IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARLINA ROMERO,

Plaintiff-Appellant,

vs.

Ct. App. No. 35,177
Bernalillo County
D-202-CV-2014-06557

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

Defendant-Appellee,

WOMEN'S SPECIALISTS OF NEW MEXICO, LTD., a New Mexico Corporation, and **KRISTINA CHONGSIRIWATANA, M.D.**,

Defendants.

Appeal taken from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Nan Nash, District Judge, Presiding

PLAINTIFF-APPELLANT'S BRIEF-IN-CHIEF

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ORAL ARGUMENT IS REQUESTED.

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STATEMENT REGARDING TRANSCRIPT

The proceedings were transcribed stenographically by a court reporter.

STATEMENT OF COMPLIANCE

The body of this brief-in-chief does not exceed thirty-five (35) pages in 14-point Times New Roman typeface, and therefore a statement concerning the type-volume under Rule 12-213(F)(3) is not required under Rule 12-213(G). The body of the brief is 8,500 words in length as measured using the word count feature of WordPerfect X7.

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SUMMARY OF PROCEEDINGS

I. Nature of the Case and Relevant Facts

This appeal asks the Court to decide how the provisions in the Medical Malpractice Act (MMA) for tolling the statute of limitations in a medical negligence case are supposed to work when a patient brings claims against both an individual qualified health care provider and an employer, principal, or business organization that is not a qualified health care provider. On October 17, 2014, Plaintiff Marlina Romero filed a civil action in the Second Judicial District Court against three Defendants: Lovelace Health System, Inc. (LHS), Women's Specialists of New Mexico, Ltd. (Women's Specialists), and Dr. Kristina Chongsiriwatana, M.D. The Complaint alleges that Ms. Romero was a patient of all three Defendants, and that LHS and Women's Specialists employed, controlled, and had a principal-agent relationship with Dr. Chongsiriwatana. **[RP 0001-2, 0010-11.]**

Ms. Romero's Complaint further alleges that Defendants were negligent in diagnosing, treating, operating, and caring for her, culminating in the loss of her pregnancy through a forced medical abortion on June 23, 2011. Count I of the Complaint asserts a claim for medical negligence against all Defendants. Count II asserts a claim for medical negligence/lack of informed consent against Dr. Chongsiriwatana. Count III asserts a claim for *respondeat superior* liability against

LHS and Women's Specialists. **[RP 0002-11.]**

The dates of the alleged negligence (culminating on June 23, 2011) are more than three years before the date the civil action was filed (October 17, 2014); however, the reason for the delay in filing the civil action in district court was the pendency of Ms. Romero's application with the New Mexico Medical Review Commission (Commission) pursuant to the MMA's tolling provisions. Paragraph 57 of the Complaint states that Ms. Romero filed an application with the Commission on or about May 14, 2014, asking the Commission to review the conduct of the Defendants. Paragraphs 58 and 59 of the Complaint state that a panel of the Commission met on September 22, 2014, in connection with Ms. Romero's application, and issued results of the panel hearing the following day. **[RP 0007.]** The date of Ms. Romero's application is less than three years after the events giving rise to her claims. So if the MMA's tolling provisions apply, the statute of limitations does not provide a basis for dismissing the claims against LHS.

II. Course of Proceedings and Disposition Below.

Dr. Chongsiriwatana and Women's Specialists filed their Answer to Ms. Romero's Complaint on November 26, 2014, and did not pursue any dispositive motions at that time. **[RP 0017.]** LHS filed its Answer on December 12, 2014 **[RP 0037]** and concurrently filed a document entitled "Motion to Dismiss" **[RP 0032]**.

LHS's two-page motion did not cite any rule of civil procedure. Instead, LHS merely argued that the three-year statute of limitations in NMSA 1978, § 37-1-8, barred Ms. Romero's claims against it. **[RP 0032-33.]** LHS's motion did not raise or address the MMA's tolling provisions, which state that: "The running of the applicable limitation period in a malpractice claim shall be tolled upon submission of the case for the consideration of the panel and shall not commence to run again until thirty days after the panel's final decision." NMSA 1978, § 41-5-22.

Based on the title of LHS's motion and its failure to cite or attach any extrinsic evidence, Ms. Romero responded to it as a motion for judgment on the pleadings under Rule 1-012(C) NMRA. **[RP 0049-50.]** Ms. Romero's pleading easily survives LHS's motion under this standard, because she raised the tolling provisions in Section 41-5-22 of the MMA in response to the motion **[RP 0051-54]**, and Paragraph 57 of the Complaint states that she invoked those tolling provisions by filing an application with the Commission on or about May 14, 2014, asking it to review the conduct of "the Defendants." **[RP 0007.]**

In reply to Ms. Romero's response to the motion, however, LHS declined to assume the truth of those allegations in her Complaint and raised a new argument contending that her application to the Commission did not toll the statute of limitations as to LHS because it did not include allegations against LHS. **[RP 0058**

& n.1.] To support this new argument, LHS attached new exhibits to its reply brief, *i.e.*, a copy of Ms. Romero's application to the Commission **[RP 0062-65]**, and an excerpt from the Commission's policies and procedures **[RP 0066-67]**.

At the motion hearing on September 2, 2015, Ms. Romero's counsel argued that it was too late to convert LHS's motion to dismiss into a motion for summary judgment, because such a belated conversion did not afford Ms. Romero a fair opportunity to respond to the new evidence and argument raised for the first time in LHS's reply brief. **[09-02-15 Tr. 4:17-5:25; 18:1-18:21, 33:21-34:7.]** The district court responded by permitting Ms. Romero's counsel to file a surreply **[09-02-15 Tr. 29:15-30:15, 31:3-34:12]** on September 21, 2015 **[RP 0133]**.

