IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 33,087

SARA CAHN,

Plaintiff/Appellee,

vs.

Second Judicial District
No. CV 2009-4198

JOHN D. BERRYMAN, M.D.,

Defendant/Appellant.

BRIEF IN CHIEF

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

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Oral Argument is Requested

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA, the Brief in Chief complies with the applicable type-volume limitation of Rule 12-213(F)(3) in that the body of the Brief contains 5,811 words as indicated by the word-count total of the word processing system used to prepare the same, which is Microsoft Word 2010.

SUMMARY OF PROCEEDINGS

I. Nature of the Case

This is a medical malpractice action brought pursuant to the provisions of the Medical Malpractice Act, NMSA 1978, §§ 41-5-1, et seq. (1992) ("the MMA"). The Defendant-Appellant, John D. Berryman, M.D., is a qualified health care provider for purposes of the MMA. The sole issue presented by this appeal is whether the claim against Dr. Berryman, filed almost four years after the alleged malpractice, is barred by the three-year statute of repose in the MMA.

II. Course of Proceedings

Plaintiff, Sara Cahn, filed her original Complaint for Medical Negligence on April 10, 2009. The Complaint named Lovelace Health Systems, Angeline Fitzgerald, M.D., Markus Hamm, M.D., Michelle Layman, P.A., Paul Shelburne, M.D., Douglas Krell, M.D., and John Doe as defendants. The original Complaint did not name Dr. Berryman as a defendant. (R.P. 1).

Plaintiff was granted leave to amend and, on July 9, 2010, filed her Amended Complaint for Medical Negligence. Dr. Berryman was joined as a defendant for the first time by that Amended Complaint. (R.P. 209, 213).

Dr. Berryman filed a Motion for Summary Judgment based on the MMA statute of repose on January 13, 2011. (R.P. 340). The Motion sought summary judgment on the grounds that the last and only time that Dr. Berryman treated

Plaintiff was on August 8, 2006, and therefore the Amended Complaint against Dr. Berryman, filed on July 9, 2010, was barred by the three-year statute of repose. (R.P. 343-355). Plaintiff responded to the Motion for Summary Judgment on February 7, 2011. (R.P. 375-411). Dr. Berryman's Reply was then filed on March 17, 2011. (R.P. 440-464).

The Court held a hearing on the Motion for Summary Judgment on June 7, 2011. (Tr. 6/7/2011). The Court's Order denying the Motion for Summary Judgment was entered on June 22, 2011. (R.P. 481).

Following discovery, Dr. Berryman filed his Motion for Reconsideration of Ruling on Motion for Summary Judgment on March 30, 2012. (R.P. 706-743). Plaintiff Cahn's Response to the Motion for Reconsideration was filed on April 18, 2012. (R.P. 773-800). Dr. Berryman filed his Reply in support of the Motion for Reconsideration on April 24, 2012. (R.P. 820-827). The Motion for Reconsideration was denied by the Court's Order entered July 12, 2012. (R.P. 1572).

By unopposed Motion filed July 19, 2012, Dr. Berryman requested that the Court certify the statute of repose issue for interlocutory appeal to this Court. (R.P. 1576). An Amended Order certifying the issue was then entered by the Court on August 6, 2012. (R.P. 1721). Dr. Berryman filed an Application for Interlocutory Appeal with this Court, which was docketed as Court of Appeals No. 32,410). The

Application for Interlocutory Appeal was denied by this Court on October 28, 2012 and the case was remanded to the District Court. (R.P. 1727).

The case was then set for a jury trial commencing June 10, 2013. (R.P. 1732). Prior to June 10, 2013, Lovelace Health Systems and all individual defendants except Dr. Berryman settled the claims against them with the Plaintiff and were dismissed. Plaintiff Cahn and Dr. Berryman entered into a Stipulated Conditional Directed Verdict and Final Judgment on June 19, 2013. (R.P. 1830). The Stipulated Conditional Directed Verdict preserved, for appeal to this Court, the issue of whether the Plaintiff's claim is barred by the statute of repose. See, *Kysar v. BP America Production Co.,* 2012-NMCA-036, 873 P.3d 867. The Notice of Appeal, appealing the statute of repose issue to this Court was timely filed on July 17, 2013. (R.P. 1836).

