IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARLINA ROMERO,

Plaintiff-Appellant,

vs.

No. 35,177

LOVELACE HEALTH SYSTEM, INC.,
a New Mexico Corporation,

Defendant-Appellee;

WOMEN'S SPECIALISTS OF NEW MEXICO,
LTD., and KRISTINA CHONGSIRIWATANA, M.D.,

Defendants.

Appeal from the Second Judicial District Court, Bernalillo County, New Mexico

The Honorable Nan Nash, Judge

ANSWER BRIEF

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Introduction

Despite Plaintiff's metaphor (BIC at 10-11), this appeal does not involve a Wonderland-like litigation experience. Instead, the district court properly adhered to the Rules of Civil Procedure when it converted Lovelace Health System, Inc.'s ("Lovelace") motion to dismiss into a motion for summary judgment after material outside the pleadings was introduced in a reply brief and then allowed Plaintiff to respond to the new material and to the conversion not only at the motion hearing but also in a subsequent surreply.

Nor did the district court err in granting summary judgment to Lovelace on limitations grounds. In applying the medical malpractice tolling statute, NMSA 1978, § 41-5-22 (1976), the court correctly recognized that the principles underlying statutes of limitations require that tolling occur only if the plaintiff's application to the Medical Review Commission gives adequate notice that a claim of malpractice is being asserted against a particular provider. There was no such notice with respect to Lovelace in this case.

For these reasons, the district court's judgment should be affirmed.

Supplemental Summary of Facts and Proceedings

According to her Complaint, in June 2011Plaintiff presented at Lovelace Medical Center with abdominal and pelvic pain. She was transferred to Lovelace Women's Hospital where she was seen by Dr. Chongsiriwatana, an employee of

Women's Specialists of New Mexico, Ltd. Plaintiff alleges that she underwent unnecessary surgery and a forced abortion, the consequences of which were damaging to her. The Complaint, filed in October 2014, asserts claims of negligence and vicarious liability against Lovelace, in addition to claims against Women's Specialists and Dr. Chongsiriwatana . (RP 1-11.) The parties agree that Lovelace is not a qualified healthcare provider ("QHP") under the Medical Malpractice Act. (Tr. 4.) See NMSA 1978, § 41-5-5 (1992).

Lovelace moved to dismiss on the ground that Plaintiff's claims against it are barred by the general personal injury statute of limitations, NMSA 1978, § 37-1-8 (1976) (establishing a three-year limitations period for actions for injury to the person). (RP 32-33.) Plaintiff countered that, taking as true her allegation that she had timely submitted an application to the Medical Review Commission ("MRC") "to review the conduct of the Defendants" (RP 7, ¶ 57), the limitations period was tolled pursuant to Section 41-5-22 until 30 days after the MRC issued its decision, and her lawsuit therefore was timely (RP 50-54). In reply, Lovelace asserted that Plaintiff could not take advantage of the tolling provision because Lovelace "was not named in the [a]pplication" to the MRC. (RP 58.) Lovelace attached a copy of the application and an MRC "policies and procedures" document to its reply brief. (RP 62-67.)

At the hearing on Lovelace's motion, Plaintiff argued that she "didn't have a chance to address" Lovelace's argument about the content of the application that "came in as an exhibit to a reply brief." (Tr. 4.) When Plaintiff began to address the language of the application and mentioned the standard for a motion to dismiss, the district court pointed out, to "be clear," that "[t]his isn't a motion to dismiss. This is a motion for summary judgment. You both asked me to look at matters outside the pleading. So the [c]ourt has converted this into a motion for summary judgment." (Tr. 5-6.)

Plaintiff argued that her application to the MRC referred to Lovelace and satisfied "a very basic notice pleading standard." (Tr. 6-8.) "[T]here's enough to raise a reasonable inference that Dr. Chong [sic] was acting within the scope of some employment or agency with Lovelace," and "I think there's a direct theory that's listed in the application" as well. (Tr. 11.) Lovelace contended that the application provided "no notice . . . that any claims are being brought against it. . . . There's nothing in this application suggesting that a claim was being asserted against Lovelace." (Tr. 15.) "[T]he focus in analyzing whether the tolling provision applies or not [is] on notice." (Tr. 26.)

