IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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NICHOLAS T. LEGER as Personal Representative for the ESTATE of MICHAEL THOEMKE and DANIEL THOEMKE, individually

Plaintiffs,

No.35,807
Fourth Judicial Dist. Ct.
No. D-412-CV-2012-328

v.

NICHOLAS T. LEGER as assignee of PRESBYTERIAN HEALTHCARE SERVICES

Defendant and Third-Party Plaintiff-Appellee,

v.

RICHARD GERETY, M.D. and the NEW MEXICO HEART INSTITUTE,

Third-Party Defendants-Appellants.

RICHARD GERETY, M.D. AND THE NEW MEXICO HEART INSTITUTE'S REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. The Legislature did not intend to restrict the application of § 41-5-12 by the phrase "patient's claim for compensation" 2

A. Leger concedes that the MMA is to be interpreted broadly in order to further the purposes of the Act 2

B. Leger concedes that the purposes of the MMA include providing predictability to, and placing limitations upon, claims against healthcare providers and their insurers 3

C. The narrow interpretation of § 41-5-12 urged by Leger would make the provision of healthcare in New Mexico more expensive and less predictable, and frustrate the purpose of the Act 3

1. The double recovery sought by Leger would make the overall delivery of healthcare more expensive 3

2. Assignment of an indemnity claim from a hospital to the patient will always result in a double payment for the provider's negligence, which frustrates the purpose of the MMA 5

3. Assignments of medical malpractice claims make the claims more likely to be pursued and, hence, more expensive and less predictable for insurers of qualified healthcare providers 5

4. The adverse consequences of permitting assignments of medical malpractice claims are severe, real, and well demonstrated by the case before the Court 6

D. The MMA as a whole, and, in particular, the language and context of Section 41-5-12, suggest that the prohibition of assignments should be applied as broadly as all of the other limitations and requirements in the Act 9

1. Leger errs in focusing on the word "patient" rather than on the phrase of which it is an integral part........................ 9

2. The title and location of § 41-5-12 supports a broad interpretation.. 11

3. Broad application of Section 41-5-12 does not require the Court to "remove" the word "patient." Rather, the Court can interpret the section in the same manner it has interpreted the Act in other cases 12

II. The Legislature could not have intended that an assignment could be used to circumvent the MMA's statute of repose and the prerequisite for a commission decision.. 14

III. Enforcement of the assignment would contravene the public policy prohibiting the assignment of claims for personal injury 15

CONCLUSION AND REQUEST FOR RELIEF.. 16

TABLE OF AUTHORITIES

NEW MEXICO CASES

Baker v. Hedstrom,
2013-NMSC-043, 309 P.3d 1047 10

Christus St. Vincent Regional Medical Center v. Duarte-Afara,
2011-NMCA-112, 267 P.3d 70 .... 11, 14, 15, 16

Hale v. Basin Motor Co.,
1990-NMSC-068, 795 P.2d 1006 4

Hughey v. Ware,
1929-NMSC-024, 276 P. 27 4

State v. Richardson,
1944-NMSC-059, 154 P.2d 224 12

Sunnyland Farms, Inc. v. Central New Mexico Elec. Co-op., Inc.,
2013-NMSC-017, 301 P.3d 387 4

Wilschinsky v. Medina,
1989-NMSC-047, 775 P.2d 713 .... 10, 12-13

NEW MEXICO STATUTES AND RULES

NMSA 1978 § 41-5-3 (1977) 10, 11, 15, 16

NMSA 1978 § 41-5-6 (1992) 16

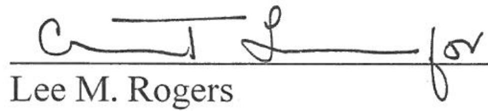
NMSA 1978 § 41-5-12 (1976) .... *passim*

NMSA 1978 § 41-5-13 (1976) 16

NMSA 1978 § 41-5-15 (1976) 14, 16

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(A)(1)(c), Defendants-Appellants, Richard Gerety, M.D. and the New Mexico Heart Institute, state that this Reply Brief complies with the length limitations of Rule 12-318(F) NMRA. The brief uses a proportionately spaced font, has a typeface of 14 points, and contains 3,644 words. The word count is obtained using Microsoft Word 2013.



