

COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 33,087

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

APR 28 2014

Wendy Flores

SARA CAHN,

Plaintiff/Appellee,

vs.

Second Judicial District
No. CV 2009-4198

JOHN D. BERRYMAN, M.D.,

Defendant/Appellant.

REPLY BRIEF

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
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Oral Argument is Requested

TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY OF THE ARGUMENT	1
REPLY TO SUMMARY OF THE FACTS	2
REPLY ARGUMENT	6
I. APPLICATION OF THE STATUTE OF REPOSE TO BAR CLAIMS AFTER THREE YEARS IS ESSENTIAL TO ACHIEVING THE LEGISLATIVE GOALS OF THE MEDICAL MALPRACTICE ACT	6
II. PLAINTIFF HAD SUFFICIENT TIME, CONSISTENT WITH DUE PROCESS, TO COMMENCE HER ACTION AGAINST DR. BERRYMAN WITHIN THE STATUTE OF REPOSE	9
III. THE DOCTRINE OF EQUITABLE TOLLING AND FRAUDULENT CONCEALMENT WAS ARGUED BY PLAINTIFF IN THE COURT BELOW, BUT HAS BEEN ABANDONED	12
CONCLUSION	14

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Christus St. Vincent Regional Medical Center v. Duarte-Afara</i> , 2011-NMCA-112, ¶¶ 12, 16, 151 N.M. 6.	8
<i>Cummings v. X-Ray Associates of New Mexico</i> , 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321	7, 8 9
<i>Garcia v. LaFarge</i> , 1995-NMSC-019, 119 N.M. 532, 539, 893 P.2d 428, 435.	9
<i>Kysar v. BP America Production Co.</i> , 2012-NMCA-036, 873 P.3d 867.	2
<i>Meza v. Topalovski</i> , 2012-NMCA-002, ¶ 10, ___ N.M. ___.	7
<i>Quynh Truong v. Allstate Ins. Co.</i> , 2010-NMSC-009, ¶ 29, 147 N.M. 583	6
<i>Tomlinson v. George</i> , 2005-NMSC-020, 138 N.M. 34, 116 P.3d 105,	10

STATUTES

NMSA 1978, § 41-5-13 (1976). <i>passim</i>
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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA, the Reply Brief complies with the applicable type-volume limitation of Rule 12-213(F)(3) in that the body of the Brief contains 3,116 words as indicated by the word-count total of the word processing system used to prepare the same, which is Microsoft Word 2010.

SUMMARY OF THE ARGUMENT

Plaintiff Cahn's medical malpractice claim against Dr. Berryman, a qualified healthcare provider, was filed by her attorneys eleven months after the statute of repose in the Medical Malpractice Act had expired despite the fact that she could easily have ascertained Dr. Berryman's identity prior to that time. Therefore, under Section 41-5-13 of the Act, Plaintiff's claims are time-barred. Plaintiff argues that, because she did not learn of her potential claim against Dr. Berryman until approximately two years into the repose period, the time remaining for her to commence her action was constitutionally inadequate and, therefore, her suit should not be barred.

However, the information necessary to identify Dr. Berryman was available to Plaintiff throughout the three-year period of the statute of repose, both through Plaintiff's bank account records, and her insurance plan's explanation of benefits forms ("EOBs"). Plaintiff and her attorneys did not review her bank account records or request the EOB for her August 2006 visit with Dr. Berryman, which specifically identified him, until after the statute of repose expired. Further, the amount of time was sufficient for Plaintiff to retain counsel and commence the lawsuit against six co-defendants within the three-year statute of repose. Plaintiff clearly had a reasonable amount of time, consistent with due process, to institute her action within the three-year statute of repose.

The statute of repose is an integral part of the statutory framework of the Medical Malpractice Act and serves important purposes of making insurance available and encouraging widespread participation by healthcare providers so that patients will have a reliable source of recovery should they be injured. To promote these Legislative purposes, the statutory benefits conferred on qualified health care providers, including the statute of repose, must be enforced by the Courts.

Therefore, the Court should hold that Plaintiff's claim against Dr. Berryman is time-barred based on the failure to file it within the three-year statute of repose.