The court commented that it was "inclined to find that the claims against Lovelace are in fact barred." (Tr. 29.) But it continued, "That being said, I think Plaintiff is entitled to the opportunity . . . to present, if it wishes, a surreply and to

direct the [c]ourt . . . to anything additional that it would like to direct the [c]ourt to." (Tr. 29-30.) Plaintiff expressed her understanding that the surreply would address "the new argument coming up in the reply" and "specifically going to . . . the [MRC] rule that's attached [as] Exhibit B and the [application] that's attached as Exhibit A." (Tr. 34.) Plaintiff agreed to the court's direction to submit the surreply within 23 days of the hearing. (Tr. 35.)

In her surreply, Plaintiff acknowledged that the additional pleading served the purpose of allowing her to submit material responsive to the argument newly advanced in Lovelace's reply brief and to the conversion of the motion to dismiss into a motion for summary judgment. (RP 134.) Plaintiff expanded in writing on the more impromptu response to the reply brief argument she had made at the hearing. In addition, Plaintiff argued that a question of fact existed as to whether Lovelace had notice of Plaintiff's claims against it, offering as "evidence that it did receive notice" a copy of a medical records release and transmittal correspondence sent to Lovelace Women's Hospital by the MRC. (RP 142, 144-46.)

Lovelace submitted a response to the surreply. (RP 147.) There Lovelace pointed out that the medical release transmittal letter sent to Women's Hospital, as well as a similar letter sent to Lovelace Medical Center, made reference to "an application to the Medical Legal Panel from the above named patient [Plaintiff]" which "does not involve you." (See RP 144, 148, 151.)

The district court entered an order reflecting the conversion of Lovelace's motion to dismiss into a summary judgment motion and noting that "Plaintiff was granted leave to file a surreply to address the evidence outside of the pleadings that the court considered." (RP 154-55.) The court determined that Lovelace was "technically named in the application," in that the application states that Plaintiff "presented at Lovelace" and was transferred from "Lovelace downtown" to "Lovelace Women's," but that Lovelace was not named in the application within the meaning of the tolling statute, and therefore the limitations period was not tolled as to Plaintiff's claims against Lovelace. (RP155-56.) Specifically, the application contained "no dates and circumstances suggesting malpractice, negligence, alleged acts or respondeat superior on behalf of Lovelace." (RP 156.) Accordingly, the court granted summary judgment and dismissed the claims against Lovelace as time-barred. (RP 156.) Plaintiff has appealed from the grant of summary judgment. (RP 159.)

Argument

I. THE DISTRICT COURT PROPERLY CONVERTED LOVELACE'S MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT. *(Response to Brief in Chief Points I & II.)*

Standard of Review: A trial court's application of a procedural rule is reviewed for abuse of discretion. See, e.g., Trinosky v. Johnstone, 2011-NMCA-045, ¶ 23, 149 N.M. 605. An abuse of discretion occurs "when the district court's

decision is clearly untenable or contrary to logic and reason" or "when it exercises its discretion based on a misunderstanding of the law." Id. (internal quotation marks & citations omitted) (alteration omitted).

Preservation of Issue: Plaintiff did not preserve the procedural issue of whether the district court properly converted Lovelace's motion to dismiss into a motion for summary judgment. Although Plaintiff claims that the court converted the motion "over [Plaintiff's] objection" (BIC at 11), no objection to conversion is cited to in the record. See Crutchfield v. N.M. Dep't of Taxation & Revenue, 2005-NMCA-022, ¶ 14, 137 N.M. 26 ("[O]n appeal, the party must specifically point out where, in the record, the party invoked the court's ruling on the issue."). Plaintiff's objection was that she did not have an adequate opportunity to respond to the argument raised in Lovelace's reply. (See BIC at 11.) The district court allowed Plaintiff the opportunity to file a surreply, which Plaintiff accepted. Supra pp. 3-4. Plaintiff never has argued that the measure taken by the district court was insufficient to allow Plaintiff to present in full her opposition to summary judgment. Cf. Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 13, 125 N.M. 748 (concluding that where party objected to jury instruction, court modified instruction, and party subsequently failed to make clear that modification did not fully resolve party's concerns, claim of error in instruction was not preserved).

The Rules of Civil Procedure provide that if, on a motion to dismiss for failure to state a claim,

> matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 1-056 NMRA, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 1-056 NMRA.

