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 REPLY BRIEF

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STATEMENT OF COMPLIANCE

The body of this brief-in-chief does not exceed fifteen (15) 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 3,589 words in length as measured using the word count feature of WordPerfect X7.

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INTRODUCTION

Defendant-Appellee Lovelace Health System, Inc. (LHS) makes three key concessions in its Answer Brief. First, LHS concedes that Plaintiff-Appellant Marlina Romero "preserved the merits issue of whether summary judgment is warranted" on LHS's statute of limitations defense. **[AB at 11.]** Regardless of LHS's procedural shenanigans in the district court or how the district court chose to respond to them, it is undisputed that Ms. Romero timely and appropriately raised the same arguments in the district court that are now presented in this appeal.

Second, LHS has conceded all along that "the malpractice tolling provision, Section 41-5-22, applies both to qualified and to non-qualified health care providers." [**AB at 12**, citing *Grantland v.v Lea Reg. Hosp.*, 1990-NMSC-076, ¶ 9, 110 N.M. 378, 796 P.2d 599.] Regardless of what other methods were or could have been used to defeat a statute-of-limitations defense, it is undisputed that an application to New Mexico's Medical Review Commission which adequately names Lovelace hospitals would suffice to toll the limitations period even though LHS is not a "qualified health-care provider" under the Medical Malpractice Act (MMA). *Cf. Meza v. Topalovski*, 2012-NMCA-002, ¶ 12, 268 P.3d 1284 (concluding that the tolling provision did not apply to an "unnamed" qualified health-care provider).

Third, LHS now concedes that "Plaintiff's timely application to the MRC in

this case, unlike in *Meza*, makes some reference to Lovelace hospitals."[1] [**AB at 12**, citing **RP 62-65.**] Regardless of the fact that LHS is not "qualified" to receive benefits under the MMA, a "hospital" still falls under the statutory definition of a "provider." [**AB at 21**, citing NMSA 1978, § 41-5-3(A).] And it is beyond dispute that Ms. Romero's application includes the names "Lovelace Medical Center" as well as "Lovelace Women's Hospital" **[RP 62-63, 145]**, which the Commission understood to mean: "Counsel for the patient has indicated that you [LHS] provided care to the above-referenced patient [Ms. Romero]" **[RP145]**.

LHS's sole argument remaining on appeal is that Ms. Romero needed to do something more than name LHS or its hospitals in the application in order to trigger the MMA's tolling provision. And the only reason LHS asserts for requiring Ms. Romero to say something more in the application is so that LHS would have more notice of her claim. But LHS offers no cogent or coherent explanation of why it needed more notice, how it was unfairly prejudiced by the alleged lack of it, or what it would have done differently had Ms. Romero said more than she did in her application. Therefore, the Court should determine that Ms. Romero's application is

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[1]This third concession marks a change from the position LHS took in its reply brief in the district court. There LHS had argued that the MMA's tolling provision did not apply "pursuant to the ruling in *Meza*, since LHS was not named in Plaintiff's Application to the Commission." **[RP 0059.]**

already sufficient to toll the statute of limitations as to LHS and reverse the district court's ruling to the contrary.

ARGUMENT

Because the first point discussed in LHS's answer brief is intertwined with the second, Ms. Romero will reply to them both as one argument. Under its first point, LHS asserts that the Court should not elevate form over substance. [**AB at 9**, citing *Ennis v. K-Mart Corp.*, 2001-NMCA-068, ¶ 21, 131 N.M. 32, 33 P.3d 32.] For example, LHS asks the Court to overlook formalities by converting a document entitled "Reply in Support of Motion to Dismiss" **[RP 0058]** into a motion for summary judgment, even though that document doesn't mention anything about converting itself to a summary-judgment motion. LHS also asks the Court to do some fact-finding about the manner in which Ms. Romero named Lovelace hospitals in her application to the Commission, even though none of LHS's filings contain the numbered statements of undisputed fact required under Rule 1-056(D)(2) NMRA.