In both the surreply and at the hearing, Ms. Romero's counsel pointed out that the application to the Commission does, in several instances, identify LHS as one of the providers that injured Ms. Romero. **[RP 0135-39, 09-02-15 Tr. 4:11-5:16, 6:11-7:4, 8:10-13:8, 20:22-21:13.]** Ms. Romero's counsel also argued that interpreting the application as tolling the statute of limitations for Dr. Chongsiriwatana, but not for LHS, would be contrary to the purposes of the MMA and inconsistent with the principles articulated in New Mexico precedents. **[RP 0139-42; 09-02-15 Tr. 13:9-14:20; 19:3-20:2, 22:6-22:21; 23:2-25:3.]**

In an order filed October 6, 2015, the district court stated that it was converting

LHS's motion to dismiss into a motion for summary judgment and dismissing all of Ms. Romero's claims against LHS based on a statute of limitations defense without a further hearing. **[RP 0154-56.]** The district court's order acknowledged that LHS "is technically named in the application" to the Commission, but nevertheless concluded that LHS "was not named in the application" for purposes of tolling the statute of limitations. **[RP 0156.]** The district court did not cite any authority on which to base a distinction between "technically" naming a provider in an application and naming that provider for the purpose of invoking the MMA's tolling provisions. The district court did not explain what a patient is supposed to do to preserve a claim against a provider who is only "technically" named in an application while the application is pending against another provider who is properly named therein.

The district court's order serves as the final judgment as to LHS pursuant to Rule 1-054(B)(2) NMRA, because it adjudicates all issues as to LHS and does not expressly provide otherwise.[1] **[RP 0154-56.]** Ms. Romero's Notice of Appeal and Docketing Statement were timely filed under Rules 12-201(A)(2) and 12-208(B)

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[1]As of the filing date of this brief-in-chief, a proposed rule is circulating that would change Rule 1-054(B)(2) so that a judgment against fewer than all parties is not considered final absent an express determination by the district court that there is no just reason for delay. *See* Proposal No. 2016-53 (comment deadline Apr. 6, 2016). This appeal commenced before that or any other recent proposed change to the appellate rules went into effect.

NMRA. **[RP 0159, 0164.]** The appeal was assigned to the general calendar on January 28, 2016, and the transcript was filed on April 14, 2016. Ms. Romero's claims against Women's Specialists and Dr. Chongsiriwatana remain pending in the district court as of the date of this brief-in-chief. **[RP 0110-13, 0157.]**

ARGUMENT

The substantive question of law to be decided in this appeal is whether or to what extent the MMA requires a patient's application to the Commission regarding an individual doctor, who is a "qualified health care provider," to also include certain information about an employer, principal, or business organization that is not a "qualified health care provider," in order to toll the statute of limitations as to the employer, principal, or business organization. If patients must include such information, then there is also a question as to whether Ms. Romero's application met that requirement for purposes of triggering the MMA's tolling provisions as to LHS. Answering that question in turn requires resolution of a procedural issue: was LHS's motion to dismiss raising the statute of limitations as an affirmative defense appropriately converted to a motion for summary judgment based on evidence that LHS presented for the first time in its reply brief? This brief-in-chief will answer the last question first because it impacts the standard of review and the manner in which the issues were preserved.

I. The district court erred by converting LHS's reply brief on its motion to dismiss to a motion for summary judgment and applying the wrong standard of review.

The standard of review in this appeal depends on whether LHS's "motion to dismiss" is to be treated as a motion for judgment on the pleadings under Rule 1-012(C) or was properly converted to a motion for summary judgment under Rule 1-056. A Rule 1-012(C) motion is reviewed *de novo* under the same notice pleading standard applicable to motions to dismiss under Rule 1-012(B)(6). *Village of Angel Fire v. Bd. of County Comm'rs of Colfax County*, 2010-NMCA-038, ¶ 5, 148 N.M. 804, 242 P.3d 371. A pleading is not required to surmount "procedural booby traps" or engage in "technical niceties" to survive review under Rule 1-012(B)(6), *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 14, 335 P.3d 1243, nor is a plaintiff required to plead around affirmative defenses such as the statute of limitations in order to survive such a motion, *Richards v. Mitcheff*, 696 F.3d 635, 637-38 (7th Cir. 2012).

A court cannot convert a motion for judgment on the pleadings to a motion for summary judgment unless and until the non-movant has been given reasonable opportunity to present all material made pertinent to such a motion by Rule 1-056. *See* Rule 1-012(C); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 281 (4th Cir. 2013) (en banc). To invoke the Rule 1-056 standard, a motion also must set out a concise, numbered statement

of undisputed material facts with supporting references to the evidence of record in order to give the non-movant a fair opportunity to formulate a response. *See* Rule 1-056(D); *Richardson v. Glass*, 1992-NMSC-046, ¶ 3, 114 N.M. 119, 835 P.2d 835.

Only when those conditions are satisfied should the court apply the standard of review for summary judgment under Rule 1-056 and consider evidence outside the pleadings. *Ennis v. Kmart Corp.*, 2001-NMCA-068, ¶ 14, 131 N.M. 32, 33 P.3d 32. A district court's ruling on a motion for summary judgment is reviewed *de novo* on appeal, viewing the evidence in the light most favorable to the non-movant and drawing all reasonable inferences in support of a trial on the merits. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280.

The standard of review is also affected by which party bears the burden of proof as to the claim or defense on which summary judgment is sought. *See Farmington Police Officers Ass'n CWA Local 7911 v. City of Farmington*, 2006-NMCA-077, ¶ 15, 139 N.M. 750, 137 P.3d 1204. "When the movant is also the party bearing the burden of persuasion on the claim or defense for which he or she is seeking summary judgment, the movant must show that the record as a whole satisfies each essential element of that claim or defense in such a way that no rational trier of fact could find for the non-moving party." *Summit Elec. Supply Co. v. IBM Corp.*, No. 1:07-cv-0431 MCA/DJS, 2009 WL 9087259, at *5 (D.N.M. Sept. 30, 2009)

(unpublished disposition collecting cases from other jurisdictions). Thus, "[a] party who will bear the burden of persuasion on a claim or affirmative defense at trial must satisfy a stringent burden to justify summary judgment." *City of Farmington*, 2006-NMCA-077, ¶ 15; *accord Pelt v. Utah*, 539 F.3d 1271, 1280 (10th Cir. 2008).