Rule 1-012(B) NMRA; see also Rule 1-012(C) (providing similarly for motions for judgment on the pleadings). In other words, the district court may consider extrinsic material presented in connection with a motion to dismiss, as long as the court ensures that the opposing party is afforded a reasonable opportunity to defend against it. See Ennis v. K-Mart Corp., 2001-NMCA-068, ¶ 21, 131 N.M. 32 ("New Mexico cases require only that the opposing party have an opportunity to respond to the introduction of material outside of the pleadings, and that the requirements of Rule 1-056 are met.").

Here, the district court gave clear notice to Plaintiff that it was converting Lovelace's motion to dismiss into a summary judgment motion and, in response to Plaintiff's objection that she did not have an adequate opportunity to address Lovelace's reply brief argument, the court granted Plaintiff leave to file a surreply. Supra pp. 3-4. Plaintiff has not claimed that the argument she presented at the hearing and her subsequent surreply provided a less than sufficient chance for her to present fully her argument in opposition to summary judgment. The district

court therefore acted consistently with the procedural rules and did not abuse its discretion in considering the extrinsic material addressed by both parties in their arguments and converting Lovelace's motion into a motion for summary judgment. See Peck v. Title USA Ins. Corp., 1988-NMSC-095, ¶ 10, 108 N.M. 30 (upholding grant of summary judgment where motion to dismiss was supported by extrinsic materials and trial court postponed hearing to allow opposing party to present evidence demonstrating existence of disputed material fact; "Since matters outside the pleadings were presented to the trial court and since both parties had adequate notice to present all pertinent material at the hearing, the trial court correctly treated the [motion to dismiss] as a motion for summary judgment.").

Plaintiff argues that for conversion of a motion to dismiss to be proper there must not only be a reasonable opportunity to present opposing material but the motion "also must set out a concise, numbered statement of undisputed material facts . . . in order to give the non-movant a fair opportunity to formulate a response." (BIC at 7-8 (citing Rule 1-056(D) NMRA).) Plaintiff's interpretation of the rules would make the conversion process a nullity; before conversion to a motion for summary judgment could occur, a motion to dismiss would have to be, in substance, a motion for summary judgment. But motions under Rule 1-012(B) need not conform to summary judgment requirements. Instead, "[m]otions shall be prepared and submitted in the matter required by Rule 1-007.1 NMRA." Rule 1-

012(B). See also Santistevan v. Centinel Bank, 1981-NMSC-092, 96 N.M. 730 (concluding that conversion was proper although motion to dismiss was not served within time specified by summary judgment rule).

Furthermore, Plaintiff has not claimed or demonstrated that the absence of a numbered statement of facts deprived her of "a fair opportunity to formulate a response" to Lovelace's motion. In determining whether conversion is proper, New Mexico courts look to "substance rather than form." Ennis, 2001-NMCA-068, ¶ 21 (internal quotation marks & citation omitted). Lovelace's motion papers left no doubt regarding the issue in dispute: the sufficiency of Plaintiff's MRC application to toll the statute of limitations. And the record demonstrates that Plaintiff was well aware of the issue and addressed it both at the motion hearing and in her surreply. Supra p. 4. Plaintiff has not demonstrated that she was prejudiced by the conversion of the motion to dismiss into a motion for summary judgment. Cf. Ennis, 2001-NMCA-068, ¶ 22. "Absent a showing of prejudice, we will not find abuse of discretion." Blake v. Blake, 1985-NMCA-009, ¶ 27, 102 N.M. 354; see also Deaton v. Gutierrez, 2004-NMCA-043, ¶ 30, 135 N.M. 423 ("In the absence of prejudice, there is no reversible error." (internal quotation marks & citation omitted)).

