IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NICOLAS T. LEGER, as Personal Representative of the Wrongful Death Estate of MICHAEL THOEMKE and DANIEL THOEMKE, Individually,

Plaintiffs,

vs.

NICOLAS T. LEGER as assignee of PRESBYTERIAN HEALTHCARE SERVICES,

Defendant and Third-Party Plaintiff-Appellee,

vs.

RICHARD GERTY, M.D. and NEW MEXICO HEART INSTITUTE,

Third-Party Defendants-Appellants.

Ct. App. Cause No. 35,807

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
SAN MIGUEL COUNTY
THE HONORABLE GERALD BACA
DIST. CT. CAUSE NO. D-412-CV-2012-328

THIRD-PARTY PLAINTIFF-APPELLEE'S ANSWER BRIEF

Oral Argument Requested

Ray M. Vargas, II
THE VARGAS LAW FIRM, LLC
807 Silver Ave. SW
Albuquerque, NM 87102
(505) 242-1670

Richard J. Valle
Criostoir O'Cleireachain
CARTER & VALLE LAW FIRM
8012 Pennsylvania Circle NE,
Albuquerque, NM 87110
(505) 888-4357

TABLE OF CONTENTS

TABLE OF AUTHORITIES
New Mexico Cases

New Mexico Statutes

New Mexico Rules

STATEMENT OF COMPLIANCE WITH RULE 12-318(G)

Undersigned counsel hereby certifies, consistent with Rule 12-318(G), NMRA 2017, that this brief was prepared using a proportionally-spaced typeface, Times New Roman, and contains a total of 4,829 words in the Argument section.

STANDARD OF REVIEW[1]

This case presents primarily a matter of statutory construction, which concerns a pure question of law; such matters are reviewed *de novo*. *Ponder v. State Farm Mutual Ins. Co.*, 2000-NMSC-033, ¶ 7, 12 P.3d 960. The "'Court's primary goal when interpreting statutes is to further legislative intent.' We 'us[e] the plain language of the statute as the primary indicator of legislative intent[.]' ... However, '[i]f the plain meaning of the statute is doubtful, ambiguous, or [if] an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, we will construe the statute according to its obvious spirit or reason.'" *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11, 309 P.3d 1047 (citations omitted).

[1] A separate statement of the standard of review appears in Argument Section IV, as that argument includes both statutory construction and a factual determination, requiring a mixed standard of review.

ARGUMENT

In prior cases presented to New Mexico's Appellate Courts, qualified healthcare providers sued for claims that are not expressly covered by the New Mexico Medical Malpractice Act (hereinafter "the Act") have asked Courts to read the Act broadly, and read them, or the claims asserted, in such a way to bring them under the Act's protective blanket. Taking an unusual tact, Appellants here ask this Court not to include those not expressly named in the Act under its protections, but, rather, to *exclude* the express definition of who is a "patient," and to excise the term "patient" from the Act's clear prohibition against the assignment of a "*patient's* claim" for malpractice.

Contrary to Appellants' arguments, the Act clearly and unambiguously sought to limit its prohibition against assignment of claims to claims of a "patient," as that term is defined in the Act. Neither the rules of statutory construction, nor the purposes behind the Act mandate reading the prohibition otherwise.

Moreover, reading the Act by its express terms and limiting the prohibition against assignments only to "patient's claims" does not lead to an absurd result, is wholly consistent with the Act's purpose, is consistent with the way Courts have applied it, and is consistent with the common-law prohibition against assignment of personal injury claims.

Furthermore, the relief sought by Appellants here requires legislative action, and it would be wholly inappropriate for a Court to rewrite the Act, removing express limitations from its provisions.

Because Appellee stands in the shoes of Presbyterian Healthcare Services, as the assignee of all its rights to the claims for indemnification, including the pending third-party lawsuit, and because Presbyterian timely submitted its claims and went through the Medical Review Commission, then timely filed the claims being prosecuted herein, the Act's statute of repose was not missed, lapsed, or otherwise violated when Appellants assumed the assigned, pending claim and lawsuit for equitable indemnity.