REPLY TO SUMMARY OF THE FACTS

This appeal is before the Court in a unique procedural posture. The appeal is a single issue appeal, brought on a Stipulated Conditional Directed Verdict pursuant to *Kysar v. BP America Production Co.*, 2012-NMCA-036, 873 P.3d 867. Plaintiff argues that the Statement of Facts in the Brief in Chief should be disregarded because it does not include pinpoint cites to the Record Proper. In the Brief in Chief, counsel directed the Court to the Stipulated Conditional Directed Verdict and the parties' specific moving papers as the factual basis for the appeal including Dr. Berryman's Motion for Summary Judgment, Plaintiff's Response to the Motion for Summary Judgment, Dr. Berryman's Reply, Dr. Berryman's Motion for Reconsideration, Plaintiff Cahn's Response, and Dr. Berryman's Reply

on the Motion for Reconsideration. See, R.P. 1830 and R.P. 343, 375, 440, 706, 773, 820.

This is not a substantial evidence appeal, but an appeal based on a limited, stipulated record. Because the case is before the Court by Stipulated Conditional Directed Verdict, the Court will decide the legal issue of application of the statute of repose, *de novo*, on the factual record created in the moving papers and the stipulations of the parties. Therefore, it is essential that the Court review and decide the case on that record. See *Kysar*, 2012-NMCA-036, ¶ 21, 873 P.3d at 873.

The supplemental factual statements in Plaintiff's Answer Brief demonstrate the need for the Court to review the complete record created by the moving papers and decide the appeal based on that record. The citations in the Answer Brief do not support many of the statements made and a number of the citations are to arguments within the moving papers, not to the factual evidence in the record. Some examples include:

Fact No. 3: The citations to the Record Proper do not support the statement that Ms. Cahn understood Dr. Berryman to be a Lovelace Health System physician. Instead, the cited portions of the deposition of Plaintiff contain testimony regarding Plaintiff's recollections of the office she went to and what the doctor looked like, but do not state that she understood him to be a Lovelace

Health System employee. (R.P. 463, p. 37, line 14-R.P. 464, p. 41, line 14; R.P. 786, ¶¶ 3, 4).

Fact No. 5: Plaintiff's citation, from Dr. Connor's deposition, does not support Plaintiff's statement.

Fact No. 6: The cited portion of the Record Proper provides no reference to the date of treatment. However, the date of treatment can be found at numerous locations in the record. See, e.g., R.P. 400.

Fact No. 7: See Fact No. 6, above.

Fact No. 8: Dr. Berryman affirmatively stated that he advised Ms. Cahn to come back. See R.P. 403.

Fact No. 12: Plaintiff's last sentence, "Sara Cahn spent approximately three and a half months in treatment with these providers," is not supported by the citations to the Record Proper. There does not appear to be anything in the Record Proper that would establish precisely how long Ms. Cahn was in treatment after her diagnosis.

Fact No. 17: The quote from Dr. Connor's deposition is incomplete and as quoted, is misleading. The complete testimony is as follows:

"Q. And do you have any idea, sir, since your Office didn't move between 2006 and 2008, and Ms. Cahn received a copy of the explanation of Benefits for her visit with Dr. Berryman, why she Couldn't locate Dr. Berryman after that?

...

A. I'm not exactly sure why she could not recall Dr. Berryman. I frequently see that patients do not recall their physician's names. I see it all the time as far as I'll ask somebody, who did your surgery last year, and they have no idea. Or I ask them who their primary doctor is, and they don't know."

R.P. 490, lines 3-18.

Fact No. 19: This factual statement does not distinguish between Plaintiff's requests for "records" from Lovelace and Defendant Berryman's requests to Lovelace Health Plan for the EOBs. Plaintiff's responses to Dr. Berryman's discovery requests related to Plaintiff's record requests are at RP 734-735. These documents, as well as Ms. Cahn's deposition testimony (see RP 706) demonstrate that Plaintiff did not request her EOB's for August 2006 prior to the statute of repose expiring.

Fact No. 21: See reply to Fact No. 19. RP 734-735.

Fact No. 22: See reply to Fact No. 19.

Fact No. 23: Plaintiff did not request her EOBs for the August 2006 visit with Dr. Berryman until after the statute of repose expired. The cited testimony relates to requests for EOBs from May through July 2006, prior to her single treatment by Dr. Berryman in August 2006. Please see RP 724, 734-735.