In the second section of argument in its Answer Brief, however, LHS takes the opposite approach and insists that the Court is precluded from ever reaching the merits of Ms. Romero's malpractice claim if her application to the Commission deviates even slightly from the strictest formal requirements. Exactly what formality Ms. Romero's application was supposed to satisfy is unclear because, as noted above,

LHS never enumerated a statement of undisputed facts under Rule 1-056(D)(2).

In its reply brief in the district court, LHS said the alleged technical defect was the failure to "name" Lovelace hospitals in the section of the application entitled "Individuals involved," instead of in the narrative section entitled "Statement of Facts, Including Dates and Circumstances." **[RP 0058.]** At the motion hearing, however, LHS argued that even naming Lovelace hospitals several times in the section entitled "Statement of Facts, Including Dates and Circumstances" does not suffice to provide "dates and circumstances suggesting malpractice, negligence, alleged acts or respondeat superior on behalf of Lovelace." [**AB at 5**, citing RP 156.]

LHS cannot have it both ways by insisting on form over substance with respect to Ms. Romero's application while doing the opposite with respect to its own filings in the district court. If the Court is going to "look to substance rather than form," [**AB at 9**, quoting *Ennis*, 2001-NMCA-068, ¶ 21], then it must do so consistently. Thus, if a document entitled "Reply in Support of Motion to Dismiss" so easily converts to a motion for summary judgment without any express language to that effect, then an application to the Commission which names Lovelace hospitals several times under a section heading entitled "Statement of Facts, Including Dates and Circumstances" should just as easily suffice to trigger the MMA's tolling provisions as to LHS. And if a court can convert a reply brief into a summary-

judgment motion without a numbered statements of fact for the non-movant to respond to, then a court can just as easily use an application naming Lovelace hospitals to trigger the MMA's tolling provisions even though the company's address and telephone number are listed in the medical releases attached to the application **[RP 0145]** instead of the section entitled "Individuals involved." **[RP 0064.]**

I. Application of the MMA's tolling provision does not depend on contingencies that arise after an application is submitted.

LHS makes much of the fact that the Commission's form letter transmitting the medical releases attached to Ms. Romero's application states that: "This application does not involve you. . . ." **[AB at 4**, citing **RP 0144.]** But if one is not elevating form over substance, one should not read too much into the Commission's form letter. After all, the second paragraph of that letter states: "Counsel for the patient has indicated that you provided care to the above-referenced patient." **[RP 144.]** That language shows that LHS *is* considered a provider in the application.

The substantive reason why the Commission's form letter says Ms. Romero's application "does not involve" LHS is that LHS is not a *qualified* provider to which additional process is due before the commission under the MMA. *See* NMSA 1978, § 41-5-5(C) ("A health care provider not qualifying under this section shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of a

malpractice claim against it.") LHS concedes, however, that the MMA's tolling provision is not a "benefit" that is restricted to qualified providers **[AB at 12]**, so whether LHS received additional process from the Commission after Ms. Romero's application was filed is immaterial. *See Grantland*, 1990-NMSC-076, ¶ 9.

How the Commission interpreted or responded to Ms. Romero's application is also immaterial, because both parties agree that: "'An applicant needs to know what conditions must be satisfied for tolling the statute of limitations at the time the application is submitted.'" [**AB at 22**, quoting **BIC at 26.**] Suppose, for example, that Ms. Romero's application itself contained enough information to trigger the MMA's tolling provisions, but the Commission sent the wrong form letter asking for medical records, or sent a letter to the wrong address or the wrong provider. Would that mean the tolling provision is not triggered? Of course not. The statute does not say the tolling provision is triggered by what the Commission says in a letter used to process the application. And for the reasons already stated on Pages 23-27 of Ms. Romero's Brief-in-Chief, the tolling provision's applicability cannot depend on contingencies that may or may not arise *after* the application is submitted.