Lee M. Rogers

INTRODUCTION

Appellee Nicholas Leger asks the Court to hold that when the Legislature said a patient's claim for compensation under the MMA is not assignable, what it meant was that a patient cannot sell a malpractice claim, but a patient can buy one. This was not the Legislature's intent.

Leger's Answer Brief confirms that:

1. The Legislature created the Medical Malpractice Act in order to make claims against healthcare providers more predictable and thereby encourage providers to live and work in New Mexico.
2. At every opportunity, the appellate courts of New Mexico have interpreted the Act broadly, in the way that most fully furthers that legislative purpose, even when the plain language of the Act might suggest a more narrow application.
3. Such precedent favors applying and interpreting the Act to accomplish the Legislature's purpose, rather than sending the provider away with instructions to "go talk to your legislator."
4. An interpretation of § 41-5-12 that would prohibit assignments of medical malpractice claims by "patients," but would permit any other person to sell or trade a medical malpractice claim, would make the delivery of health

care less predictable, more expensive, and less attractive to providers, thus making it more difficult for New Mexico to attract and retain providers.

5. No principle of justice or fairness supports enforcing the assignment in this case, where the Plaintiffs below recovered 100% of their damages and now, by their own admission, seek a double recovery and a double payment.

ARGUMENT

I. The Legislature did not intend to restrict the application of § 41-5-12 by the phrase "patient's claim for compensation."

A. Leger concedes that the MMA is to be interpreted broadly in order to further the purposes of the Act.

Leger concedes that the appellate courts of New Mexico have always interpreted and applied the Medical Malpractice Act ("MMA") "expansively" in order to accomplish the "purpose behind the Act," to ensure that qualified healthcare providers receive the full benefits and "protections of the Act," to prevent claimants from making an "end run around" the limitations found in the Act, to "prevent claimants from obtaining rights or recovery beyond what is allowed under the Act," and to avoid any application of the Act that would "frustrate" the Legislature's intent or "elevate form over substance." *See, Answer Brief at pp. 9-13.*

B. Leger concedes that the purposes of the MMA include providing predictability to, and placing limitations upon, claims against healthcare providers and their insurers.

Leger concedes that by enacting the MMA, the Legislature intended to relieve "insurers and healthcare providers from" uncertainty, to ensure "protections" to providers, and to adopt "limitations" on the "rights and remedies" otherwise available to medical malpractice claimants. *See Answer Brief at pp. 9-14.* Yet his argument conflicts with every one of his concessions.

C. The narrow interpretation of § 41-5-12 urged by Leger would make the provision of healthcare in New Mexico more expensive and less predictable, and frustrate the purpose of the Act.

Leger contends that assignments of medical malpractice claims by persons or corporations other than patients would not conflict with or frustrate the purposes of the Medical Malpractice Act. He is wrong.

1. The double recovery sought by Leger would make the overall delivery of healthcare more expensive.

Leger concedes that his assignor, Presbyterian Healthcare Services, has paid him 100 percent of his damages. *See, B.I.C., p. 7, fact No. 7.* This means that Leger has already recovered all damages allegedly caused by any negligence of Dr. Richard Gerety and the New Mexico Heart Institute (hereinafter jointly referred to as "Dr. Gerety"). Any further recovery by Leger from Dr. Gerety pursuant to the assignment would be a double recovery. New Mexico law has long precluded double recoveries.

See e.g. Hughey v. Ware, 1929-NMSC-024, ¶ 15, 276 P. 27 (it is impermissible to attempt to recover twice for the same injury); *Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 795 P.2d 1006 (New Mexico law does not allow duplication of damages or double recovery for injuries received); *Sunnyland Farms, Inc. v. Central New Mexico Elec. Co-op., Inc.*, 2013-NMSC-017. ¶ 47, 301 P.3d 387 (Plaintiffs may not collect compensation twice for the same injury).

Compelling physicians to insure against the possibility of a double recovery makes no sense given the longstanding prohibition on double recoveries. Permitting a double recovery for Dr. Gerety's alleged negligence is also entirely at odds with the Legislature's intent to lower the cost of insurance for healthcare providers who qualify under the MMA. The justification for precluding assignments such as this is established by simply comparing the potential outcome here with the result that would have been obtained had Presbyterian been the one seeking indemnity. Under that circumstances Presbyterian would have made one payment, and been reimbursed a portion of what it paid Leger. The overall cost of paying damages for the alleged negligence of Dr. Gerety would not have been doubled.