III. Summary of the Facts

The facts relating to the statute of repose issue, as stipulated to by the parties in the Stipulated Conditional Directed Verdict and Final Judgment (R.P. 1830) and as contained in the parties' moving papers (R.P. 343, 375, 440, 706, 773, 820) are as follows:

1. Plaintiff Sara Cahn's claims arise out of medical care provided by Defendant John D. Berryman, M.D., who saw Plaintiff Cahn on only one occasion,

August 8, 2006. Plaintiff claimed that on August 8, 2006 Dr. Berryman failed to properly advise her as to the results of a pelvic ultrasound.

2. At the time Dr. Berryman saw Plaintiff Cahn, Dr. Berryman was a Qualified Healthcare Provider under the provisions of the MMA, employed by Sandia OB/GYN in Albuquerque.

3. The MMA contains a three-year statute of repose, NMSA 1978, § 41-5-13 (1976).

4. On September 19, 2008, Plaintiff was seen at Gros Ventre OB/GYN LLP in Jackson, Wyoming. Plaintiff underwent a CT scan of her abdomen and pelvis on September 22, 2008, which revealed an "extensive abnormality in the pelvis with what appears to be a large, multilobulated complex cystic mass . . ." In the following three and one-half months, Plaintiff underwent surgery to remove her uterus and ovaries.

5. Plaintiff became aware of her possible malpractice claim at the time of her CT scan on September 22, 2008.

6. After becoming aware of her possible claim, Plaintiff had three hundred twenty-one (321) days to file her medical malpractice claim against Dr. Berryman before the statute of repose expired.

7. Plaintiff retained counsel in relation to her possible malpractice claim no later than December 2008.[1]

8. From the time of retention, counsel for Plaintiff had approximately eight (8) months to identify Dr. Berryman before the statute of repose expired.

9. Plaintiff filed her Complaint for Medical Negligence on April 10, 2009. That Complaint named Lovelace Health System, Inc., Angeline Fitzgerald, M.D., Markus Hamm, M.D., Michelle Layman, P.A., Paul Shelburne, M.D., Douglas Krell, M.D. and John Doe as Defendants.

10. After filing her original Complaint, Plaintiff still had one hundred twenty-one (121) days to conduct discovery and identify Dr. Berryman before the statute of repose expired.

11. Plaintiff filed her First Amended Complaint against Dr. Berryman on July 9, 2010.

12. Plaintiff's First Amended Complaint was filed three hundred thirty-six (336) days after the three-year statute of repose under the MMA had expired.

13. At all material times, Plaintiff was an enrollee in the Lovelace Health Plan.

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[1] On information and belief, the initial case investigation as performed by counsel other than Plaintiff's current counsel.

14. Plaintiff and her counsel did not send any requests for records to Lovelace Health Plan prior to August 8, 2009. Plaintiff did request her records from Lovelace Health Plan in June, 2010.

15. In response to written discovery from Dr. Berryman, in July, 2010, Lovelace produced copies of all Lovelace Health Plan's "explanation of benefits" sent to Plaintiff. The "explanation of benefits" produced by Lovelace indicated that Plaintiff received care and treatment from Dr. Berryman on August 8, 2006.

16. Plaintiff has maintained a checking account at New Mexico Educators Federal Credit Union from August 2006 through the present.

17. Plaintiff did not obtain her bank statements from August 2006 until asked to do so in written discovery by Dr. Berryman.

18. Plaintiff was able to access her August 2006 bank statement online.

19. Plaintiff's August 2006 bank statement indicates that Plaintiff was charged $30.00 by Sandia OB/GYN Associates on August 8, 2006.

20. If Plaintiff had reviewed her bank statements, she could have called Sandia OB/GYN to obtain a copy of her chart.

21. Neither Plaintiff nor her counsel attempted to go to Lovelace Women's Hospital to identify the physical location of the physician's office where Plaintiff saw Dr. Berryman even though Plaintiff was able to describe in her deposition where the office was located.