Finally, though not a separate argument here, it should be noted that nowhere in their Brief in Chief do Appellants set forth how or where they preserved each issue for appeal, as required by Rule 12-318(A)(4), NMRA 2017. Appellee points this out because, specifically, Appellants' arguments set forth in Brief in Chief sections I(B) and I(C) were never raised below and therefore not properly preserved for appeal. *See Morningstar Water Users Assn., Inc. v. Farmington Mun. School Dist. No. 5*, 1995-NMSC-052, ¶ 55; 901 P.2d 725.

I. THE ACT CLEARLY AND UNAMBIGUOUSLY INTENDED TO LIMIT THE PROHIBITION AGAINST ASSIGNMENTS TO CLAIMS OF A "PATIENT," AS THAT TERM IS DEFINED IN THE ACT.

As declared by the Legislature, "[t]he text of a statute...is the primary, essential source of its meaning." NMSA 1978, § 12-2A-19 (1997). "The first guiding principle" in the interpretation and application of a statute therefore "dictates that [the reviewing Court] look to the wording of the statute and attempt to apply the plain meaning rule." *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 9, 237 p.2d 728 (internal quotation marks and citation omitted). Under the plain meaning rule, when the words used in the statute at issue are clear and unambiguous, the Court "must give effect to that language and refrain from further interpretation." *Id.* (internal quotation marks and citation omitted). This is true because "it is of course the responsibility of the judiciary to apply the statute as written" in order to ensure that the Legislature's goals in enacting the law at issue are not undermined. *State v. Lewis*, 2008-NMCA-070, ¶ 6, 184 P. 3d 1050 (internal quotation marks and citation omitted).

a. The Legislature consciously chose to define the term "Patient," and limited it to a natural person, not a corporation like Presbyterian.

While Appellants are careful to cite this Court to numerous provisions of the Act, they curiously omit the fact that the Act expressly defines the term "patient." Indeed, while the Act uses numerous, complex terms throughout its provisions, the Legislature took care to expressly define only six (6) terms, each of which is to be

applied "in the Medical Malpractice Act..." *See* § 41-5-3, NMSA 1978 (1977). The term "Patient," as used in the Act, is defined as follows:

> "patient" means a natural person who received or should have received health care from a licensed health care provider, under a contract, express or implied; ...

§ 41-5-3(E).

Because the Legislature chose to define only specific terms, and expressly stated that those terms, as used in the Act, are constrained to the definition provided, it is clear that the Legislature intended those definitions to mean something; and, their use in the Act should not be discounted, omitted, or subject to a different definition. In this case, since the term "patient" is limited to a "natural person," and one who "received or should have received health care," it is undisputable that a "patient" is a person who was treated, or not treated, for health care.

It is likewise undisputable that a "patient" is not a corporation or a hospital, such as Presbyterian. As explained more fully herein—and as admitted by Appellants—the claims prosecuted by Appellees here are the claims of Presbyterian, a corporation and hospital, to indemnification. The claims at issue are therefore not a "patient's" claim. Presbyterian clearly does not meet the definition of a "patient," and, thus, its claims for equitable indemnification are not, and cannot be, the claims of a "patient," under the Act.

b. The Act's prohibition against assignments of claims is clearly and expressly limited to a "patient's" claim.

As set forth, above, the fact that the Legislature took care to define the term "patient," and mandate that its definition be used within the Act, means that its use of the term is purposeful. Appellants go to great lengths, and new levels of creativity, to convince this Court that the Legislature didn't mean what it said, in § 41-5-12 (1976), when it expressly mandated that only a "patient's claim" cannot be assigned. The fact remains: the Act expressly limits the prohibition against assignment of claims to a "patient's claim, as follows:

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

The fact that the term "patient" is not used in the heading of § 41-5-12 does not support the argument that the express, defined term should be omitted or ignored. Indeed, a review of the entire Act demonstrates that while the term "patient" as defined, is used in no fewer than twenty-seven (27) separate sub-parts[2], comprising fifteen (15) separate sections of the Act, only two sections uses the term "patient" in the heading, § 41-5-10 (1976), and § 41-5-25 (1997).