In this case, LHS's motion is atypical not only because the evidence on which the district court relied to convert it to a motion for summary judgment appeared for the first time in LHS's reply brief. LHS's motion is also atypical because it is based on the statute of limitations--an affirmative defense on which LHS bears the burden of proof at trial. *See Yurcic v. City of Gallup*, 2013-NMCA-039, ¶ 29, 298 P.3d 500. It follows that LHS bears the burden of proving each essential element of its statute of limitations defense in such a way that no rational trier of fact could find for the non-moving party. *See id.*; *Summit Elec. Supply Co.*, *supra*, 2009 WL 9087259, at *5. For the reasons set forth below, LHS has not met this burden.

II. The district court's *sua sponte* conversion of LHS's reply brief on its motion to dismiss to a motion for summary judgment limited Ms. Romero's ability to make a record and preserve the issues for review.

The statute of limitations defense at issue in this appeal was first raised in LHS's "motion to dismiss" on December 12, 2014 **[RP 0032]**. To the extent LHS's motion is treated as a motion for judgment on the pleadings under Rule 1-012(C), Ms. Romero preserved the issues raised in this appeal by specifically citing the MMA's

tolling provisions and Paragraph 57 of the Complaint in her response filed January 12, 2015 **[RP 0051]**, and by reiterating those provisions at the hearing **[09-02-15 Tr. 4:17-5:25]**. *See Village of Angel Fire*, 2010-NMCA-038, ¶ 17.

LHS's motion did not qualify as a motion for summary judgment under Rule 1-056, because it did not provide a numbered statement of undisputed material facts, nor did it attach any evidence outside the pleadings to support such a statement **[RP 0032-33]**. LHS's reply brief in support of its motion also did not provide a numbered statement of undisputed facts and did not even mention converting the motion to dismiss to a motion for summary judgment. **[RP 0058-60]**. Thus, Ms. Romero did not have a fair opportunity to respond or preserve error with respect to summary judgment before the motion hearing on September 2, 2015. *See* Rules 1-046, 12-216 NMRA; *Madrid v. Roybal*, 1991-NMCA-068, ¶¶ 7-10, 112 N.M. 354, 815 P.2d 650.

The first mention of converting LHS's motion to dismiss into a motion for summary judgment occurred at the hearing itself, where the district court made its *sua sponte* ruling that LHS's "motion to dismiss" **[RP 0032]** "isn't a motion to dismiss" **[09-02-15 Tr. 6:1-6:2]**. At that point, the case popped down a large rabbit hole into a wonderland where motions to dismiss magically bloom into motions for summary judgment based on evidence submitted for the first time in a reply brief, and applications to the Commission which "technically" name Lovelace several times do

not count as naming that corporation for purposes of tolling the statute of limitations under Section 41-5-22 of the MMA.[2]

Under these circumstances, Ms. Romero's counsel made a reasonable effort to preserve the issues through argument at the hearing and by filing a surreply. *See* Rules 1-046, 12-216; *Madrid*, 1991-NMCA-068, ¶¶ 7-10; *State ex rel. CYFD v. Kathleen D.C.*, 2007-NMSC-018, ¶ 10, 141 N.M. 535, 157 P.3d 714; *Garcia ex rel. Garcia v. La Farge*, 1995-NMSC-019, ¶¶ 28-32, 119 N.M. 532, 893 P.2d 428. Ms. Romero's counsel specifically objected to the district court's consideration of evidence raised for the first time in LHS's reply brief. **[09-02-15 Tr. 18:4-18:21, 33:21-34:7.]** After the Court converted LHS's motion to dismiss into a motion for summary judgment over Ms. Romero's objection **[09-02-15 Tr. 6:1-6:6]**, her counsel also presented specific arguments and authorities at the hearing as to why the evidence included for the first time in LHS's reply brief did not support summary judgment in LHS's favor. **[09-02-15 Tr. 4:11-5:16, 6:11-7:4, 8:10-14:20, 19:3-20:2, 20:22-21:13, 22:6-22:21, 23:2-25:3.]** Although the district court was already inclined to grant summary judgment to LHS at the hearing **[09-02-15 Tr. 29:22-29:24]**, the district court granted leave for Ms. Romero's counsel to file a surreply

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[2]The rabbit hole metaphor is taken from the first chapter of Lewis Carroll's *The Annotated Alice: Alice's Adventures in Wonderland and Through the Looking Glass* 12 (Martin Gardner ed., W.W. Norton & Co. 2000) (1865).

after the hearing in order to make a record of her objections and further advance the goal of preserving them for this appeal **[09-02-15 Tr. 29:25-30:15]**. Ms. Romero filed the surreply permitted by the district court **[RP 133-46]** but had no further opportunity to preserve the issues. The district court declined to hold another hearing and issued its written order **[RP 161-63]** after LHS filed a response to Plaintiff's surreply without seeking leave of court **[RP 0147-49.]**

III. The district court erred by finding that Ms. Romero's application to the Commission did not name LHS for purposes of tolling the statute of limitations under the MMA.

LHS's contention that Ms. Romero was required to do something more in order to overcome a statute-of-limitations defense begs the question: Exactly what more was she supposed to do? At the motion hearing, LHS's counsel proposed two alternatives. The first involves Ms. Romero's application to the Commission or the Commission proceedings initiated by that application. The second involves filing a protective lawsuit against LHS while the Commission proceedings against Dr. Chongsiriwatana were still pending. **[Tr. 09-02-15, at 27:6-27:24.]** This section of Ms. Romero's brief-in-chief will address the proceedings before the Commission; the next section will discuss the prospect of filing an earlier lawsuit against LHS.