22. In response to the summary judgment motion and motion for reconsideration, Plaintiff Cahn argued that she did not remember Dr. Berryman's name and the period of time from her discovery of her possible malpractice claim in September of 2008 and the running of the three-year statute of repose on August 8, 2009 was an unreasonably short period of time for her to discover Dr. Berryman's identity and file her claim against him.

23. Dr. Berryman contended that Plaintiff had access to the information to enable her to identify him and the three hundred and twenty one day period was a reasonable amount of time for her to commence her malpractice claim within the statute of repose.

SUMMARY OF THE ARGUMENT

The claims in this case are governed by the MMA, including the three-year statute of repose. The statute of repose is an "occurrence" type of limitation that runs from the date of the alleged act of malpractice. Plaintiff Cahn was treated by Dr. Berryman on only one occasion—August 8, 2006. Information regarding Dr. Berryman's identity and treatment were available to Plaintiff through her Lovelace Health Plan and banking records at all times after August 8, 2006. Plaintiff did not, however, file suit against Dr. Berryman until July, 2010. Therefore, the three-year statute of repose bars Plaintiff's claim.

Plaintiff contends that the running of the statute of repose should be tolled, based on either equitable tolling or the doctrine of fraudulent concealment. However, Plaintiff had a constitutionally reasonable amount of time to discover Dr. Berryman's identity and to commence her suit against him within the three-year statutory period. Nor was there any fraudulent concealment. Therefore, there is no basis for tolling of the statute of repose.

The statue of repose is one of the benefits of the MMA, and was enacted to encourage broad participation by health care providers in order to fund the Patient Compensation Fund. Enforcement of the provisions of the MMA, including the statute of repose, is necessary to further the policies and purposes underlying the MMA. Therefore, the District Court's denial of summary judgment based on the statute of repose should be reversed and the claims against Dr. Berryman should be dismissed as time-barred.

STANDARD OF REVIEW

An appellate court reviews de novo a district court's application of the law to the facts in arriving at its legal conclusions. Thus, the appellate court analyzes the legal issues without any presumption in favor of the judgment of the court below. Issues of statutory construction and application are questions of law, which an appellate court reviews de novo. *Godwin v. Mem'l Med. Ctr.*, 2001-NMCA-033, ¶

23, 130 N.M. 434, 25 P.3d 273; *Bd. of Comm'rs v. Greacen,* 2000-NMSC-016, ¶ 4, 129 N.M. 177, 3 P.3d 672.

The issue on appeal is a pure question of the application of statutory law to the undisputed facts; specifically, whether the three-year statute of repose set forth in Section 41-5-13 of the MMA applies to bar the medical malpractice claim in this case. Thus, the appropriate standard of review is de novo.

ARGUMENT

I. Dr. Berryman Is a Qualified Health Care Provider Entitled to Application of the Three-Year Statute of Limitations in the Medical Malpractice Act.

Dr. Berryman was, undisputedly, a qualified health care provider as defined by Section 41-5-5 of the MMA. Therefore, the statute of repose in the MMA is the statute applicable to the claim against Dr. Berryman in this case. NMSA 1978, § 41-5-13. Under the statute of repose in Section 41-5-13, the claim against Dr. Berryman must have been brought within three years of the alleged act of malpractice or that claim is time-barred.

The three-year statute of repose of the MMA, Section 41-5-13, is an "occurrence" type statute and runs from the date of treatment of the patient. *Chavez v. Delgado,* 2014-NMCA-014, ¶¶ 14-15, ____P.3d ___, *cert. denied,* no. 34,420 (December 11, 2013). The "discovery" rule applicable to non-qualified health care providers does not govern the claims in this case. See, *Roberts v.*

Community Health Services, 1992-NMSC-042, 114 N.M. 248, 250, 837 P.2d 442, 444. Instead, the statute of repose applicable to claims against a qualified health care provider runs from the alleged act of negligence by the health care provider. *Juarez v. Nelson,* 2003-NMCA-011, 133 N.M. 168, 61 P.3d 877, *overruled in part, Tomlinson v. George,* 2005-NMSC-020, 138 N.M. 34, 116 P.3d 105; *see also, Cummings v. X-Ray Associates of New Mexico,* 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321(in misdiagnosis cases, the date of occurrence is the date that patient was last examined by defendant).