The only conclusion that can be drawn by the use, or non-use, of the term "patient" in the various headings of the sections of the Act is that the Legislature

[2] The term "patient" is used in sections 41-5-3(E); 41-5-6(A) and (E); 41-5-7(A), (B), (F), (G), and (H); 41-5-8; 41-5-9(B), (C), and (D); 41-5-10; 41-5-11(A); 41-5-14(D); 41-5-20(A); 41-5-22; 41-5-23; 41-5-25(A), (B), (E), (F), (G), and (H); 4-5-28; and 41-5-29(B).

was not consistent in using the term "patient" in headings. A classic example is found in § 41-5-7, NMSA 1978 (1991), where the term "patient" is not used in the heading, but the text of that section makes it clear that it can only apply to a "patient's claim." Specifically, § 41-5-7 sets forth the procedure for awarding future medical care and related benefits. Obviously, this section can only apply to the payment of future medical expenses for a "patient," to the exclusion of indemnification claims by third parties, yet the title is not "*patient's* future medical expenses;" the title is "future medical expenses." Thus, if one were trying to guess, speculate, or otherwise "read the tea leaves" by looking at how the Legislature used the term "patient" in the headings of the various sections of the Act, the only take-away is that it used the term inconsistently, and intermittently.

The argument that placement within the Act of the prohibition against assigning a patient's claim is somehow instructive is similarly unavailing. No statute, case, or other authority supports looking at where, within an act, a particular section is placed to determine legislative intent. There is simply no canon or rule of statutory construction that supports this, and it amounts to mere speculation. Appellants cite no statute, rule, or case law in support of this argument.

Finally, it should be noted that neither the "heading" or "placement" arguments were made at the trial court, and therefore were not preserved for

appeal. Indeed, it should not be lost on this Court that nowhere in Appellants' Brief in Chief do they state, as required by Rule 12-318(A)(4), NMRA 2017, how their arguments were preserved for appeal.

II. LIMITING THE PROHIBITION AGAINST ASSIGNMENTS TO PATIENT'S CLAIMS IS CONSISTENT WITH THE ACT'S INTENT AND WITH THE PUBLIC POLICY PROHIBITING ASSIGNMENTS OF PERSONAL INJURY CLAIMS.

Generally speaking, no one, other than a patient or someone acting in a legal capacity on behalf of the patient—such as a wrongful death personal representative or a conservator—brings a "patient's claim" for medical malpractice. Indeed, it is only those parties who *can* legally bring a claim for injury to the person. However, Appellees conflate the patient's claim, where the patient or their legally-authorized representative brings claims for personal injuries to the patient, with an indemnification claim. As explained more fully herein, while our courts have found that an equitable indemnification claim is a "malpractice claim" as that term is defined by the Act—because they have their "gravamen" in medical malpractice—no statute or case law supports the legal voodoo required to transform an indemnification claim into a claim for injury to a person.

Additionally, limiting the prohibition against assignment of claims to "patient's claims" is consistent with the common law and there is nothing in either the purpose of the Act or the common law that would mandate ignoring the Legislature's clear intent.

a. Allowing the assignment of a hospital's claim for indemnification is not inconsistent with the Act and would not lead to absurd results.

Appellants cite to three cases where our Courts have read the Act expansively and, relying upon the purpose behind the Act, found that: 1) claims by third parties injured by a patient under the influence of physician-administered narcotics are governed by the Act (*Wilschinsky v. Medina*, 1989-NMSC-047); 2) indemnification claims by hospitals are "malpractice claims" as defined in the Act and therefore governed by the three-year statute of repose (*Christus St. Vincent v. Duarte-Afara*, 2011-NMCA-112); and that the medical, corporate entities where qualified healthcare providers practice are, themselves, qualified healthcare providers, even though the Act does not include the corporate entity in the definition of such (*Baker v. Hedstrom*, 2013-NMSC-043).

In each of the three examples cited by Appellants, the claimant sought to use the absence of language in the Act to obtain rights that a patient would not otherwise have against a qualified healthcare provider. Examining the purpose behind the Act, the courts in each of those cases cited the need to read the Act expansively in order to provide qualified healthcare providers with the protections of the Act, and to prevent claimants from obtaining rights or recovery beyond what is allowed under the Act. In this case, however, it is undisputed that Presbyterian could have maintained its equitable indemnification claim, that it filed it within the statute or repose and went through the medical review commission, and that it

would be bound by the Act's cap on damages. Thus, this is not a case where the claimant is seeking rights or relief beyond what the Act allows and therefore the qualified healthcare provider needs an expansive reading of the Act in order to obtain a benefit in the form of the protection offered by the Act. Rather, this is a case where the claimant is seeking to avail itself of one of the rights provided by the Act, and the qualified healthcare provider is seeking to limit—and, in fact omit—express language in the Act that allows the claimant's suit to go forward. An examination of Appellant's three cases will illustrate this important difference.