Plaintiff has not demonstrated grounds for reversal in the conversion of Lovelace's motion to dismiss into a motion for summary judgment.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE GROUND THAT PLAINTIFF'S CLAIMS AGAINST LOVELACE ARE BARRED BY THE STATUTE OF LIMITATIONS. *(Response to Brief in Chief Points III & IV.)*

Standard of Review: "We review motions to dismiss as motions for summary judgment when the district court considered matters outside the pleadings in making its ruling. As with motions to dismiss, we review rulings on motions for summary judgment de novo. The difference in the review is that evidentiary information submitted to the district court is considered when determining whether summary judgment was proper. Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Delfino v. Griffo, 2011-NMSC-015, ¶ 10, 150 N.M. 97 (internal quotation marks & citations omitted). When, as in this case, the material facts (the relevant dates and the content of Plaintiff's MRC application) "are undisputed and only a legal interpretation of the facts remains, summary judgment is the appropriate remedy." Romero Excavation & Trucking v. Bradley Constr., 1996-NMSC-010, ¶ 4, 121 N.M. 471 (internal quotation marks & citations omitted). Furthermore, the question whether Section 41-5-22 operates to toll the limitations period in this case presents an issue of statutory construction, "which an appellate court reviews de novo." State Farm Mut. Auto. Ins. Co. v. Valencia, 1995-NMCA-096, ¶ 7, 120 N.M. 662. Plaintiff is incorrect in suggesting that the "no rational trier of fact" standard applicable where evidence is disputed or

subject to varying interpretations applies here. (E.g., BIC at 9, 18.) This appeal presents the purely legal question whether Plaintiff's application to the MRC was sufficient to toll the statute of limitations with respect to Plaintiff's claims against Lovelace. (See BIC at 35.) De novo review applies.

Preservation of Issue: Lovelace does not dispute that Plaintiff's arguments at the motion hearing and in her surreply preserved the merits issue of whether summary judgment is warranted. (BIC at 11.)

Because Lovelace is not a QHP under the Medical Malpractice Act, supra p. 2, the applicable statute of limitations in this instance is Section 37-1-8 (general personal injury), under which Plaintiff was required to bring her claims against Lovelace within three years of the time the claims accrued – i.e., when she "kn[ew] or with reasonable diligence should have known of the injury and its cause." See Roberts v. Sw. Cmty. Health Servs., 1992-NMSC-042, ¶ 27, 114 N.M. 248. Plaintiff alleges that in June of 2011 she received negligent medical treatment which caused her to undergo unnecessary surgery and a forced abortion, supra pp. 1-2, as a result of which she suffered "severe depression, which adversely affected her relationships and employment" (RP 7). Plaintiff never has challenged the assumption underlying Lovelace's motion – that Plaintiff's claims accrued in June 2011. Cf. Roberts, 1992-NMSC-042, ¶ 26 ("In most situations, the plaintiff in a tort action knows immediately of both the wrongful act and of the injury and

. . . the cause of action accrues at the time of the negligent act."). She has relied exclusively on tolling under Section 41-5-22 to save her claims against Lovelace set forth in her October 2014 Complaint from the limitations bar. (E.g., BIC at 2.) If tolling does not apply, Plaintiff's claims are precluded.

Two established propositions frame the issue presented by this case. First, the malpractice tolling provision, Section 41-5-22, applies both to qualified and to non-qualified health care providers. Grantland v. Lea Regional Hosp., 1990-NMSC-076, ¶ 9, 110 N.M. 378. Second, Section 41-5-22 does not toll the limitations period for a provider that is "unnamed" in the plaintiff's application for review to the MRC. Meza v. Topalovsky, 2012-NMCA-002, ¶ 12, 268 P.3d 1284. In Meza, the provider in question was not named in the application before a post-limitations amendment which this Court deemed ineffective. Id. ¶ 1. That is to say, the application "did not allege a malpractice claim against" the provider until the application was amended after the limitations period had run. Id. ¶ 3. Since Plaintiff's timely application to the MRC in this case, unlike in Meza, makes some reference to Lovelace hospitals (see RP 62-65), the question at hand is whether the application's references are sufficient to trigger the operation of Section 41-5-22. The trial court correctly held that they are not.