Another problem with making the MMA's tolling provision contingent on what the Commission thought of Ms. Romero's application is that the MMA's confidentiality provisions are supposed to shield the fact-finder from its deliberations

and decision-making. "The deliberations of the panel shall be and remain confidential." NMSA 1978, § 41-5-20(A). "All votes of the panel on the two questions for decision shall be by secret ballot." *Id.* § 41-5-20(B). "The report of the medical review panel shall not be admissible as evidence in any action subsequently brought in a court of law." *Id.* § 41-5-20(D). "The panel's decisions shall be without administrative or judicial authority and shall not be binding on any party." *Id.* § 41-5-20(F). Reading the provisions of the same statute *in pari materia* with one another, it would make no sense for the applicability of the MMA's tolling provision to depend on facts concerning how the Commission deliberated on the application, which are not admissible or even discoverable under the confidentiality provisions cited above. *See Ramirez v. State ex rel. CYFD*, 2016-NMSC-016, ¶ 32, 372 P.3d 497 (reading "statutes *in pari materia* to ascertain legislative intent").

Ms. Romero went as far as she could by making the rest of the application materials part of the record in the district court after LHS's reply brief was belatedly converted to a motion for summary judgment. **[RP 144-46.]** The MMA's confidentiality provisions meant there was nothing more for Ms. Romero to discover or present to the district court regarding the Commission proceedings. Her application itself was all that was needed to toll the statute of limitations as to LHS.

II. The standard for reviewing an application under the MMA is not stricter or more formal than the notice pleading standard articulated in *Zamora*.

After taking the reader on a circuitous trip through a litigation wonderland to explain why its "Reply in Support of Motion to Dismiss" was really a motion for summary judgment, LHS next contends that the standard of review for a summary-judgment motion does not really require the Court to draw reasonable inferences in the non-movant's favor under the stringent "no rational trier of fact" standard for affirmative defenses cited on Pages 8-9 of Ms. Romero's Brief-in-Chief. LHS attempts to suppress such inferences in Ms. Romero's favor by contending that this case presents a "purely legal question" subject to *de novo* review. **[AB at 10-11.]**

Ms. Romero agrees that this appeal presents a legal question of statutory interpretation to which *de novo* review applies. But that only means the Court should afford no deference to the district court's ruling. *See Quynh Trong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 27, 147 N.M. 583, 227 P.3d 73. It does not mean that the Court gets to view the evidence in the light most favorable to LHS or draw inferences in its favor. Even if one converts LHS's reply brief into a summary-judgment motion, one must still view the evidence of record in the light most favorable to Ms. Romero and draw all reasonable inferences from it in her favor, just as one would liberally construe her pleading if one were determining whether it stated a claim under Rule 1-012(b)(6). *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713,

242 P.3d 280; *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 9, 335 P.3d 1243.

Without disputing that *Zamora* is the leading authority articulating New Mexico's notice-pleading standard, LHS claims this case is factually distinct from *Zamora* in some way. But where does LHS get the facts on which to assert such a distinction? And does that distinction make any difference with respect to tolling the statute of limitations?

The institutional defendant in *Zamora* claimed the pleading at issue in that case did not say enough to state a claim for vicarious liability because it did not name the individual agents of the hospital or explain the theory on which the hospital was alleged to be vicariously liable for their acts or omissions. Our Supreme Court rejected that assertion, holding that "it was immaterial that the complaint failed to specify which particular agents were negligent or which theory of agency resulted in liability on the part of St. Vincent." *Zamora*, 2014-NMSC-035, ¶ 15.

In the present case, Ms. Romero's application lists plenty of individual providers, so LHS does not take issue with that. Instead, LHS disputes that those individual providers had any kind of agency or employment relationship with Lovelace hospitals. Specifically, LHS contends that "Dr. Chongsiriwatana was not a Lovelace contractor," and that "[s]he was a private physician employed by the physician group that Plaintiff was seeing as a patient." **[AB at 19.]** But none of

LHS's motion papers in the district court attach any evidence to support its contention that Dr. Chongsiriwatana or other individual providers listed in the application had no employment or agency relationship with Lovelace hospitals.