2. Assignment of an indemnity claim from a hospital to the patient will always result in a double payment for the provider's negligence, which frustrates the purpose of the MMA.

Not every medical malpractice claimant will be as successful in litigation as Leger and recover 100 percent of his or her damages. Yet, a payment of a claim of equitable indemnity to anyone other than the indemnitee (in this case, the hospital) represents a re-payment of damages paid for the alleged negligence of the tortfeasor/indemnitor (in this case, Dr. Gerety). If the patient recovers damages from a qualified healthcare provider's ostensible principal/employer (such as a hospital) and then recovers the same damages directly from the qualified healthcare provider pursuant to an assignment of the indemnity claim, there is an undeniable double payment of damages to a patient whose claim is governed by the MMA. It would be absurd to conclude that the Legislature intended to permit such double payments as the consequence of an assignment of a medical malpractice claim. If no assignment is allowed, and the indemnitor (the physician) reimburses the indemnitee (the Hospital) directly, then there is only one payment for the physician's liability, and the cost to the health care system remains level.

3. Assignments of medical malpractice claims make the claims more likely to be pursued and, hence, more expensive and less predictable for insurers of qualified healthcare providers.

In this case, the Hospital paid to the Plaintiffs 100 percent of the damages claimed by those Plaintiffs. *See, B.I.C. at p. 7, fact No. 7.* This means that the

Hospital received no discount, through the settlement negotiations, for assigning its indemnity claim against Dr. Gerety. In other words, the Hospital gave away its medical malpractice claim against Dr. Gerety, receiving no consideration in return. We know that the probability of Leger pursuing a medical malpractice claim against Dr. Gerety is 100 percent – because it has occurred. Given that the Hospital placed no monetary value on its indemnity claim, one can only conclude that the probability that the Hospital would have pursued its medical malpractice claim against Dr. Gerety is far below 100 percent. Thus, the claim Leger seeks to assert is likely only being pursued because it was assigned. Who would buy an assignment of a medical malpractice claim, and then *not* pursue that claim? Conversely, who would assign away a medical malpractice claim in exchange for no purchase price, and yet have been willing to spend the money on lawyers and expert witnesses necessary to pursue that claim? Allowing assignments of medical malpractice claims under the MMA increases the number of claims that will be pursued, and frustrates the purposes of the MMA.

4. The adverse consequences of permitting assignments of medical malpractice claims are severe, real, and well demonstrated by the case before the Court.

Leger's Answer Brief, in a single paragraph, calls Dr. Gerety's concerns "manufactured, wholly speculative, implausible, a frightening parade of horribles, and a contrived 'sky is falling' story." *See, Answer Brief at p. 14.* The Court need

look no further than the undisputed facts of this case to understand that Dr. Gerety's concerns are real. The facts are:

- After the Hospital obtained a finding of no negligence by Dr. Gerety from the Medical Review Commission and properly filed its Third Party Complaint for Indemnity, Leger moved the Court to stay the Third Party Complaint, claiming he had no interest in suing Dr. Gerety, and had no interest in the claim of indemnity. *See, B.I.C. at p. 7, fact No. 6.*
- Dr. Gerety chose not to oppose the motion to stay because the Hospital (1) consistently denied vicarious liability for Dr. Gerety and denied he was negligent, (2) was the primary target in the lawsuit for its own wrongful conduct, misrepresentations, and the negligence of its employed physicians, nurses, and administrators, (3) had moved multiple times to dismiss for improper venue and would likely not oppose a change of venue for the indemnity claim, and (4) is a for-profit hospital—a corporation—who was suing a doctor called in by that same Hospital to help a sick boy.
- If the assignment is enforced, Dr. Gerety will face at trial a completely different claim and claimant – one who (1) is free of any comparative fault, (2) is a grieving father, not a negligent corporation, (3) contends

(in contrast to the hospital's position pre-settlement) that Dr. Gerety was negligent and that the Hospital was vicariously liable for him, and (4) hand-picked the venue.