In *Wilschinsky v. Medina*, 1989-NMSC-047, 775 P.2d 713, the claimant was injured in an auto accident when the physician's patient, under the influence of narcotics just administered by the physician, ran into the claimant. After finding that the physician owed a duty the claimant, a third party, the court then turned to the question of whether this was a "malpractice claim" under the Act that would confer the benefits of the cap on damages to the physician. Noting the purposes behind the Act, the fact that the claimant was seeking to make an end-run around the cap on damages in the Act, and that the crux of the claim was the physician's negligent administration of medication to a patient, the *Wilschinsky* court ultimately concluded that the claim was a "malpractice claim" as that term is defined by the Act.

Similarly, in *Christus St. Vincent Regional Med. Ctr. v. Duarte-Afara,* 2011-NMCA-112, 267 P.3d 70, the hospital was sued, along with a physician who was a qualified healthcare provider, for negligence. The suit was brought more than three years after the alleged negligence, and the suit against the physician was therefore barred the Act's three (3) year statute of repose. After the physician was dismissed, the hospital brought third party indemnification claims against the physician. Finding that the "gravamen" of the indemnification claim is predicated upon the allegation of negligence by a physician, and noting that it would frustrate the Act's purpose to allow the third party claim to proceed where the patient's claim was time-barred, the court found that indemnification claims are "malpractice claims" subject to the same three (3) year statute of repose as the underlying claim.

In *Baker v. Hedstrom*, 2013-NMSC-043, 309 P.3d 1047, the claimants, comprised of three separate plaintiffs, with three separate suits against different defendants, each sought a loophole around the Act's cap on damages by suing the physicians' professional health care organizations/professional corporations for vicarious liability. The claimants each argued that such health care organizations, corporations, or practices were not included in the definition of a "qualified health care provider" under the Act, even though the individual physicians practicing in those organizations were. Noting the expansive nature of the purpose behind the

Act, the fact that it would be absurd that the physicians would be covered by the Act, but the legal entity or vehicle that they practiced in would not, and the fact that the claimants sought to obtain relief they were not otherwise entitled to under the Act, the *Baker* court found that the physicians' practices met the definition of a qualified healthcare provider.

In each of Appellants' examples of how the purposes behind the Act require an expansive reading of its provisions, the claimants sought relief that was not otherwise available under the Act; whether it be damages in excess of the cap, or the ability to sue beyond the statute of repose. In each case, the court used the broad purposes behind the Act to read language and limitations into the Act that are not expressly stated in the Act. In none of those cases have our courts cited the purposes behind the Act to remove express provisions in the Act.

Additionally, in each of those cases, the court was able to articulate exactly *which* purpose behind the Act would be thwarted by allowing the claimant's claims. In *Wilschinsky*, the court noted that "if we recognize a third-party cause of action for the Wilschinskys and it is not covered by the Act, a third party would be placed in a better position to achieve full recovery from an act of malpractice than would the patient malpracticed upon." 1989-NMSC-047 at ¶ 25. In *Christus St. Vincent*, the court noted that "Martinez's [patient's] claim was properly dismissed as untimely. To permit Medical Center's claim to proceed where Martinez's claim

could not, would, in our view, elevate form over substance and frustrate the underlying concerns which motivated our Legislature to enact the MMA and Section 41-5-13—that is, relieving insurers and health care providers from the uncertainly posed by stale malpractice claims." 2011-NMCA-112 at ¶ 16. In *Baker*, the court noted claimants suing a physician's corporation without complying with the Act would mean the physician would not receive any benefits to which she was entitled-to in her individual capacity. "The Legislature could not have intended to strip the individual medical professionals of the MMA's protections simply because they chose to operate as a business corporation, professional corporation, limited liability corporation or any other legal form of business organization." 2013-NMSC-043 at ¶ 36. Here, Appellants do not, and cannot, articulate exactly why allowing the assignment in this case would afford Appellee any greater rights than the Act provides, or deprive Appellants of the purposes behind the Act, or protections afforded by the Act.