LHS has conceded that the statute of limitations would be tolled by the MMA if Ms. Romero's application to the Commission included allegations which provided

notice of a claim against LHS. In particular, LHS conceded that the tolling provision in Section 41-5-22 of the MMA would apply to an application that properly names LHS even though LHS does not qualify for benefits as a "health care provider" under NMSA 1978, § 41-5-5. **[RP 0058-59; 09-02-15 Tr. 26:6-26:18, 27:6-27:12.]**

Our Supreme Court has specifically held that the tolling provisions still applied when a patient mistakenly filed an application against a provider whom the Commission later determined was not qualified under the MMA. *See Grantland v. Lea Regional Hosp.*, 1990-NMSC-076, ¶ 9, 110 N.M. 378, 796 P.2d 599. *Grantland* does not say, however, that certain "magic words" about a non-qualified provider such as LHS are necessary in Plaintiff's application to the Commission in order to toll the statute of limitations. On the contrary, *Grantland* cautions against "placing form over substance" when an applicant makes a "good faith attempt to comply with the Medical Malpractice Act." *Id.* ¶ 6.

Section 41-5-15(B) of the MMA states that an application to the Commission shall 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," and "a statement authorizing the panel to obtain access to all medical and hospital records and information pertaining to the matter giving rise to the application." NMSA 1978, § 41-5-15. "Under this Section it is not necessary that

each of plaintiff's counts, nor each of his allegations, be presented to the commission." *Trujillo v. Puro*, 1984-NMCA-050, ¶ 8, 101 N.M. 408, 683 P.2d 963. Thus, Section 41-5-15 is akin to the liberal pleading standard set forth in Rule 1-008(A)(2) NMRA. Under that type of standard, Ms. Romero is not required to set out vicarious liability or *respondeat superior* as a separate count or legal theory in her application. *See Zamora*, 2014-NMSC-035, ¶ 14.

The Commission's policies and procedures, which LHS attached as an exhibit to its reply brief, state that:

> There is no special form for the Application except that it must:
> (1) be brief;
> (2) state the persons involved (*i.e.*, names, addresses, and phone numbers of all providers whose care may be germane to the issues and not merely the providers subject to the inquiry);
> (3) state the date/s of the alleged acts;
> (4) state the circumstances of the alleged acts;
> (5) include a sufficient medical release, as a separate document, signed by the patient or patient's representative.

[RP 0066.] The Commission also reiterates the statutory requirement that the Application be submitted by an attorney. **[*Id.*]** (citing NMSA 1978, § 41-5-14(D)).

Ms. Romero's application to the Commission fulfills these requirements. The second sentence on Page 1 of the application states: "As is supported by the below facts, Ms. Romero seeks a finding that there is a reasonable medical probability that she was injured by her providers." **[RP 0062.]** Immediately after that sentence is a

section heading entitled "Statement of Facts, Including Dates and Circumstances." Lovelace and its facilities are named or referenced as a provider no less than five times in that section of the Application: at the bottom of Page 1; three times in the second paragraph on Page 2; and once at the beginning of the third paragraph on Page 2. The context for the latter reference indicates that "Women's" meant, "Lovelace Women's Hospital," where Ms. Romero was taken by ambulance to see Dr. Chongsiriwatana at the direction of LHS staff after she first presented and sought medical care at Lovelace Medical Center downtown. **[RP 0062-63.]**

After the "statement of facts" section of the application, there is another section heading entitled "Individuals Involved." The latter section of the application contains a list of individual's names, addresses, and phone numbers preceded by a sentence explaining that the listed individuals are "providers whose care may be germane to the issues." **[RP 0064-65.]** LHS's corporate address and phone number are not listed in that section of the application; however, the application also includes a section entitled "Medical Releases" which references a set of "attached authorizations." **[RP 0065.]** LHS's reply brief did not include the complete application packet with all the medical releases referenced in that section. But the LHS medical release form Ms. Romero signed and included with her application packet was made part of the record as an exhibit to her surreply **[RP 0145-46]**, along with a letter from the Commission

forwarding her signed release to LHS **[RP 0144]**. The release form is specific to LHS, lists several addresses and phone numbers for LHS, and has a stamp indicating it was received by LHS on May 27, 2014. **[RP 0145.]**

In a footnote to its reply brief in the district court, LHS asserted that Ms. Romero's application to the Commission does not count for purposes of tolling the statute of limitations against LHS, because the application does not specifically list the name, address, and phone number of an LHS facility in the section entitled "Individuals Involved." **[RP 0058 n.1.]** At the motion hearing, LHS's counsel also argued that the references to LHS facilities in the "statement of facts" section of the application merely referred to a physical location where an event occurred, and did not give rise to a reasonable inference that LHS was named as a provider of care. **[09-02-15, at 7:11-7:20, 15:1-15:4, 15:16-15:25; 17:14-17:15.]** The district court's order acknowledges that LHS "is technically named in the application," but nevertheless finds that fact is not sufficient to toll the statute of limitations, because the district court could not find allegations concerning a separate act of negligence attributed solely to LHS in the application. **[RP 0156.]**

The only authority the district court cited for the proposition that "[t]he statute of limitations is not tolled as to a party not named in the application" is *Meza v. Topalovski*, 2012-NMCA-002, ¶¶ 4, 9, 268 P.3d 1284. But *Meza* does not offer any

principled distinction between "technically" naming a provider in an application and naming that provider for purposes of tolling the statute of limitations. *Meza* addressed a situation where an applicant belatedly tried to substitute a qualified individual health care provider (Dr. Topalovski) who was not named *at all* in the original application. *Meza* states the deficiency in the original application as being "not named," *id.* ¶ 1, or "unnamed," *id.* ¶¶ 8, 12. *Meza* does not say that anything else besides "naming" a qualified health care provider in the application is required in order to toll the statute of limitations. If "naming" a provider provides the test for triggering the MMA's tolling provision, then Ms. Romero's application meets that test, because LHS was in fact named several times in the original application.