Section 41-5-13 of the MMA terminates a plaintiff's malpractice claim within three years after the date the alleged malpractice occurred, not when plaintiff was injured by the malpractice or when the plaintiff acquired knowledge of the injury. *Chavez v. Delgado,* 2014-NMCA-014, ¶ 16, ____P.3d.___. It is undisputed that the last and only time Dr. Berryman treated Plaintiff Cahn was August 8, 2006. Therefore, under the provisions of the MMA, the alleged act of negligence could only have occurred on August 8, 2006. The Plaintiffs Amended Complaint adding Dr. Berryman as a Defendant was not filed until July 9, 2010, almost four years after the last date of treatment by Dr. Berryman.

Plaintiff's claims against Dr. Berryman clearly are not timely under the three-year statute of repose contained in Section 41-5-13 of the MMA. Therefore, in the

absence of circumstances tolling the running of the statute of repose, those claims against Dr. Berryman are barred.

II. The Policy and Purposes of the Medical Malpractice Act Support that the Act was Intended to Protect Qualified Health Care Providers from Exposure to Litigation or Liability Once the Statute of Repose has Run

The MMA is remedial legislation. See NMSA 1978 41-5-1 et seq. It is a complex statutory framework that was designed to benefit all of New Mexico's citizens, not just health care providers. The Legislature passed the MMA in 1976, in response to a medical malpractice insurance crisis resulting from the departure of the only carrier willing to write medical malpractice coverage. *Baker v. Hedstrom,* 2012-NMCA-073, ¶ 22, ___P.3d ___, *affirmed,* 2013-NMSC-043, ___P.3d ___.

The MMA states that its purpose is "...to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." NMSA 1978 §41-5-2 "Purpose of the Act." It was intended to address factors adversely affecting the availability and cost of medical malpractice insurance "and to provide incentives for furnishing professional liability insurance." *Moncor Trust Co. on behalf of Flynn v. Feil,* 1987-NMCA-015, 105 N.M. 444, 446, 733 P.2d 1327. To carry out its purpose, the MMA provides malpractice liability coverage, limitations of malpractice awards,

limitations of personal liability of health care providers for future medical expenses, and a mandatory procedure for reviewing medical malpractice claims before such claims can be brought in a district court. NMSA 1978, §§ 41-5-25, 41-5-6, 41-5-7, and 41-5-14 to -21.

The Act establishes mandatory amounts for medical malpractice liability insurance coverage and provides benefits to those providers who become "qualified" in accordance with its provisions. NMSA 1978, § 41-5-25. A health care provider's liability insurance responsibility under the MMA is currently $200,000, with any amounts in excess of that, including future medical payments, being the responsibility of the Patients' Compensation Fund (PCF). NMSA 1978 § 41-5-6. The PCF is funded entirely through surcharges paid by physicians and entities that choose to become qualified. To qualify under the Act, a health care provider must establish financial responsibility under NMSA 1978 § 41-5-5.

The legislature conditioned a health care provider's entitlement to these benefits of the MMA on qualifying under the Act. Section 41-5-5(A). The Act specifically denies any of its benefits to those who do not qualify. Section 41-5-5(C). Thus, the benefits are indisputably provided as incentives for health care providers to accept the burdens of qualification. *Moncor Trust Co. on behalf of Flynn*, 1986-NMSC-081, 105 N.M. at 446.

The legislature balanced benefits to medical practitioners with benefits to patients, such as expert witnesses for plaintiffs who prevailed at medical legal panels, and reliable sources of recovery through insurance and the PCF. The PCF is of particular significance because it operates to relieve an injured patient from the risk that his or her future medical needs would be miscalculated or go unmet, a benefit provided to no other class of plaintiff.

The legislature clearly established its concern for the health and well-being of all citizens of New Mexico, recognizing that it is affected by the availability of practicing physicians and the availability of malpractice insurance. Its intent was to encourage maximum participation by health care practitioners in order to fund the Patient Compensation Fund. It sought to solve a statewide and profession-wide problem of insurance unavailability. It recognized a need for limitation of health care providers' liability, in order to assure that all New Mexicans would have access to medical care and reliable sources of compensation for injuries caused by medical negligence. *See e.g.* NMSA 1978, § 41-5-6 (1992), providing damage caps, a shorter statute of limitations, *compare* NMSA 1978, § 41-5-13 (1976) (three years), *with* NMSA 1978, § 37-1-4 (1880) (four years), and required evaluation and decision by the medical review commission, *see* NMSA 1978, § 41-5-15 (1976).