Moreover, unlike the claims in *Wilschinsky, Christus St. Vincent,* or *Baker*, it is undisputed here that the claim for indemnification being prosecuted falls within the Act. The claim arose from Presbyterian Hospital's payment of Appellants' liability in a settlement stemming from Appellants' negligence. Brief in Chief at pg. 7-8, ¶ 8. Presbyterian Hospital complied with the Act's requirement of submitting the claim to the medical review commission, filed it within the three-

year statute of repose, and is constrained by the cap on damages. Appellees, claimants here, are not seeking any rights above and beyond what are expressly provided-for in the Act and cases interpreting the Act; and, therefore, are not seeking an end-run around the Act's protections. There is thus nothing in the purpose underlying the Act that would compel this Court to remove the defined, express term "patient's" that the Legislature purposefully included in § 41-5-12.

Finally, while Appellants attempt to manufacture a frightening, but wholly speculative and implausible, parade of horribles that might someday arise from allowing the assignment of a claim under the Act, that is simply not *this* case. This is not a case where, as Appellant speculates, a patient, having missed his opportunity to sue his physician, would then, implausibly, purchase the hospital's claim for indemnity. *See* Brief in Chief at 21. There is no evidence in the record, or elsewhere, that there is a market for such claims or that they represent a commodity. This is merely speculation, whipped into a contrived "sky is falling" story by Appellants in an effort to scare this Court into refusing to read a clear, unambiguous statute, as written.

b. <u>The prohibition against the assignment of a patient's claim only is consistent with the common-law prohibition against the assignment of personal injury claims, and not in contravention of the common law.</u>

While the *Christus St. Vincent* case made it abundantly clear that a hospital's claim for indemnification against a qualified healthcare provider is a "malpractice

claim" subject to the Act's three-year statute of repose, nothing in that case transformed the indemnification claim into a personal injury claim. Indeed, in coming to its conclusion, the *Christus St. Vincent* court clearly stated that "we hold that Medical Center's equitable indemnification claim is a malpractice claim **as that term is used in the MMA** and is, therefore, subject to Section 41-5-13." 2011-NMCA-112 at ¶ 15 (emphasis added). As discussed above, the court did so, in part, 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. However, nothing in that case, or any other, went so far as to say that an indemnification claim is a personal injury claim. Rather, the *Christus St. Vincent* court merely began its analysis by noting that the "gravamen" of the claim was predicated upon negligence by the physician.

Thus, while our courts have used the Act's expansive purpose in order to find non-injury claims to fit the definition of a "malpractice claim" under the Act, they have never held—nor could they—that indemnification claims are claims for personal injury. Indeed, when the claimants in *Christus St. Vincent* argued that "the cause of action for indemnification is separate and distinct from the underlying tort," (2011-NMCA-112 at ¶ 18) this Court responded as follows:

> **We do not dispute this point of law.** However, this point does not undermine our confidence in the conclusion that Medical Center's indemnification claim does fall within the ambit of the term "malpractice claim" as that term is used in the MMA.

Id. (Emphasis added). The fact remains that an indemnification claim is not a "personal injury" claim; it is simply that claims for indemnification under the Act meet the Act's definition of a "malpractice claim" such that the remainder of the Act's statutory provisions apply to these claims.

Consistent with that fact, the Legislature—in § 41-5-12 of the Act—codified what is a general rule at common law: that an injured party may not assign their personal injury claim. Recognizing that only a patient has a personal injury claim—and not third parties—the Legislature expressly prohibited the assignment of a "patient's claim" under the Act. § 41-5-12, NMSA 1978 (1976). Rather than contravening the common law, as Appellants argue, this express codification is wholly consistent with the common law's general rule.

The fallacy in Appellants' argument, however, is that a claim for indemnification—even one that meets the statutory definition of a "malpractice claim" under the Act—is a personal injury claim. As the Court in *Christus St. Vincent* acknowledged, indemnification claims are, in fact, distinct from the underlying tort. However, they are subject to the Act's provisions. Nothing in the Act, its purpose, or the *Christus St. Vincent* court's holding transformed a hospital's indemnification claim into a personal injury claim, or, more acutely, to a "patient's claim" under the Act.