Consideration of the concerns underlying statutes of limitations, viewed in light of the special procedures for litigation under the Medical Malpractice Act,

informs the determination of how the Act's tolling provision should operate in a case like this one. To begin, the tolling provision must be applied with the understanding that "the running of the statute of limitations creates a substantive right for a provider to be free of liability after a specified period of time." Meza, 2012-NMCA-002, ¶ 10. That time period reflects the balance struck by the legislature between a claimant's need for a reasonable period within which to commence litigation and a defendant's interest in being informed of the claim before a lapse of time prejudices its ability to defend. See Garcia v. Lafarge, 1995-NMSC-019, ¶ 14, 119 N.M. 532. "[T]he purpose of a statute of limitations is to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." Butler v. Deutsche Morgen Grenfell, Inc., 2006-NMCA-084, ¶ 23, 140 N.M. 111 (internal quotation marks & citation omitted). Statutes of limitations promote "basic fairness to the defendant" by "encouraging promptness in instituting a claim, suppressing stale or fraudulent claims, . . . avoiding inconvenience" and "encourag[ing] plaintiffs to bring their actions while the evidence is still available and fresh." Roberts, 1992-NMSC-042, ¶ 25.

The Medical Malpractice Act adds an extra procedural step to litigating a medical malpractice claim against a QHP: before a suit can be filed, the plaintiff must first apply to the MRC for review. See NMSA 1978, 41-5-15 (1976). Section 41-5-22 accommodates plaintiffs who might otherwise be prejudiced by

this requirement. As long as the plaintiff makes application to the MRC within the limitations period, the plaintiff is protected against the running of the statute of limitations while the application is under review. Under the tolling provision,

> [t]he running of the applicable limitation period in a malpractice claim shall be tolled upon submission of the case for the consideration of the [reviewing] panel and shall not commence to run again until thirty days after the panel's final decision is entered in the permanent files of the [MRC] and a copy is served upon the claimant and his attorney by certified mail.

NMSA 1978, § 41-5-22.

But related provisions of the Malpractice Act concerning submission of a claim to the MRC equally recognize the defendant's interest, protected by the statute of limitations, supra p. 13, in receiving timely notice of a claim after it is initiated so that the defendant is not prejudiced in its ability to defend. See State v. Martinez, 1998-NMSC-023, ¶ 9, 126 N.M. 39 ("[W]e will interpret statutes as a whole . . . in order to determine legislative intent."). First, the application to the MRC must contain "a brief statement of the facts of the case, naming the persons involved, the dates and the circumstances, so far as they are known, of the alleged act or acts of malpractice." NMSA 1978, § 41-5-15(B)(1). And second, "[u]pon receipt of an application for review, the commission's director or his delegate shall cause to be served a true copy of the application on the health care providers involved." Id. § 41-5-16(A) (1976).

This statutory scheme explains why the content of a plaintiff's MRC application is significant to tolling under Section 41-5-22. If the application does not "nam[e]" the defendant and provide "the dates and the circumstances . . . of the alleged . . . malpractice" as Section 41-5-15(B)(1) requires, the application is incapable of providing notice to the defendant that it is the subject of a malpractice claim. Indeed, the application may be so deficient in identifying a provider as the subject of a claim that the MRC itself lacks notice that it should serve a copy of the application on the provider pursuant to Section 41-5-16(A). That is just what occurred here; while the MRC sent copies of Plaintiff's medical records release to two Lovelace hospitals as a result of Plaintiff's application, it also informed the hospitals in its transmittal correspondence that the application "does not involve you." Supra p. 4.

To be sure, an MRC application is not a complaint; it need not contain "each of plaintiff's counts, nor each of his [or her] allegations." Trujillo v. Puro, 1984-NMCA-050, ¶ 8, 101 N.M. 408. But it must at least "allege a malpractice claim against" the intended defendant in some discernable way. Meza, 2012-NMCA-002, ¶ 3. See supra p. 12. Otherwise, it cannot fulfill its function of giving notice to the defendant and therefore does not suffice to toll the limitations period.

In the case of a non-QHP like Lovelace, a plaintiff is not required to submit a malpractice claim for review by the MRC prior to suit. See NMSA 1978, § 41-5-

15(A). Plaintiff therefore had the option of filing a lawsuit against Lovelace within the limitations period to preserve her claims while pursuing MRC proceedings with respect to any QHP defendants. The more efficient and equally safe procedure would have been for Plaintiff to include all her claims against all intended defendants in her application to the MRC; that way, all of Plaintiff's claims would proceed as a package and would receive the benefit of Section 41-5-22. And filing a timely and complete application to the MRC to toll limitations as to all intended defendants fully resolves the concerns about split or premature lawsuits mentioned in Grantland and raised in Plaintiff's arguments. (BIC at 29-30.) But either way, Plaintiff would have to at least minimally articulate a malpractice claim against Lovelace within the limitations period, either in a complaint or in her MRC application.