Ironically, after arguing so strenuously to get its reply brief converted into a summary-judgment motion, LHS does not cite any evidence of record to support its allegations about Dr. Chongsiriwatana. Instead, LHS just cites Paragraphs 6 and 8 of Ms. Romero's complaint filed in the district court [**AB at 19**, citing **RP 2**], as if the Answer Brief filed in this Court were sufficient to effect a last-minute conversion from the summary-judgment standard back to the motion-to-dismiss standard. The Court should be wary of such last-minute conversions.

If Ms. Romero's *pleading* is now the source for LHS's factual allegations about whether the company had an agency relationship with Dr. Chongsiriwatana or another individual provider named in the application, then that pleading must be construed in the light most favorable to Ms. Romero. *See Zamora*, 2014-NMSC-035, ¶ 14. Reading her pleading as a whole, one must also consider the allegations that Ms. Romero "was a patient of Lovelace Health System, Inc." **[RP 0001, at ¶ 3]**, who "received medical services at Lovelace Women's Hospital and Lovelace Medical Center, locations of Lovelace Health System, Inc." **[RP 0002, at ¶ 4]**, and that the individuals named in the Complaint were "employed by and/or under the control of

Defendants," including LHS **[RP 11, at ¶ 78]**.

These allegations do not compel the inference that Dr. Chongsiriwatana or other individual providers named in the application or in the Complaint were legally separate from LHS to such a degree that LHS could not be liable for their errors or omissions. Thus, LHS's contention that this case is somehow distinct from *Zamora* on the grounds that Dr. Chongsiriwatana was a "private contractor" at LHS Hospitals is completely illusory and unsupported by the record.

The same is true of LHS's attempt to distinguish this case from *Houghland v. Grant*, 1995-NMCA-005, 119 N.M. 422, 891 P.2d 563. Again LHS cites no evidence of record to support its contention that "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." [**AB at 20**, citing nothing.] If LHS is again relying on allegations from Ms. Romero's Complaint, then those allegations must be construed in the light most favorable to her. *See Zamora*, 2014-NMSC-035, ¶ 9. On Pages 19-21 of her Brief-in-Chief, Ms. Romero has already recited the factual allegations and reasonable inferences that support a theory akin to the situation described in *Houghland*. Pages 13-14 of Ms. Romero's Brief-in-Chief also explain why there is no reason to construe the allegations in her application to the Commission any more strictly than those in the Complaint she filed

in district court. The statutory requirements for filing an application are just as liberal--if not more so--than the requirements of the notice-pleading standard articulated in *Zamora*. *See* NMSA 1978, § 41-5-15(B); *Trujillo v. Puro*, 1984-NMCA-050, ¶ 8, 101 N.M. 408, 683 P.2d 963. The Court should not be "placing form over substance" when an applicant makes a "good faith attempt to comply with the Medical Malpractice Act." *Grantland*, 1990-NMSC-076, ¶ 6. And there is no allegation--much less any evidence--that Ms. Romero omitted anything from her application to the Commission in bad faith to gain an unfair tactical advantage.

III. LHS has failed to show how it was unfairly prejudiced by the content of Ms. Romero's application to the Commission.

As part of its "substance over form" argument, LHS's answer brief asserts that Ms. Romero was not unfairly prejudiced by the conversion of LHS's "Reply in Support of Motion to Dismiss" to a motion for summary judgment, because her counsel had the opportunity to present oral argument and a surreply brief in the district court. **[AB at 7-8.]** Ms. Romero agrees that there is no unfair prejudice to her if this Court is still going to rule in her favor on the merits regardless of which procedural avenue the district court followed.[2]

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[2]Nevertheless, Ms. Romero stands by the argument on Page 10 of her Brief-in-Chief that there was no opportunity to object because the district court's ruling was already a *fait accompli* when announced at the beginning of the hearing. **[09-02-15 Tr. 6:1-5.]** *See* Rules 1-046, 12-216 NMRA.