III. REMOVAL OF THE PHRASE "PATIENT'S CLAIM" FROM SECTION 41-5-12 OF THE ACT REQUIRES LEGISLATIVE ACTION, NOT JUDICIAL SURGERY.

A fundamental principle of our system of government is that "it is the particular domain of the legislature, as the voice of the people, to make public policy." *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995). Such is true because it is that branch of government that is most "politically responsible to the people." *Id.* The judiciary therefore customarily addresses requests to supplement or rewrite statutory language with great caution so as not to unintentionally alter the policy choices announced by the legislative branch and makes policy "only when the body politic has not spoken." *Id.* Deference is given to whatever the declaration of the Legislature may be with the understanding that any amendments will be achieved via the political process. *See id.*

Unlike prior cases, where courts have been asked to include types of claims in the definitions of "malpractice claim" under the Act, the relief sought by Appellants here would require this Court to engage in inappropriate judicial surgery to excise a key, defined term inserted by the Legislature into section 41-5-12. In prior cases, all cited by Appellants, the courts relied upon the broad purpose behind the Act to supplement the Act where the Legislature was silent.

In this case, the Legislature was not silent. It specifically defined the term "patient," in section 41-5-3(E). It specifically limited the prohibition against the

assignment of claims under the Act to "patient's claims" in section 41-5-12. In cases, like these, where parties unhappy with the wording of a statute seek a court's intervention to change the language of a statute, our courts have been clear: such action requires "legislative therapy, not judicial surgery." *See State ex rel. Rodriguez v. Amer. Legion Post 99*, 1987-NMCA-137, ¶ 12, 750 P.2d 1110 (holding that courts interpret statutes based upon principles of statutory construction and do not re-write legislation). This Court should decline Appellants' invitation to re-write the Act and remove a key, defined term that the Legislature purposefully chose to include.

IV. THE ASSIGNMENT PROVIDED APPELLEE WITH ALL RIGHTS THAT PRESBYTERIAN HAD, INCLUDING THE EXISTING LAWSUIT THAT WAS FIRST PRESENTED TO THE MEDICAL REVIEW COMMISSION AND FILED WITHIN THE STATUTE OF REPOSE; APPELLEE STANDS IN THE SHOES OF PRESBYTERIAN.

Because this argument by Appellants raises both an issue of statutory interpretation—i.e. whether the Act required Appellee to submit the claim to the medical review commission again and re-file the pending third party claim within a particular time period—and an issue of fact as to whether those acts occurred, a mixed standard of review applies. *See Schuster v. N.M. Dept. of Taxation and Revenue*, 2012-NMSC-025, ¶ 23, 283 P.3d 288 (mixed question of law and fact requires that factual questions be reviewed for substantial evidence and application of the law to the facts are reviewed de novo).

Straying from their purely legal argument that indemnification claims by third parties cannot be assigned, Appellants attempt to muddy the waters by suggesting that Appellee did not comply with the statutory provisions of the Act by not presenting Presbyterian's indemnification claim to the medical review commission, and by not filing it within the three-year statute of repose. Presbyterian complied with all of the Act's requirements prior to assigning its claims to Appellee, and Appellee stands in the shoes of Presbyterian.

At the trial court, Appellants admitted that Presbyterian "submitted its claim for indemnification to the medical review commission and obtained a decision, as required by NMSA 1978 § 45-5-15 (1976)" [RP at 2700-2701]. It was also undisputed by Appellants that Presbyterian's claim for indemnification against them was timely filed, within the Act's three-year statute of repose[3]. What Appellants appear to be arguing here, without authority, is that Appellee, upon obtaining the rights to Presbyterian's claim for indemnification and Presbyterian's pending Third-Party lawsuit, was somehow required to re-present the claim to the medical review commission and re-file the claim anew. Appellants cite no case, rule, law, or other authority in support of this unfounded position.

The assignment at issue in this appeal provided Appellee with, in relevant part:

---

[3] The date of the original malpractice was December 4, 2010 [RP at 5-7], and the Third-Party Complaint for Indemnification was filed May 21, 2013 [RP at 205].