Here, Plaintiff did neither. She did not file suit against Lovelace until several months after the limitations period expired. And although her application to the MRC was timely, as the district court observed it lacks any factual assertions "suggesting malpractice, negligence, alleged acts or respondeat superior on behalf of Lovelace." (RP 156.)

The application begins by describing Plaintiff's consultation with her midwife at Women's Specialists in the fall of 2010 in connection with Plaintiff's desire to become pregnant. Plaintiff began taking a fertility drug. (RP 62.) In

June 2011 Plaintiff had a positive home fertility test which was confirmed by Women's Specialists. Later in June Plaintiff experienced abdominal and pelvic pain and spotting. She "presented at Lovelace Medical Center" where she "was examined." Her hormone levels were consistent with pregnancy. Radiology also indicated signs of pregnancy and also an ovarian cystic structure. (RP 62-63.)

The physicians whom Plaintiff had seen at Lovelace Medical Center "authorized [her] transfer to Lovelace Women's Hospital." (RP 63.) There, Plaintiff was seen by Dr. Chongsiriwatana. The application alleges that Dr. Chongsiriwatana pressured Plaintiff into undergoing a diagnostic laparoscopy for a presumed ectopic pregnancy. Post-surgery, Dr. Chongsiriwatana diagnosed an ovarian cyst and administered methotrexate to Plaintiff to "take care of" any pregnancy "despite having discovered no visible evidence of an ectopic pregnancy" and without discussing the drug with Plaintiff or obtaining her consent. (RP 63.) Several days later, Dr. Chongsiriwatana allegedly told Plaintiff that "[w]e messed up" and that Plaintiff had a normal pregnancy which had to be aborted because of the potentially injurious effects of methotrexate on the fetus. Plaintiff then underwent a "forced medical abortion," after which she "fell into a deep depression which adversely affected her relationships and employment." (RP 63.)

The application next lists the names, addresses, and telephone numbers of "all providers whose care may be germane to the issues." Neither Lovelace nor either of the Lovelace hospitals is listed in this part of the application. (RP 64-65.)

The application conveys the clear impression that Plaintiff's claim of malpractice is focused on Dr. Chongsiriwatana and her employer, Women's Specialists. According to the application, it was Dr. Chongsiriwatana who misdiagnosed Plaintiff's condition and improperly administered a drug that had devastating consequences for Plaintiff's desired pregnancy. It was Dr. Chongsiri-watana who allegedly confessed to Plaintiff that she had "messed up." In contrast, Lovelace's hospital facilities are referenced only as the locations where Plaintiff was seen or treated by other providers. Indeed, the application indicates that Plaintiff did not consider either Lovelace Medical Center, Lovelace Women's Hospital, or Lovelace itself as a provider "whose care may be germane" to her issues. There is not a single fact or circumstance stated in the application indicating that Lovelace had any culpable involvement in any alleged malpractice. Not surprisingly, the MRC informed both Lovelace hospitals that the malpractice alleged in Plaintiff's application "does not involve you." Supra p. 4.

Plaintiff argues that her application is sufficient because a reader could "infer" that Plaintiff is alleging negligence or respondeat superior liability on Lovelace's part. (BIC at 20-21.) But the substance of the application is simply too

thin to support such claims. It is not inference but divination that would be required here.

Plaintiff invokes the pleading standard of Zamora v. St. Vincent Hospital, 2014-NMSC-035, 335 P.3d 1243, and the apparent agency theory recognized in Houghland v. Grant, 1995-NMCA-005, 119 N.M. 422, as supporting an inferential malpractice claim. (BIC at 14, 20.) Neither case assists her.

In Zamora the patient's radiology report was not transmitted to the patient's physician, forestalling treatment for cancer. The plaintiff alleged negligence in "the apparent failure by [the hospital] through an administrative inadequacy to forward the radiology report." Id. ¶ 4 (internal quotation marks & citation omitted). But the radiologist there was a contractor of the hospital. The allegation thus adequately apprised the hospital of a respondeat superior claim – that "someone in [the hospital's] sphere of responsibility failed to communicate vital medical information." Id. ¶ 15. The application also sufficiently implicated "any other employees or agents who took part in the mishandling of [the patient's] cancer diagnosis." Id. ¶ 20. Here, in contrast, Dr. Chongsiriwatana was not a Lovelace contractor. She was a private physician employed by the physician group that Plaintiff was seeing as a patient. (RP 2, ¶¶ 6, 8.) And the application contains nothing comparable to the Zamora allegation of "administrative inadequacy" that would suggest fault on the part of a Lovelace employee or agent.