The Legislature's judgment in how it chose to define the malpractice liability of health care providers to ensure the availability of health care for New Mexicans emphasizes the appropriateness of reserving to the legislature any expansion of health care providers' liability. *Lester v. Hall,* 1998-NMSC-047, ¶ 11, 126 N.M. 404, 407-08, 970 P.2d 590, 593-94. The MMA should be construed to further the balance struck by the Legislature and the goals of the legislation.

Adopting a statute of repose that ran from the date of the act of malpractice was essential to achievement of the statute's goal. *Cummings*, 1996-NMSC-035, ¶ 29 (the statute of repose is "one of the most notable benefits" of the MMA); *Meza v. Topalorski*, 2012-NMCA-002, ¶ 10, ___ N.M. ___. In *Meza* the Court pointed out that the historical purpose of NMSA 1978 § 41-5-13 was "to preclude almost all malpractice claims from being brought more than 3 years after the act of malpractice." 2012-NMCA-002, ¶ 10, citing *Cummings*, 1996-NMSC-035, ¶ 40. The Court concluded "[t]hus, the running of the statute of limitations creates a substantive right to be free of liability after a specified period of time." *Id.*

In *Christus St. Vincent Regional Medical Center v. Duarte-Afara*, 2011-NMCA-112, ¶¶ 12, 16, 151 N.M. 6, this Court recognized that NMSA 1978 § 41-5-13 addressed one of the reasons carriers had been withdrawing from writing malpractice insurance: the potential for suit long after the act of alleged

malpractice. It also recognized that a goal of the MMA was to relieve insurers and health care providers of the uncertainty posed by stale claims. *St. Vincent v. Duarte-Afara*, 2011-NMCA-112, ¶¶ 12, 16, 151 N.M. 6 (citing *Cummings*, 1996-NMSC-035, ¶ 40).

Duarte-Afara's conclusions are entirely consistent with *Cummings, Jaramillo v. Heaton*, 2004-NMCA-123, ¶ 12, 136 N.M. 498 and *Garcia v. LaFarge*, 1995-NMSC-019, 119 N.M. 532, 539, 893 P.2d 428, 435. In *Jaramillo* the Court stated "The Act utilizes a statute of repose in order to curb the cost of insurance, to encourage physicians to carry insurance, and to provide a benefit to physicians who opt in to the Act's provisions by purchasing occurrence based insurance." 2004-NMCA-123, ¶ 12 (citing *Garcia v. LaFarge*, 1995-NMSC-019, 119 N.M. at 539, 893 P.2d at 435). The *Garcia* Court, in rejecting a constitutional challenge to the statute based on a claim of special legislation, similarly concluded that the statute of repose was a vital part of the legislature's effort to encourage qualification:

> The legislature reasonably could have concluded that providing the benefit of a shorter period of exposure to malpractice claims only to qualified health care providers was and is necessary to encourage all health care providers to "qualify" under the Medical Malpractice Act. Section 41-5-13 may be viewed as a reasonable benefit accorded to those health care providers who accept the concomitant burden of obtaining occurrence-based malpractice

insurance...and of insuring the solvency of the Patient's Compensation Fund...

1995-NMSC-019, 119 N.M. at 539, 893 P.2d at 435.

As this Court recognized in *Garcia* and *Cummings*, widespread participation is essential to achievement of the MMA's goals. *Id.; Cummings*, 1996-NMSC-035, ¶¶ 28-30, 37 (recognizing that the "legislature provided a number of incentives to assure participation by health care providers in the burdens of qualification"). The insurance obtained by qualified health care providers was intended to assure that patients injured by malpractice would have funds from which to recover. *Cummings*, 1996-NMSC-035, ¶ 28.