Meza is distinguishable from this case in several important respects, and none of the arguments presented by LHS or the district court accord with the language and purpose of the MMA or the standard of review on a motion for summary judgment where the defendant bears the burden of proving an affirmative defense. Unlike this case, *Meza* was decided on a properly filed motion for summary judgment, where the plaintiff did not contest any of the material facts stated in the motion. *See id.* ¶ 7. The facts material to the analysis in *Meza* were that the patient's original application to the Commission--on which she relied for tolling the statute of limitations--named the wrong provider entirely. The defendant in that case (Dr. Topalovski) was a

qualified individual health care provider whose name did not appear at all until a subsequent version of the application was submitted after the statute of limitations had already run. *See id.* ¶ 3. Here, in contrast, LHS does not contend that Ms. Romero named the wrong qualified health care provider in her original application or later tried to substitute another provider. And here the district court converted LHS's motion to dismiss into a motion for summary judgment on an affirmative defense without applying the proper standard of review.

This Court cannot affirm summary judgment in LHS's favor without concluding that no rational trier of fact could find Ms. Romero's application to have included sufficient language about LHS even when it is read in the light most favorable to Ms. Romero and all reasonable inferences are drawn in her favor. *See City of Farmington*, 2006-NMCA-077, ¶ 15; *Summit Elec. Supply Co.*, *supra*, 2009 WL 9087259, at *5. The record simply does not support such a conclusion.

A rational trier of fact reviewing Ms. Romero's application under this standard could find that the application contains sufficient allegations about LHS notwithstanding the absence of LHS's address and phone number on the list of "individuals involved." LHS is not an individual, and the purpose of the list in Section B of the application is to address the Commission's policy requiring an applicant to provide "names, addresses, and phone numbers of all providers whose

care may be germane to the issues and not merely the providers subject to the inquiry." **[RP 0066.]** Insofar as that policy merely seeks addresses and phone numbers for a broader class of persons than just "the providers subject to the inquiry," the list in Section B of the application is not the proper or exclusive means of determining which providers are named for purposes of triggering the tolling provisions in Section 41-5-22 of the MMA. There is nothing in the statutory language itself which requires an application to include an address and phone number for a particular provider, much less to list that information in a particular section of the application. The Commission's policies and procedures do not prescribe a "special form for the Application" **[RP 0066]**, and Ms. Romero met the address-and-phone-number requirement by including that information in the LHS release form submitted with the application packet **[RP 0145]**.

Insofar as a rational trier of fact would be looking for "dates and circumstances suggesting malpractice, negligence, alleged acts or respondeat superior on behalf of" LHS **[RP 00156]** instead of merely an address or phone number, the logical place to look is not the list in Section B of the application but rather the statement of facts in Section A. Viewing Section A in the light most favorable to Ms. Romero, a rational trier of fact would not read the references to "Lovelace Medical Center," "Lovelace Women's Hospital," or "Lovelace Downtown" as simply a physical location where

Ms. Romero went to meet an individual provider. The MMA expressly includes "facility" and "hospital" in the definition of "health care provider." NMSA 1978, § 41-5-3(A). So in this context, a facility or hospital is understood to be a provider.

When a pregnant patient presents at a hospital complaining of "sharp pain in her lower abdomen and left-sided pelvic region" **[RP 0062-63]**, the more reasonable inference is that the patient is seeking urgent or emergent care from the organization or entity that operates the hospital, not merely soliciting an appointment with a specific individual provider. *See Houghland v. Grant*, 1995-NMCA-005, ¶ 22, 119 N.M. 422, 891 P.2d 563. A patient experiencing "sharp pain" who seeks such urgent or emergent care does not have the luxury of waiting to make an appointment with a specific individual; instead, she is seen by whomever the organization or entity operating the hospital has placed on duty at the time.

When the staff at one hospital "authorize" the patient's transfer to another hospital "via ambulance" while the patient is "heavily medicated" **[RP 0063]**, it is also reasonable to infer that the organization or entity which operates both hospitals is playing a causal role in directing the patient's care and selecting which of the hospital's staff or affiliates will provide care to the patient. *See id.* Viewing the application in the light most favorable to Ms. Romero, it is not reasonable to infer that she was directing her own care or choosing which specific individual provider she

would see while being transported from one LHS hospital to another via ambulance, or while "heavily medicated" at Lovelace Women's Hospital.

The district court seemed to fault Ms. Romero's counsel for referring to the specific individuals at the hospitals who directed her care, instead of stating that LHS-- as an organization or entity--saw and communicated with Ms. Romero, ordered tests, signed reports, made findings, discussed them with other staff members, authorized the patient's transport via ambulance, made a diagnosis, performed specific procedures, or administered medication. **[RP 0062-63.]** But the reasons for using specific individuals' names in this context, instead of repeatedly naming LHS in each sentence, would be understood by a rational trier of fact reading the application in the light most favorable to Ms. Romero and in its statutory context.

As a matter of law, a "corporation can act only through its officers and employees, and any act or omission of an officer or an employee of a corporation, within the scope of his or her employment, is an act or omission of the corporation." *Bourgeous v. Horizon Healthcare Corp.*, 1994-NMSC-038, ¶ 11, 117 N.M. 434, 872 P.2d 852.) Thus, it is necessary that Ms. Romero's application name specific individuals working at LHS facilities, and it is reasonable to infer from the application as a whole that those individuals are employees or agents of LHS, whom LHS caused to staff its facilities during the relevant time period. On what basis

would a rational trier of fact conclude to the contrary that the individuals who provided care at its facilities did so without an employment or agency relationship with LHS? And why would a rational trier of fact be required to accept such an inference when viewing the application in the light most favorable to Ms. Romero?

