 783-785, 787). It was not until Lovelace produced Ms. Cahn's health insurance billing records on July 1, 2010, that Ms. Cahn determined the true identity of Dr. John Doe was actually Dr. John D. Berryman, and that even though she entered his office via the Lovelace Women's Hospital, Dr. Berryman was actually not an employee of Lovelace. (R.P. 193, 718, 775, 787, 794). Within days of learning Dr. Berryman's identity, Ms. Cahn filed her Amended Complaint to replace Dr. John Doe with Dr. John Berryman. (R.P. 192, 197, 1839). That she filed just days after learning his identity further demonstrates her diligence.

The record proper shows that Ms. Cahn did not "sleep on her rights" in failing to identify and file against Dr. Berryman within the statutory period like the plaintiffs in *Cummings* or *Tomlinson*. Ms. Cahn was diligent in her discovery; her inadvertent mistake was assuming that she was looking for a Lovelace doctor. She had no reason to think otherwise. Ms. Cahn saw Dr. Berryman at Lovelace Women's Hospital. (R.P. 786). She was seen by Lovelace health care providers for her medical care. (R.P. 392) Lovelace referred Ms. Cahn to a gynecologist who she understood was a Lovelace physician. (R.P. 463-464, 786) It was later determined in July, 2010 that the gynecologist was John Berryman, M.D. None of the documents Ms. Cahn saw during the August 8, 2006 appointment referenced Dr. Berryman or Sandia OB-GYN on them and there was nothing that would have put Ms. Cahn on notice that she was at Sandia OB-GYN and not Lovelace Sandia or Lovelace Women's Hospital. (R.P. 793).

Indeed, Ms. Cahn's actions demonstrate her diligence in pursuing her claim. Even months of surgeries and cancer treatment did not stop her from taking significant steps to identify parties and file her claim. She was unable to file against Dr. Berryman within the ten and a half month time period *despite* her diligence, not because of a lack of it. Her diligence was thwarted by a confusing medical record system that prevented her from identifying a

doctor that for all practical purposes appeared to be a Lovelace provider. These are circumstances that the Court may consider in determining if Ms. Cahn had a constitutionally reasonable time period in which to file.

Ms. Cahn respectfully submits that the facts of this case, as well as the Legislature's objective to protect a claimant's due process rights, all support upholding the District Court's decision that ten and a half months was not a constitutionally reasonable amount of time for Ms. Cahn to file her claim against Dr. Berryman.

D. Appellant Conflates the Doctrines of Due Process and Equitable Tolling, which are Discrete Exceptions to Section 41-5-13 of the Medical Malpractice Act.

Point III of Appellant's Brief speaks directly to the issue on appeal, i.e. whether the District Court erred in ruling that Ms. Cahn's claim was not barred by the statute of repose. (BIC 17-20) In presenting his argument, however, Appellant incorrectly combines two distinct legal concepts: due process (where the statute of repose does not apply because it violates the claimant's constitutional rights) and equitable tolling (where the statute of repose applies but is tolled based on circumstances such as a defendant's fraudulent concealment.) This conflation of two separate legal doctrines demonstrates Appellant's flawed understanding of the law upon which the

District Court's ruling was based and undermines his argument for overturning it.

Due process and equitable tolling are discrete exceptions to Section 41-5-13. *Cummings*, 1996–NMSC–035, ¶ 54. The due process exception applies when a plaintiff discovers her claim **within** the period of a statute but does not have a constitutionally reasonable amount of time to file. *La Farge*, 1995-NMSC-019, ¶ 36. Equitable tolling applies where the plaintiff discovers a claim **after** the statutory period expires and the statute has to be tolled "as a matter of equity". *Tomlinson*, 2005–NMSC–020, ¶ 14. "Fraudulent concealment" is a circumstance where equitable tolling may apply. *Id.*

In this case, the District Court's Order is silent on equitable tolling and fraudulent concealment. (R.P. 481). The District Court did not "toll" the statute of repose. (BIC 17-18). Rather, the Court *declined to apply* the statute of repose based on due process and instead left in force a discovery based statutory period that expired on September 22, 2011. Ms. Cahn filed her claim against Dr. Berryman well within that period on July 9, 2010 and so her claim was not barred. As such, Dr. Berryman's arguments and case law regarding equitable tolling is not helpful to this Panel.

E. Points I, II and IV of Appellant's Brief Do Not Address the Issue on Appeal and Therefore Do Not Assist this Court in Making A Determination.

Point I of Appellant's Brief presents a "plain vanilla" or a one size fits all application of the statute of repose. Appellant states that because the statute of repose expired on August 8, 2009 and Ms. Cahn did not amend her complaint to include Dr. Berryman until July 9, 2010, the claim is "clearly not timely." (BIC 9-10). The problem with Appellant's legal conclusion is that it ignores the very question on review i.e. whether the circumstances of Ms. Cahn's case triggered a due process exception to the statute of repose.

Point II of Appellant's Brief asks the Court to uphold the statute of repose based on the policy and purpose of the MMA. (BIC 11-17). Ms. Cahn agrees that there are important public policy reasons validating our Legislature's adoption of the MMA. However, Point II ignores that 1) our Legislature intends to allow a claimant a reasonable amount of time to file a claim; and 2) that our Supreme Court recognizes a due process exception to the statute, despite the strong policy driving the MMA.

Point IV of Appellant's Brief concerns the doctrine of fraudulent concealment and equitable tolling. As explained infra, the doctrine of equitable estoppel applies where the plaintiff discovers a claim **after** the statutory period expires. *Tomlinson,* 2005–NMSC–020, ¶ 14. The District

Court's Order was silent on this legal doctrine, and it is undisputed that despite her diligence Sara Cahn did not discover Dr. Berryman's identity until after the statutory period expired. The issue on appeal is whether the three year filing period of the statute of repose provides a constitutionally reasonable period in which to file where the claimant discovers the occurrence of malpractice two years and two months into the statutory period.

Because Points I, II and IV of the Brief in Chief all fail to address the facts or case law relevant to the issue on appeal, those sections of the argument are unhelpful in analyzing the issue before the Court.

III. STATEMENT REGARDING ORAL ARGUMENT

Ms. Cahn believes the briefing demonstrates that the District Court's decision should be affirmed. She requests oral argument, however, in the event the Court has any questions directed to the issues raised by the appeal.

IV. CONCLUSION

The Medical Malpractice Act's statute of repose does not bar Ms. Cahn's malpractice claim against Dr. Berryman because she had only ten and a half months to file her lawsuit, which left her an unreasonably short period of time within which to file. There is no indication that our Legislature ever intended for any limitations period to be shorter than one

year and thus a period shorter than one year should be deemed an "unreasonably short period of time." In New Mexico, when the statute of repose leaves an unreasonably short period of time within which to bring a cause of action, it then violates due process. *LaFarge*, ¶ 35. Because the application of the statute of repose would violate the substantive due process rights of Ms. Cahn, this Court should affirm the decision of the District Court, and following the lead of the Supreme Court in *LaFarge,* apply the three-year accrual-based limitation period in NMSA 1978, § 37–1–8 that would be applicable to her claims if the statute of repose had not been enacted. NMSA 1978, § 37–1–8, *LaFarge*, 1995-NMSC-019, ¶ 37; see also *Terry v. Highway Comm'n*, 1982-NMSC-047, ¶ 17.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2014 I have placed in the U.S. Mail, postage prepaid, a true and correct copy of the foregoing Answer Brief addressed to the following:

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