While the statute of repose may be the most notable benefit accorded to qualifying health care providers, the most direct benefit to injured patients is delivered through the patients' compensation fund (PCF). The PCF is funded by the surcharges paid by the qualified health care providers. Widespread participation by health care providers is essential to the solvency of the PCF, and so to its ability to meet the ongoing medical needs of persons injured by an act of malpractice. *Cummings*, 1996-NMSC-035, ¶ 28; *Garcia*, 1995-NMSC-019, 119 N.M. at 539, 893 P.2d at 435.

The PCF delivers a benefit to the state as a whole by preventing a medical condition attributable to malpractice from driving injured persons into poverty,

forcing them to rely on public assistance or leaving them without health care. *See* NMSA 1978 § 41-5-6. Achieving the participation required for the PCF to remain viable and solvent means that the benefits accorded to health care providers need to be sufficiently appealing that a large percentage of health care providers will opt to become and remain qualified health care providers under the MMA. Erosion of that benefit through late-filed claims is entirely incompatible with encouraging the widespread participation essential to the operation of the MMA.

The statute of repose clearly bars the Plaintiff's claims against Dr. Berryman in this case. In accordance with the purposes of the MMA to make insurance available and to encourage widespread participation so that patients will have a reliable source of recovery should they be injured, the statutory benefits conferred on qualified health care providers, including the statute of repose, should be enforced by the Courts. *Cummings v. X-Ray Associates*, 1996-NMSC-035, ¶ 28, 121 N.M. 821, 830, 918 P.2d 1321.

III. The Plaintiff had a Constitutionally Reasonable Amount of Time to Discover Dr. Berryman's Identity and to File the Claim Within the Three Year Statute of Repose

Plaintiff's primary argument is that she did not have a reasonable period of time before the running of the statute of repose to discover Dr. Berryman's identity and commence her claim against him. Therefore, Plaintiff argues, the running of the statute should be tolled based on the doctrine of equitable tolling. Plaintiff,

however, clearly had a constitutionally reasonable time in which to obtain the information regarding Dr. Berryman's identity and treatment and to commence her action prior to expiration of the three-year period, and there is no basis for equitable tolling of the statute of repose in this case.

The New Mexico Supreme Court has, on occasion, applied equitable tolling of statutes of limitations based on due process concerns. See, *Terry v. State Highway Commission,* 1982-NMSC-047, 98 N.M. 119, 645 P.2d 1375 and *Garcia v. LaFarge,* 1995-NMSC-019, 119 N.M. 532, 893 P.2d 428. In *Garcia v. LaFarge,* the Supreme Court stated that the legislature may, consistent with due process, impose a statutory time deadline for commencing an accrued action where no limit existed before, and may, consistent with due process, shorten the time period within which existing claims may be brought as long as a reasonable time is provided for commencing suit. The legislature's enactment of the three-year statue of repose is constitutionally valid. 1995- NMSC-019, ¶ 33 (citing *Terry v. Anderson,* 95 U.S. 628, 632–33, 24 L.Ed. 365 (1877)).

However, the Court concluded that, where a plaintiff has an unreasonable short period of time between discovery of the cause of action and running of the statute of repose, exceptional circumstances may exist that justify tolling of the statute based on due process concerns. Therefore, in *Garcia v. LaFarge,* the Court held that the eighty-five days remaining before the limitations period was

scheduled to expire was an unreasonably short period of time and, therefore, as applied to the plaintiff's malpractice claims in the circumstances of that case, Section 41–5–13 violated due process. 1995- NMSC -019, ¶ 37.

In *Cummings v. X-Ray Associates*, 1996-NMSC-035, 121 N.M. 821, 830, 918 P.2d 1321, the Supreme Court again had occasion to address the question of equitable tolling of the statute of repose. In *Cummings,* the Court held that, where Plaintiff discovered her cause of action one and a half years prior to running of the statute of repose, she had a reasonable amount of time to file her suit. The Court noted that the most determinative fact against the plaintiff was that she did not exercise diligence when she first learned she had been misinformed about the mass in her lung by X–Ray Associates. She sat on her rights and did not file any claim for more than two years. By that time, almost four years had passed since the act of malpractice. Therefore, the Court concluded, Cummings lost her medical malpractice claim through her own lack of diligence. 1996- NMSC-035, ¶ 57.