Under the MMA, an application only requires "a brief statement of . . . circumstances, so far as they are known." NMSA 1978, § 41-5-15(B)(1). Patients ordinarily do not have the means to know more specific details of a doctor's employment or agency relationship with a hospital or organization at the time an application is submitted. *See Houghland*, 1995-NMCA-005, ¶ 22. Neither the plain language of Section 41-5-15(B) nor the Commission's policies and procedures **[RP 0066]** require a patient to plead a specific legal theory such as vicarious liability or *respondeat superior* in her application to the Commission. *See Trujillo*, 1984-NMCA-050, ¶ 8; *Zamora*, 2014-NMSC-035, ¶ 14. And there is nothing in Section 41-5-15(B) which requires a patient to specify a separate "alleged act or acts of malpractice" for each of the "persons involved" in the application. Because the statute uses both the plural "persons involved" and the singular "alleged act," it contemplates that more than one person could be involved in the same act of malpractice. *See* NMSA 1978, §41-5-15(B).

Given the reasonable inference that health-care providers often operate under the auspices of a corporation or business organization, reading the statute to require a separate act by the corporation or organization itself would lead to absurd results. It is impossible for a corporation or business organization, such as LHS, to commit an "alleged act or acts of malpractice" on its own without the involvement of an individual working at an LHS facility. Thus, under the district court's reading of the statute, an applicant could *never* satisfy the requirements for filing an application involving a corporation, because there is no act of malpractice that a corporation can commit on its own. *See Bourgeous*, 1994-NMSC-038, ¶ 11.

As a fallback to its argument about the content of the application, LHS has also contended that Ms. Romero was required to do something more than name LHS in the application in order to trigger the MMA's tolling provisions. In particular, LHS argued that Ms. Romero should have done more to notify LHS of the application **[09-02-15 Tr. 16:1-16:8]**, or should have sought LHS's voluntary participation in a panel hearing. **[RP 0059.]** Neither of these arguments have merit.

LHS's notice argument fails both as a matter of law and as a factual matter. For purposes of tolling the limitations period under Section 14-5-22 of the MMA, our Supreme Court has long held that mailing an application to the Commission is sufficient; there is no requirement that the Commission or any provider receive notice

of the Application before the limitations period would otherwise run. *See Otero v. Zouhar*, 1985-NMSC-021, ¶¶ 7-10, 102 N.M. 482, 697 P.2d 482, *overruled in part on other grounds by Grantland*, 1990-NMSC-076, ¶ 9. As a factual matter, LHS ignores the evidence that it did receive notice from the Commission before the statute of limitations ran. Ms. Romero's application packet included a signed LHS release form, which LHS received from the Commission on May 27, 2014. **[RP 0144-46.]**

LHS's next fallback argument is based on a provision in the Commission's policies and procedures under which a "medical doctor [who] is not qualified under the Act" can nevertheless receive a "panel hearing" if "all parties stipulate to the Voluntary Panel and the patient pay[s] a $25.00 application fee." **[RP 0067.]** LHS argued that Ms. Romero should have sought to include LHS in such a voluntary panel proceeding in order to toll the statute of limitations. But LHS is not a "medical doctor," and there is no guarantee that all parties would stipulate to a voluntary panel. Moreover, there is no evidence that LHS ever offered to stipulate to such a panel.

Under the Commission's procedures, a determination of whether a provider is qualified does not occur until after the Commission reviews the adequacy of the application and submits it to the Department of Insurance. It is only after the Department of Insurance certifies a provider's qualifications and supplies the name of the provider's insurance carrier that the Commission serves the application upon

the provider. Determining whether parties will stipulate to a voluntary panel would not occur until after service on the qualified provider, if at all. **[RP 0066-67.]**

For several reasons, it would not make sense for LHS's statute of limitations defense to be contingent on the prospect that all parties might stipulate to a voluntary panel hearing regarding a nonqualified provider after an application is filed. LHS's counsel "owes no legal duty to his client's adversary when acting on behalf of his client." *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 1988-NMSC-014, ¶ 17, 106 N.M. 757, 750 P.2d 118. Thus, at the time the application was submitted, Ms. Romero would have no reason to rely on the mere possibility that LHS and other parties might all agree to a voluntary panel at some later date, or that LHS might decide not to pursue a statute of limitations defense based on the way Plaintiff later handled the panel hearing. *See id.* ¶¶ 17, 24. LHS would not even be required to identify such an affirmative defense during the proceedings before the Commission. *See Meza*, 2012-NMCA-002, ¶ 16. LHS's counsel could still change its position and decide to pursue the defense after the statute of limitations had ran, just as they changed their position after the fact in *Garcia*, 1988-NMSC-014, ¶ 6.

Our Supreme Court has rejected the notion that the applicability of the MMA's tolling provisions should depend on contingencies that may or may not arise during proceedings before the Commission after an application is submitted. In *Otero*, 1985-

NMSC-021, ¶¶ 7-10, the Court held that the mailing of an application triggers the MMA's tolling provisions regardless of what contingencies arise with respect to when the Commission receives or serves it. In *Grantland*, 1990-NMSC-076, ¶ 8, the Court expanded on that reasoning by holding that the tolling provision's application does not depend on contingencies with respect to whether the provider named in the application is later determined to be qualified under the MMA.

Extending the same reasoning to its logical conclusion, it would not make sense to require the tolling of the statute of limitations to depend on contingencies that arise further down the line after an application is served and a determination is made about which providers are qualified or who will agree to a voluntary panel hearing. An applicant needs to know what conditions must be satisfied for tolling the statute of limitations at the time the application is submitted. Finding out later based on some event that may or may not occur after the application's submittal will not suffice, because at that point it is too late for the applicant to go back and add more language to the application or file a protective lawsuit against an unnamed provider.