> Any and all rights, claims, and causes of action against Richard Gerety, M.D. and New Mexico Heart Institute. The rights, claims, and causes of action assigned herein include, but are not limited to, any and all rights to, and claims for, subrogation, equitable subrogation, indemnification, contribution, or any other rights or claims arising out of Presbyterian Healthcare Services' payment of defense fees, defense costs, and payment of any amounts, including payments made in settlement to the Plaintiffs in the matter known as *Leger, et al. v. Presbyterian Healthcare Services*, Fourth Judicial District Cause No. D-412-CV-2012-328, **including the claims brought by Presbyterian Healthcare Services against Richard Gerety, M.D. and New Mexico Heart Institute in the May 21, 2013 Third Party Complaint for Indemnification filed therein**. ...

[RP at 2275] (emphasis added). In recognition that the assignment placed him in the shoes of Presbyterian—for purposes of prosecuting the existing Third Party claim for indemnification—Appellee, in his Motion to Lift Stay and Amend Third Party Complaint, Appellee specifically sought substitution of himself as the Third-Party Plaintiff. [RP at 2273]. The trial court granted that motion, and so substituted. [RP at 2354]. Thus, the assignment provided for Appellee to obtain all rights Presbyterian had, including obtaining the existing third party lawsuit against Appellants, and the trial court recognized that by granting the motion to amend, and by substituting Appellee as the third-party plaintiff.

In obtaining, via the assignment at issue, all rights that Presbyterian had against Appellants, including obtaining the existing third party lawsuit against Appellants, Appellee stood—and continues to stand—in the shoes of Presbyterian. *See Quality Chiropractic, P.C. v. Farmers Ins. Co.*, 2002-NMCA-080, ¶ 6, 51 P.3d

1172 (describing the effect of an assignment); *Investment Co. v. Reese*, 1994-NMSC-051, ¶ 30, 875 P.2d 1086 ("'It is well established that an assignee stands in the shoes of the assignor…'") (citation omitted). Thus, for purposes of prosecuting the third-party suit, and complying with the procedural strictures of the Act, Appellee stands in the shoes of Presbyterian, and, for all intents and purpose, ***is*** Presbyterian. Appellants have cited no authority mandating otherwise.

Finally, while not determinative here, it deserves mention that when Presbyterian presented its indemnification claim against Appellants to the medical review commission, Appellee, Nicolas Leger, sought to participate in those hearings. Specifically, after agreeing to provide the required medical release, counsel for Leger, Criostoir O'Cleireachain, appeared at the medical review commission hearing on Presbyterian's application. However, counsel for Appellants, Lee Rogers, objected to his participation and he was excluded from the medical review commission proceedings. Thus, it would seem at odds that Appellants successfully sought to exclude even the appearance—much less presentation—by Appellee's counsel at the medical review commission, but now argues that he was required to submit to those proceedings.

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that this Court affirm the trial court's denial of Appellees' Motion to Dismiss, specifically finding that

the claim at issue was assignable under the Act, and that Appellant—standing in the shoes of the assignor—complied with the requirements of the Act, and for such other and further relief as the Court deems just.

REQUEST FOR ORAL ARGUMENT

Because of the complicated legal and factual record, and because this appeal presents questions of first impression regarding the New Mexico Medical Malpractice Act's prohibition against assignments of only a "patient's claim" for malpractice, oral argument would aid in the Court's resolution of these issues and is therefore requested.

Respectfully submitted,

THE VARGAS LAW FIRM, LLC
807 Silver Ave, S.W.
Albuquerque, New Mexico 87102
(505) 242-1670

By: _____ for
Ray M. Vargas, II

CARTER AND VALLE LAW FIRM
8012 Pennsylvania Cir. N.E.
Albuquerque, New Mexico 87110
(505) 888-4357

By: _____
Richard J. Valle
Criostoir O'Cleireachain

I HEREBY CERTIFY that a true
and correct copy of the foregoing
was mailed to:

LORENZ LAW
Alice T. Lorenz
2501 Rio Grande Blvd., NW, Ste. A
Albuquerque, NM 87104

ATWOOD, MALONE, TURNER & SABIN, PA
Lee M. Rogers
Carla Neusch Williams
400 N. Pennsylvania, Ste. 100
Roswell, NM 88201

this 13th day of April, 2017