Similarly, the Court in *Tomlinson v. George,* 2005-NMSC-020, 138 N.M. 34, 116 P.3d 105 held that, under the substantive due process analysis of *La Farge,* almost three years was not "an unreasonably short period of time within which to bring an accrued cause of action." Under the *La Farge/ Cummings* due process analysis, Tomlinson's two years and eight months was a constitutionally reasonable period of time within which to file her claim. 2005- NMSC-020, ¶24.

The Supreme Court's decisions in *LaFarge, Cummings, and Tomlinson* establish that eighty-five days may be an unreasonably short period of time from a due process standpoint, but one and one-half years is a constitutionally adequate amount of time for a medical malpractice plaintiff to commence an action under the MMA. The time period in this case falls between the eighty-five days of *LaFarge* and the one and one-half years in *Cummings.* However, the three hundred twenty one days in this case should be deemed to be a reasonable amount of time.

From the date Plaintiff discovered her cause of action in September, 2008, Plaintiff had three hundred and twenty one days before the statute of repose would expire on August 8, 2009. This was approximately four times as long as the plaintiff in *LaFarge.* Importantly, Plaintiff Cahn had sufficiently reasonable time to retain counsel and did retain counsel to represent her on the claim in December, 2008, approximately eight months prior to running of the three-year period. As is set out, below, the information regarding Dr. Berryman's treatment of Plaintiff was readily available through Plaintiff's Lovelace Health Plan records and banking records. The eight additional months remaining after Plaintiff retained counsel was more than a reasonable amount of time for Plaintiff's counsel to have investigated the claim, identified the potential defendants, and filed suit. Even after filing of the original Complaint, naming Lovelace, Plaintiff still had one

hundred twenty one days in which to obtain Plaintiff's records from Lovelace Health Plan, which would have disclosed the identity of and treatment by Dr. Berryman.

The three hundred twenty one days between the time Plaintiff discovered her condition in September 2008 and the running of the statute of repose in August 2009 was a constitutionally reasonable and sufficient time for Plaintiff to bring her claim against Dr. Berryman. Equitable tolling should not apply to extend the time limitation in this case. *Cummings v. X-Ray Associates*, 1996-NMSC-035, ¶ 28, 121 N.M. 821, 830, 918 P.2d 1321.

IV. There Was No Fraudulent Concealment and the Running of the Statute of Repose is Not Tolled.

Plaintiff has also argued that the doctrine of fraudulent concealment should be applied to toll the running of the statute of repose in this case. Plaintiff argues that, in effect, Dr. Berryman concealed his identity and that the statute of repose should be tolled until Plaintiff discovered the information relating to Dr. Berryman during discovery in the case. However, there was no fraudulent concealment in this case.

In New Mexico, a statute of limitations or repose may be tolled if the party against whom the cause of action has accrued prevents the one entitled to bring the action from doing so by limiting knowledge of the claim by fraudulent

concealment. *Hardin v. Farris*, 1974-NMCA-146, 87 N.M. 143, 530 P.2d 507. This doctrine is based upon the principle of equitable estoppel, and is premised on the notion that the defendant should be estopped from asserting the statute of limitations as a defense if he has prevented the plaintiff from bringing suit within the statutory period. *Kern v. St. Joseph's Hospital*, 1985-NMSC-031, 102 N.M. 452, 697 P.2d 135. However, this tolling is only applicable when a plaintiff can show that a medical provider has knowledge of facts relating to malpractice, and fails to disclose those facts to the patient under circumstances where the patient may not be reasonably expected to learn of the improper acts. *Armijo v. Regents of the University of New Mexico,* 1984-NMCA-118, 103 N.M. 183, 704 P.2d 43, *reversed in part, Regents of University of New Mexico v. Armijo,* 1985-NMSC-057, 103 N.M. 174, 704 P.2d 428.

In order to invoke the doctrine of fraudulent concealment, a plaintiff must not only plead it with specificity, but must also demonstrate that the defendant doctor actually had knowledge of medical negligence, and that he intentionally concealed that evidence. As a rule, Plaintiff must demonstrate some positive act of concealment, such as a false representation by a physician or hospital, where a duty to speak exists. *Armijo*, 1984-NMCA-118, 103 N.M. at 186. However, mere silence where there exists a duty to speak may also constitute fraudulent concealment. *Id.* Plaintiff in the present case has demonstrated neither.