The lesson to be gleaned from *Otero* and *Grantland* is that the submittal of the application itself provides the best bright-line rule for determining when the MMA's tolling provisions are triggered for the purpose of precluding a statute of limitations defense. Such a bright-line rule makes sense, because it allows an applicant to know

whether the conditions for tolling the statute of limitations are met at the time the application is submitted.

Perhaps in deciding this appeal, the Court may wish to clarify what it meant by "naming" a provider in an application, as stated in *Meza*, 2012-NMCA-002, ¶¶ 1, 8, 12. The Court also may wish to consider whether that "naming" requirement still applies when the provider who later raises a statute of limitations defense is not qualified under the MMA and, therefore, is not required to participate in the Commission's proceedings. *See Grantland*, 1990-NMSC-076, ¶ 9. But it would violate a basic principle of due process for the Court to come up with a new set of naming requirements for nonqualified health care providers and apply them retroactively to an application that was submitted in reasonable reliance on the liberal pleading standard stated in the plain language of the statute, *see* NMSA 1978, § 41-5-15(B)(1), and existing precedents, *see, e.g., Trujillo*, 1984-NMCA-050, ¶ 8. Retroactive enforcement of a novel interpretation of the statutory requirements for the content of an application would be unconstitutional under these circumstances. *See Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964).

A transparent government requires simple, easy-to-follow rules that are written, published, and made available to everyone in a timely manner. The basic standard for an application to the Commission that is set forth in the plain language of Section

14-5-15(B) is an example of such transparency. The Court should follow that example here instead of relying on some unwritten custom known only to an exclusive coterie of medical malpractice specialists who regularly practice before a particular court. Such obscure practices that preclude adjudication on the merits are a prime example of the type of "procedural booby trap" or "Catch 22" that New Mexico courts eschew, *see Zamora*, 2014-NMSC-035, ¶ 12, especially when interpreting the MMA's tolling provisions, *see Grantland*, 1990-NMSC-076, ¶¶ 6-8.

IV. The district court erred in concluding that the proceedings before the Commission as to Dr. Chongsiriwatana did not have the effect of tolling the statute of limitations as to LHS.

Implicit in the district court's conclusion that Ms. Romero's application to the Commission did not do enough to name LHS is the premise that the application was not sufficient on its own to preclude a separate lawsuit against LHS while the Commission proceedings against Dr. Chongsiriwatana were still pending. The district court's order did not discuss what would have happened if Ms. Romero had filed an earlier lawsuit against LHS. **[RP 0154-56.]** At the motion hearing, however, LHS's counsel suggested that Ms. Romero should have filed such a protective lawsuit against LHS in the district court while the proceedings before the Commission were still pending against Dr. Chongsiriwatana. **[09-02-15 Tr. 27:13-27:24.]** Ms. Romero's counsel responded by explaining why filing an earlier lawsuit against LHS

does not present a viable option and would conflict with several existing precedents. **[RP 0139-42; 09-02-15 Tr. 13:9-14:20; 23:8-25:3.]**

LHS has conceded that Dr. Chongsiriwatana could not be added as a defendant in such a lawsuit until after the Commission proceedings terminated, *see* NMSA 1978, § 41-5-15(A), and thus a civil action naming only LHS as the sole defendant could not go forward until that contingency was satisfied. **[09-02-15 Tr. 27:17-27:23.]** Such a premature lawsuit against LHS would serve no practical purpose apart from the formality of staving off a potential statute of limitations defense by one of the parties. At best, a lawsuit against LHS would merely sit on the district court's docket with no activity until the Commission proceedings against Dr. Chongsiriwatana were completed.

Filing a lawsuit against LHS as a safety precaution to stave off the possibility of a statute of limitations defense by a nonqualified provider while the Commission proceedings against Dr. Chongsiriwatana were pending also runs counter to several important New Mexico precedents interpreting the MMA. Our Supreme Court first rejected the prospect of such premature protective lawsuits in *Grantland*, 1990-NMSC-0076, ¶ 8. *Grantland* held that an application to the Commission tolls the statute of limitations even when it turns out the health care provider named in the application is "not qualified" under the MMA. *Id.* ¶ 9. The reasoning behind this

conclusion is that:

> If we require claimants to file in district court at the peril of losing their case before the classification of the health care provider is known, then every claim will be filed in district court as a safety precaution, and the purpose behind the Act (to prevent court filing of nonmeritorious malpractice claims) will be defeated. The medical profession likely will suffer the ill effects of their members being accused publicly, and perhaps unjustly, of malpractice, the cost of healthcare may escalate as medical malpractice insurance premiums reflect the number of medical malpractice cases being filed in the courts, and the courts will be burdened with premature and frivolous medical malpractice claims.

Grantland, 1990-NMSC-0076, ¶ 8.

Premature lawsuits also run counter to the language and purpose of Section 41-5-15(A) of the MMA, which provides that: "No malpractice action may be filed in any court against a qualifying health care provider before application is made to the medical review commission and its decision is rendered." NMSA 1978, § 41-5-15(A). This Court has interpreted Section 41-5-15(A) as "a mandatory procedural threshold that must be crossed in the ordinary case." *Rupp v. Hurley*, 2002-NMCA-023, ¶ 21, 131 N.M. 646, 41 P.3d 914. Thus, when a lawsuit involving a qualified health-care provider is filed before the outcome of the Commission proceedings, this Court has instructed that "the district court should normally dismiss the complaint without prejudice. In addition, if the plaintiff cannot demonstrate a good faith basis for filing the complaint early, it would be appropriate for the district court to consider Rule 11 sanctions against the Plaintiff." *Id.*

In this case, a lawsuit against LHS would necessarily have to include allegations against Dr. Chongsiriwatana, because a corporation such as LHS can only act through individual employees or agents. *See Bourgeous*, 1994-NMSC-038, ¶ 11. But including such allegations against Dr. Chongsiriwatana would run counter to the purposes of the MMA articulated in *Grantland*, 1990-NMSC-076, ¶ 8. Dr. Chongsiriwatana would "suffer the ill effects of . . . being accused publicly" before the Commission finished its proceedings, and the lawsuit against LHS would add to "the number of medical malpractice cases being filed in the courts" for purposes of escalating medical malpractice insurance premiums. *Id.* If asked to justify such a lawsuit in response to the motion to dismiss or Rule 1-011 inquiry contemplated in *Rupp*, 2002-NMCA-023, ¶ 21, Ms. Romero's counsel would have to admit that an earlier lawsuit solely against LHS serves no purpose except to stand as a place holder until the Commission proceedings against Dr. Chongsiriwatana are finished.