Houghland involved a claim of malpractice by an emergency room physician employed by a group that provided emergency room staffing to a hospital. This Court held that the hospital would be liable if the physician were found to be an apparent agent of the hospital based on the hospital's provision of emergency services to the public and the patient's reasonable reliance on the hospital's representations. 1995-NMCA-005, ¶¶ 13-23. The Court in Houghland was careful to distinguish cases involving "injuries caused by a doctor with staff privileges using the hospital for an operation undertaken as part of his [or her] separate medical practice." Id. ¶ 24. Plaintiff's application does not suggest negligence in connection with any emergency services Plaintiff may have received by a hospital-selected provider. See id. As just noted, the application focuses on the performance of a private physician, outside the emergency room, who was a member of the medical practice that Plaintiff already was consulting for care.

Because Plaintiff neither filed a lawsuit against Lovelace nor submitted an application naming Lovelace within the limitations period, Lovelace did not receive the timely notice of Plaintiff's claim to which it was entitled. The fact that Plaintiff included a medical records release for both Lovelace hospitals as part of her application does not cure the deficiencies in the application, even given the fact that the MRC forwarded the releases to the hospitals. (BIC at 16, 24.) Asking all providers who furnished health care services to a plaintiff for records that may be

germane to a medical malpractice claim does not in any sense indicate that each provider receiving such a request is a subject of the claim. As has been noted, the MRC drew the opposite conclusion: it forwarded Plaintiff's medical release forms to both Lovelace facilities with the statement that Plaintiff's application "d[id] not concern" either facility. See supra p. 4.

Plaintiff offers no acceptable excuse for failing to submit an adequate application to the MRC if she sought to toll the limitations period with respect to her Lovelace claims. The Malpractice Act requires an application to the MRC to "name[ ] the persons involved." NMSA 1978, § 41-5-15(B)(1). The MRC's policies and procedures document provides that the application must state "the persons involved" and further instructs applicants to provide names, addresses, and telephone numbers for "all providers whose care may be germane to the issues and not merely the providers subject to the inquiry" (RP 66) – making clear that, at a minimum, the application must identify the providers who are the subject of the inquiry. And "providers," under the Act, plainly includes corporations such as Lovelace that operate hospitals. See NMSA 1978, § 41-5-3(A) (1977). See also David Gallagher, How to File a Medical Malpractice Claim 2 (State Bar of N.M. July 7, 1983), http://www.nmms.org/sites/default/files/images/1983_7_7_gallagher._nmmrc_history_nm_bar_review.pdf ("No more than a letter is required but make it complete, with facts.").

Plaintiff is correct in one respect: "An applicant needs to know what conditions must be satisfied for tolling the statute of limitations at the time the application is submitted." (BIC at 26.) But that is no mystery, and the proper result in this case would not be "novel." (BIC at 27.) The Malpractice Act, related case law, and the MRC's procedures make clear that an application to the MRC must minimally articulate a malpractice claim against a provider in order to provide sufficient notice of the claim to the provider and toll the statute of limitations with respect to the claim. Mere "submittal of the application itself" would, of course, provide a "bright-line rule" for determining when the medical malpractice tolling statute applies, as Plaintiff suggests (BIC at 26), but adopting such a rule would unduly benefit claimants while depriving potential defendants of the notice that is essential if they are to have a fair opportunity, as recognized and protected by the statute of limitations, to mount a defense to the claims.

Plaintiff's claims against Lovelace accrued in June 2011 and are subject to the general, three-year limitations period for claims of personal injury. Because Plaintiff's application to the MRC was insufficient to toll the limitations period with respect to those claims under Section 41-5-22, Plaintiff's October 2014 lawsuit was untimely with respect to Lovelace. The district court correctly granted summary judgment to Lovelace on limitations grounds.

Conclusion

The district court committed neither procedural nor substantive error in granting summary judgment in favor of Lovelace. Therefore, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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