In *Kern v. St. Joseph's Hospital*, plaintiff's decedent had received excessive amounts of radiation, and suffered complications leading to his death. Plaintiffs had asked about excessive radiation, and were told that the damage done to the decedent was simply a side effect of the radiation. Several years later, his widow read a newspaper article about excessive radiation at St. Joseph's Hospital, and hired an attorney to investigate. The defense pleaded that the claim was barred by the applicable statute of limitations, and the court agreed, granting summary judgment in favor of defendant. The Court articulated the elements a plaintiff must prove in order to invoke the doctrine. First, the plaintiff must show that the physician knew of the alleged wrongful act and concealed it from the patient or had material information pertinent to its discovery that he failed to disclose. In addition, the plaintiff must show that the patient did not know, or could not have known through the exercise of reasonable diligence, of his cause of action within the statutory period.

The Court of Appeals reversed, finding that a fact issue on fraudulent concealment precluded granting summary judgment. *Kern*, 1985-NMSC-031, 102 N.M. at 455. Similarly, in *Hardin v. Farris*, the plaintiff also demonstrated specific facts that were concealed by the hospital. In that case, plaintiff demonstrated that a medical record showing that only one of her Fallopian tubes had successfully been ligated was never disclosed to her. *Hardin*, 1974-NMCA-146, 87 N.M. at 144.

In *Armijo v. Regents of the University of New Mexico*, the Court declined to apply the doctrine of fraudulent concealment to toll the statute of limitations under the Tort Claims Act. The case involved a baby who suffered anoxia at birth and ultimately died. Plaintiff filed her complaint outside the two-year statute of limitations in the Tort Claims Act, and alleged fraudulent concealment because she was not provided with the baby's entire medical record. The court found, however, that plaintiff had not demonstrated any specific facts that the hospital concealed in not providing her with the entire file. 1984-NMCA-118, 103 N.M. at 186.

In the present case, Plaintiff has argued that Dr. Berryman, in effect, fraudulently concealed his identity and, therefore, the running of the statute of repose should be tolled. The facts in this case, however, fail to demonstrate that Dr. Berryman did not disclose or engaged in any conduct that concealed either his identity or the existence of any cause of action.

Plaintiff has not produced any evidence that Dr. Berryman withheld any information or records from her. To the contrary, the facts show that Plaintiff could have learned of Dr. Berryman's identity well within the three year period either by accessing her on-line banking records or by requesting her medical records from Lovelace Health Plan. At any point from August 2006, those records would have disclosed and Plaintiff could have determined the identity of Dr. Berryman. There is no evidence, whatsoever, that Dr. Berryman fraudulently

concealed his identity from Plaintiff in any manner. Therefore, the statute of repose is not tolled by the doctrine of fraudulent concealment in this case.

STATEMENT REGARDING ORAL ARGUMENT

Dr. Berryman requests that the Court grant oral argument in this case. The case involves important and significant policy concerns relating to application and enforcement of the MMA and oral argument will provide the parties the opportunity to fully inform the Court's decision on the issue of application of the statute of repose.

CONCLUSION

The Plaintiff's claim against Dr. Berryman is barred by the three-year statute of repose of the Medical Malpractice Act. Plaintiff had a constitutionally reasonable amount of time in which to commence her action against Dr. Berryman and no circumstances exist that would support application of any tolling doctrine.

The MMA is a complex statutory framework intended to address concerns over the availability of liability insurance and sufficient funding of the PCF to ensure adequate recovery by patients injured through acts of malpractice. The benefits of the Act for health care providers, including the statute of repose, are essential to gain wide-spread participation by health care providers to achieve the goals of the MMA. A failure to apply the statute of repose to claims brought more

than three years after the alleged malpractice is contrary to legislative intent and would defeat the goals of the MMA.

Therefore, the Defendant/Appellant, Dr. Berryman, would respectfully request the Court reverse the denial of summary judgment based on the MMA's statute of repose and remand this case for dismissal of the Plaintiff's claim against Dr. Berryman as time-barred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true copy of the foregoing Brief in Chief to the following this 24th day of February, 2014:

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