- Leger, as a new Third Party Plaintiff is not suing to recover a portion of what it paid in settlement, if anything, for Dr. Gerety's negligence. The new Third Party Plaintiff is suing for a double recovery.
- The new Third Party Plaintiff is the same party who (1) deliberately chose not to comply with the statute of repose, and (2) deliberately chose not to present a claim to the Medical Review Commission.
- The new Third Party Plaintiff wants Dr. Gerety to pay him the attorney fees and expenses incurred by the Hospital in defending the claim brought by the new Third Party Plaintiff, when he was the Plaintiff, thereby circumventing the American Rule respecting parties' responsibility for their own attorney fees ("pay us the attorney fees and expenses incurred in defending the claim we brought"). *See, Answer Brief* at p. 20.
- The true claimant—the Hospital—is no longer subject to the procedural discovery tools such as interrogatories, requests for production, requests for admissions, disclosure requirements, or to discovery sanctions available under Rule 1-037.

- Dr. Gerety is now litigating in the Court of Appeals over an indemnity claim that the original Third Party Plaintiff deemed worthless and gave away for nothing.

Leger argues that, because his indemnity claim is limited by the MMA's cap on damages, Dr. Gerety is not prejudiced by the assignment. *See, Answer Brief at p. 14.* Leger says he has merely slipped "into the shoes" of the Hospital. From the perspective of Dr. Gerety, however, the *shoes* of the new Third Party Plaintiff may be the same, but the comparison ends there. Every other aspect of the Third Party Complaint has completely changed. The trouble caused by this assignment is real – not speculative and trivial.

D. The MMA as a whole, and, in particular, the language and context of Section 41-5-12, suggest that the prohibition of assignments should be applied as broadly as all of the other limitations and requirements in the Act.

Leger urges the Court to hold that when the Legislature declared that a patient's claim for compensation under the Medical Malpractice Act was not assignable, what they meant was that a patient can't *sell* a malpractice claim against his doctor, but he can *buy* one. This is the type of absurd interpretation that the appellate courts of New Mexico consistently reject.

1. Leger errs in focusing on the word "patient" rather than on the phrase of which it is an integral part

The statute prohibiting assignments says:

> A patient's claim for compensation under the Medical Malpractice Act is not assignable.

NMSA 1978 § 41-5-12 (1976). The prohibiting language is "not assignable." This language is not directed to any type or class of assignor – it is the assignment itself that is prohibited, not the conduct of a limited class of persons that is prohibited. The Legislature did not say "a patient cannot…."

The thing that cannot be assigned is "a patient's claim for compensation under the medical malpractice act." NMSA 1978 §41-5-12. The issue here is whether the object of the prohibition is only claims that are held and brought by patients, or whether it includes all malpractice claims governed by the Act.

Leger argues that in defining the term "patient," the Legislature intended the term to have special status and to be interpreted literally and narrowly wherever it is found. Leger relies on his claim that the Legislature defined only six terms, each of which was intended to be interpreted in a "constrained" manner. But the courts have already rejected a "constrained" interpretation of two of those six terms. *Baker v. Hedstrom*, 2013-NMSC-043, ¶¶ 21, 40, 309 P.3d 1047 (rejecting literal interpretation of definition of "health care provider" in § 41-5-3(A); *Wilschinsky v. Medina,* 1989-NMSC-047, ¶¶ 22, 26, 775 P.2d 713 (rejecting literal interpretation of the definition of "malpractice claim" in § 41-5-3(C)). It was *Wilschinsky's* recognition that broad application of the concept of a "malpractice claim" was required that brought indemnity claims within the Medical Malpractice Act.

Christus St. Vincent Regional Medical Center v. Duarte-Afara, 2011-NMCA-112, ¶¶ 13, 20, 267 P.3d 70. The same rationale strongly supports full application, not piecemeal application, of the Act to indemnity claims. If patients are prohibited from selling malpractice claims, hospitals must also be precluded from doing so.