But the same practice of waiving formalities when there is no showing of unfair prejudice should apply to LHS's arguments about the degree of notice it received with regard to Ms. Romero's application. If a showing of unfair prejudice is required to explain why certain formalities need to be enforced when determining whether the MMA's tolling provisions apply to a particular provider, then why doesn't LHS make such a showing in its arguments about the content of Ms. Romero's application?

It is undisputed that Ms. Romero's application to the Commission "makes some reference to Lovelace hospitals." [**AB at 12**, citing **RP 62-65.**] LHS also received a letter from the Commission forwarding a signed release for Ms. Romero's medical records and stating that : "Counsel for the patient has indicated that you provided care to the above-referenced patient." **[RP 144.]** Under these circumstances, what difference would it make if Ms. Romero's application or the Commission's transmittal letter said anything more about the theories on which Ms. Romero alleges LHS is liable in this case?

LHS was not a qualified health-care provider, so no matter how much notice the company received, it would not have triggered any procedural rights for LHS in the Commission proceedings. *See* NMSA 1978, § 41-5-5(C). Further, such notice would not have made LHS privy to the Commission's deliberations, because the MMA makes those deliberations confidential. *See* NMSA 1978, § 41-5-20. Even

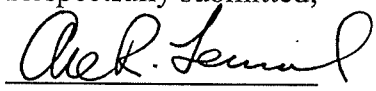
the Commission's ultimate decision is inadmissible and therefore could not be used to LHS's benefit in court. *See id.* LHS never explains what it would have done differently had it received more notice than it did in this instance.

LHS admits that filing a lawsuit against it while the Commission proceedings against Dr. Chongsiriwatana were pending would not have done any good, because of the "concerns about split or premature lawsuits mentioned in *Grantland* and raised in Plaintiff's arguments." **[AB at 16.]** Even if Ms. Romero's application didn't name Lovelace hospitals at all, the fact that it *did* name a *qualified* health-care provider such as Dr. Chongsiriwatana meant that any malpractice claim in a lawsuit filed before the completion of the Commission proceedings would have to be stayed or dismissed without prejudice under *Rupp v. Hurley*, 2002-NMCA-023, ¶ 21, 131 N.M. 646, 41 P.3d 914. Thus, LHS would not have gained any procedural rights through the filing of such a premature lawsuit, nor would such a lawsuit have expedited the resolution of Ms. Romero's claims against LHS, which needed to await the outcome of the Commission proceedings against the qualified health-care providers. It is those qualified health-care providers--not LHS--whose procedural rights would be unfairly prejudiced if the litigation had proceeded without them before the conclusion of the Commission proceedings. *See Grantland*, 1990-NMSC-076, ¶ 8. It follows that LHS lacks any justification for requiring Ms. Romero to file such a premature lawsuit.

CONCLUSION

A district court can sometimes cure the prejudice caused when a movant raises arguments for the first time in a reply brief by granting the non-movant leave to file a surreply. But LHS does not offer a similar procedure by which an applicant can go back and file a sur-application to the Commission in response to technical objections that a provider raises for the first time in the district court after an application has already been processed. On the contrary, LHS's belated critique and parsing of the language in Ms. Romero's application quickly devolves into the kind of "procedural booby trap" which our Supreme Court rejected in *Zamora*, 2014-NMSC-035, ¶¶ 12-14 . Such procedural booby traps are unfairly prejudicial to people like Ms. Romero, because their effect is to deprive her of the opportunity to have her claims fairly decided on the merits. As it has consistently done in the past, this Court should reject LHS's hypertechnical approach to the MMA's application requirements and allow Ms. Romero's claims against LHS to be heard on their merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief was served via e-mail and first-class mail to the following counsel of record at the address listed below on this 9th day of September, 2016:

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