At the motion hearing, LHS's counsel suggested that there could be some kind of unwritten custom or practice among medical malpractice attorneys, under which the filing of a lawsuit against LHS might be tolerated while the Commission proceedings against Dr. Chongsiriwatana were pending. **[09-02-15 Tr. 27:17-27:23.]** But again, Ms. Romero's counsel cannot rely on a mere hope that opposing counsel will not file a motion to dismiss such a lawsuit or for Rule 1-011 sanctions as directed

in *Rupp*, 2002-NMCA-023, ¶ 21. Opposing counsel owes no duty to protect Ms. Romero's interests in this situation, *see Garcia*, 1988-NMSC-014, ¶ 6, and litigating medical negligence lawsuits is not restricted to an exclusive coterie of malpractice specialists who can be trusted to observe the type of unwritten customs or practices to which LHS's counsel alluded at the motion hearing.

That is not to suggest defense counsel are the only ones who might be untrustworthy in their tactics, or that *Rupp* is the only precedent which may provide reasons for not agreeing to let an early lawsuit against an individual doctor's employer or business organization persist while the Commission's proceedings against that doctor are still pending. Suing an employer or business organization without awaiting the result of Commission proceedings against an individual doctor also may be exploited by plaintiffs' attorneys to gain tactical advantages contrary to the purpose and intent of the MMA. Such premature lawsuits create exactly the type of loophole in the MMA that our Supreme Court tried to close in *Baker v. Hedstrom*, 2013-NMSC-043, ¶¶ 34-36, 309 P.3d 1047.

Baker recognized the practical reality that "medical professionals . . . often choose to form or operate as professional corporations, limited liability companies, or any other legal form of business organization." *Id.* ¶ 34. Given this widespread practice, it would be contrary to the statute's purpose and intent to categorically

exclude the corporate entity or organization itself from the MMA's definition of a "health care provider." "If the MMA only covered a doctor in his or her individual capacity, but not the doctor's legal business organization, under the doctrine of *respondeat suprerior*, the patient could simply circumvent the provisions that the Legislature intended to benefit the individual doctor by directly suing the doctor's company for malpractice in district court." *Id.* ¶ 35. Such an "end run around the MMA" would effectively divest "individual medical professionals from the Act's protection." *Id.* ¶ 36. "The Legislature could not have intended to strip individual medical professionals of the MMA's protections simply because they choose to operate as a business corporation, professional corporation, limited liability corporation, or any other legal form of business organization." *Id.* ¶ 36.

The same reasoning counsels against the proposal that Ms. Romero should have sued LHS as the business organization under which Dr. Chongsiriwatana operates without awaiting the outcome of the Commission proceedings. If plaintiffs' attorneys had the green light to proceed with litigation against an individual doctor's employer or business organization without awaiting the outcome of proceedings before the Commission, then the protections that the MMA is supposed to afford to the individual doctor as a "qualified health care provider" would be eviscerated. An enterprising plaintiff's attorney could just include all the pertinent allegations about

the individual doctor in a *respondeat superior* lawsuit against the employer or organization, without waiting to afford the doctor the statutory process that she is due before the Commission.

Thus, it is important to read the MMA's tolling provisions *in pari materia* with the rest of the statute. *See Baker*, 2013-NMSC-043, ¶ 15. To afford an individual doctor the statutory benefit to which she is entitled through qualification as a "health care provider" under the MMA, the statute's tolling provisions must be read to apply to parallel claims against an employer or organization that would necessarily include allegations against the individual doctor. Submitting an application against an individual qualified health care provider to the Commission should be sufficient to trigger the MMA's tolling provisions against both that individual provider and the provider's employer or organization, especially when, as here, the employer or organization is not a "qualified health care provider" under the statute.

Both the specific purposes of the MMA and the broader goal of governmental transparency are best served by a bright-line rule that the submittal of the application against an individual doctor who is a qualified health care provider serves as the single trigger for the MMA's tolling provisions as to both that individual doctor and the employer or organization under which that doctor practices. If one accepts the precedents in *Grantland*, *Rupp*, and *Baker* indicating that a premature civil action

against LHS is not a viable option under these circumstances, then it really does not matter whether the application before the Commission does or does not contain additional details about the involvement of Dr. Chongsiriwatana's employer, principal, or organization. So long as the application meets the minimum statutory requirements for alleging an act of malpractice by Dr. Chongsiriwatana herself, then there is no place for Ms. Romero to go with her vicarious-liability claim against LHS until the Commission issues its final decision regarding Dr. Chongsiriwatana.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order dismissing Ms. Romero's claims against LHS and determine that her application to the Commission is legally sufficient to toll the statute of limitations as to LHS under the applicable standard of review.

REQUEST FOR ORAL ARGUMENT

In the district court, oral argument at the motions hearing was Ms. Romero's counsel's first and only chance to preserve objections to some of the district court's rulings, because issues were raised for the first time in LHS's reply brief or *sua sponte* at the hearing. Plaintiff requests oral argument as a precautionary measure to ensure an opportunity to respond in the event that this practice repeats itself and new issues are raised on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief-in-Chief was served via e-mail and first-class mail to the following counsel of record at the address listed below on this 26th day of May, 2016:

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