The word "patient" is not what is at issue here. At issue is what the Legislature meant by the full phrase "patient's claim for compensation under the Medical Malpractice Act." Leger has no response to Dr. Gerety's argument that, because the terms "malpractice claim" and "patient's claim" are used interchangeably in Section 41-5-3(C) (the section definitions section), it is probable that the term "patient's claim" in Section 41-5-12 was likewise intended to be the equivalent of a "malpractice claim." Because the Legislature treated "malpractice claim" and "patient's claim" as equivalent in its definitions, this Court should do so as well when addressing the meaning of those terms in the statutory sections that follow.

2. The title and location of § 41-5-12 supports a broad interpretation.

Leger concedes that the title to Section 41-5-12 refers to claims generally, not just claims held by "patients," and that the title does not suggest that only patients are prohibited from assigning of claims governed by the MMA. But Leger then argues that the Legislature, while taking great care, and very deliberately choosing the word "patient" in Section 41-5-12, gave virtually no thought to the choice of a title for that section. This argument, apart from being illogical, ignores precedent

looking to a statute's title to determine intent. *See, State v. Richardson,* 1944-NMSC-059, ¶ 21, 154 P.2d 224.

The location of § 41-5-12 is merely part of the context of the provision. It is found among a series of limitations applicable to claims and claimants, and should be considered as such. Leger, in fact, concedes that the purpose of § 41-5-12 is to prohibit assignments. He disagrees only about the breadth of the prohibition.

These arguments were preserved below in Dr. Gerety's Reply in support of the Motion to Dismiss the Amended Third Party Complaint. *See* RP 2746-2747. The "title" argument was specifically made, with citation to case law. The "location" argument was made by stating that Section 41-5-12 is located within the many protections found in the Act. That point, of course, is conceded.

3. Broad application of Section 41-5-12 does not require the Court to "remove" the word "patient." Rather, the Court can interpret the section in the same manner it has interpreted the Act in other cases.

Precedent supports a broad interpretation of the anti-assignment provision, in the way the appellate courts of New Mexico have previously interpreted the MMA.

In *Wilschinsky*, Plaintiff Wilschinsky sued a doctor for negligently discharging a patient from his office while that patient was under the influence of medication, and who then crashed into Wilschinsky's vehicle. Wilschinsky contended that his lawsuit was not governed by the MMA because the Act clearly defined a "malpractice claim" in a way that limited it to claims involving injuries to

a patient, and Wilschinsky was not a patient. The Supreme Court disagreed, and held that the Legislature could not have intended that Wilschinsky's claim – based on the doctor's negligent treatment of his patient – was *not* limited by the MMA, but any claim by the patient herself *was* limited by the MMA. *Id.* at ¶ 25. The Court interpreted the definition of a malpractice claim to include the claim by the motorist, even though the claim involved no "injury to the patient." *Id.* at ¶ 26. The Supreme Court held that it would be absurd to think that the Legislature did not intend Wilschinsky's claim to be governed by the Act. *Id.*

Here, no reason has been articulated as to why the Legislature would permit Wilschinsky, for example, or Presbyterian Hospital, to assign a malpractice claim, but prohibit a patient from doing so. That would be a senseless, absurd distinction of the type the appellate courts consistently avoid. The *Wilschinsky* Court did not tell the physician defendant to "go call his legislator." Rather, the court functioned as it should – it interpreted and applied the statute in a way that furthered, rather than frustrated, its intended purpose.

II. The Legislature could not have intended that an assignment could be used to circumvent the MMA's statute of repose and the prerequisite for a commission decision.

Leger did not sue Dr. Gerety within the MMA's three-year statute of repose, and did not meet the requirement of obtaining a medical review commission decision. See NMSA 1978 §§ 41-5-12 and 41-5-15. Leger admits that the holding in *Christus St. Vincent Regional Medical Center*, 2011-NMCA-112, which held that indemnity claims are malpractice claims under the MMA, was "to avoid exposing physicians to claims for indemnity where the patient himself could not bring claims due to the passage of the statute of repose." *See Answer Brief*, p. 15. These are the very facts of this case. Leger moved the district court for an order excluding Dr. Gerety from participating in the case because of Leger's decision not to sue Dr. Gerety. After excluding Dr. Gerety from the litigation, Leger now says he can rely on the Hospital's compliance with the MMA. Yet, he cites no authority that would permit one claimant to rely on someone else's compliance with the Act's requirements.

Interpreting Section 41-5-12 to allow this would be a narrow interpretation of the MMA that would elevate "form over substance and frustrate the underlying concerns which motivated our Legislature to enact the MMA . . . that is, relieving insurers and health care providers from the uncertainty posed by stale malpractice

claims." *Christus St. Vincent*, 2011-NMCA-112 at ¶ 16; *see also Response Brief*, p. 13.

The Medical Review Commission would not allow Leger's attorney to attend and listen to the medical-legal panel hearing convened at the request of the Hospital because Leger did not – although he could have – joined in the application. Leger was unable to successfully contend that, because the Hospital complied with the statute, Leger had a right to participate. Instead Leger was politely excused from the proceedings. The same result should obtain here.

III. Enforcement of the assignment would contravene the public policy prohibiting the assignment of claims for personal injury.

Leger concedes that the common law would prohibit him from buying or selling a medical malpractice claim against Dr. Gerety. He fails to explain why the common law should be any more tolerant of the Hospital's sale of a claim for money damages against Dr. Gerety that is based on Dr. Gerety's alleged medical malpractice and the damages allegedly caused to his patient thereby.

For the same reason the *Christus St. Vincent* opinion declared there to be no functional distinction, in the eyes of the healthcare providers, between an indemnity claim and a direct claim, and the Legislature equated a "malpractice claim" to a "patient's claim" in § 41-5-3(C), this Court should conclude that there is no practical distinction between the two.

CONCLUSION AND REQUEST FOR RELIEF

The issue is framed by the chart:

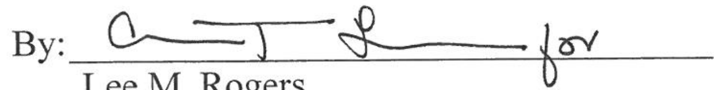
Patients	**Hospitals**
Cannot file a medical malpractice lawsuit beyond the statute of repose. NMSA 1978, § 41-5-13.	Cannot file a medical malpractice lawsuit for indemnity beyond the statute of repose. NMSA 1978, § 41-5-13; *Christus St. Vincent*, 2011-NMCA 112.
Cannot file a medical malpractice lawsuit without first obtaining a review of the claim by the Medical Review Commission. NMSA 1978, § 41-5-15.	Cannot file a medical malpractice lawsuit for indemnity without first obtaining a review of the claim by the Medical Review Commission. NMSA 1978, § 41-5-15; *Christus St. Vincent*, 2011-NMCA 112.
Cannot recover more than the statutory limit on damages. NMSA 1978, § 41-5-6.	Cannot recover more than the statutory limit on damages. NMSA 1978, § 41-5-6; *Christus St. Vincent*, 2011-NMCA 112.
Cannot assign a malpractice claim. NMSA 1978, § 41-5-12.	Cannot (or can?) assign a malpractice claim. NMSA 1978, § 41-5-12.

The Legislature did not intend to preclude a patient from *selling* his malpractice claim, while permitting him to *buy* one. The assignment in this case is every bit as offensive as any assignment of any personal injury claim. No principle of justice or fairness demands that the Court authorize this assignment of this malpractice claim for the purpose of accomplishing a double recovery, and circumventing the requirements of the Medical Malpractice Act.

WHEREFORE, Dr. Gerety respectfully requests that the Court reverse the Order denying Dr. Gerety's Motion to Dismiss.

Respectfully Submitted.

ATWOOD, MALONE, TURNER & SABIN, PA

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Reply Brief** was served by first class mail on May 15, 2017 on the following counsel of record.

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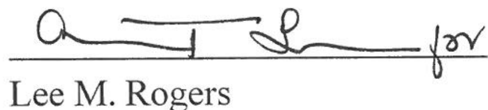
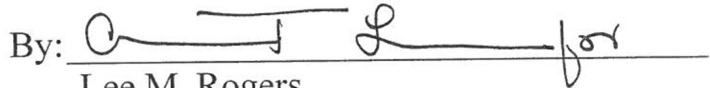


Lee M. Rogers

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. Oral argument is proper in the case to give the parties an opportunity to discuss with the Court the legislative intent of the MMA and the public policy implications of allowing assignments of medical malpractice claims.

ATWOOD, MALONE, TURNER & SABIN, PA

By: 

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