Fact No. 29: Plaintiff's citation to RP 775 is, again, to the argument made in Plaintiff's response to Dr. Berryman's motion for reconsideration, not to the actual factual record.

Fact No. 31: Plaintiff's statement that "...there was nothing that would have put Ms. Cahn on notice that she was at Sandia OB-GYN..." is inaccurate. At RP 792, Dr. Connor discusses the signage outside the office and the cards available in the office that would have clearly put Plaintiff on notice.

REPLY ARGUMENT

I. APPLICATION OF THE STATUTE OF REPOSE TO BAR CLAIMS AFTER THREE YEARS IS ESSENTIAL TO ACHIEVING THE LEGISLATIVE GOALS OF THE MEDICAL MALPRACTICE ACT

Parts I and II of Dr. Berryman's Brief in Chief address the statutory framework, legislative intent, and policy underlying the statute of repose in the Medical Malpractice Act. Plaintiff dismisses this as "a 'plain vanilla' or one size fits all application of the statute of repose" and contends that because the discussions "fail to address the facts or case law relevant to the issue on appeal, those sections of the arguments are unhelpful in analyzing the issue before the Court." Answer Brief pp. 26, 27.

Legislative intent and the policies underlying the MMA are of paramount importance to this Court's decision. *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 29, 147 N.M. 583 (quoting *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372) ("Perhaps the most basic principle is that '[i]t is the high duty and responsibility of the judicial branch of government to facilitate and promote the

legislature's accomplishment of its purpose.'") The Plaintiff's decision not to address these considerations demonstrates that neither Legislative intent nor the important policies and purposes underlying the statute of repose support Plaintiff's position in this case.

The sole question presented in this case is one of application of the Medical Malpractice Act's statute of repose, NMSA 1978 § 41-5-13. As both this Court and the Supreme Court have recognized, adopting a statute of repose that ran from the date of the act of malpractice was essential to achievement of the Legislature's statutory goal. *Cummings v. X-Ray Associates of New Mexico*, 1996-NMSC-035, ¶ 29, 121 N.M. 821, 918 P.2d 1321; *Meza v. Topalovski*, 2012-NMCA-002, ¶ 10, ___ N.M. ___. As this Court stated in *Meza*, the historical purpose of the statute of repose was to preclude almost all malpractice claims from being brought more than three years after the act of malpractice. As such, the statute of repose creates a substantive right for a qualified health care provider such as Dr. Berryman to be free of liability after a specified period. 2012-NMCA-002, ¶ 10. Therefore, even though in a limited number of cases, application of the statute of repose may seem harsh, to achieve the important goals of the Medical Malpractice Act of making insurance available and encouraging widespread participation so that patients will have a reliable source of recovery should they be injured, the statutory benefits conferred on qualified health care providers,

including the statute of repose, must be enforced by the Courts. *Cummings v. X-Ray Associates*, 1996-NMSC-035, ¶ 28, 121 N.M. 821, 830, 918 P.2d 1321; *Christus St. Vincent Regional Medical Center v. Duarte-Afara*, 2011-NMCA-112, ¶¶ 12, 16, 151 N.M. 6.

Plaintiff's claim against Dr. Berryman was, unquestionably, asserted more than three years after the August 2006 date on which Dr. Berryman treated Plaintiff. It is necessary for the Court to hold that the statute of repose bars Plaintiff's claim in order to facilitate and promote the Legislature's accomplishment of its purpose in enacting the Medical Malpractice Act. In this case, the result is not harsh because Plaintiff and her attorneys could easily have accessed information that was identified Dr. Berryman during the eleven month time period after she learned of her diagnosis and before the statute of repose expired. Plaintiff and her attorneys needed only to click their computer mouse to request the August 2006 EOB from the Lovelace Health Plan, or, as the Plaintiff admitted in her deposition, she was able to recover the record of her co-pay to Dr. Berryman's office with the click of the mouse on her home computer, when she accessed her on-line bank account records. There is no support in the record whatsoever for Plaintiff's claim that she would have been confused by her bank account records even if she had obtained them, and Plaintiff has provided no explanation for her failure to request the August 2006 EOB. (Answer Brief at p.

22). This case is not about a lack of due process. It is a case about the lack of due diligence on the part of Plaintiff and her attorneys.

II. PLAINTIFF HAD SUFFICIENT TIME, CONSISTENT WITH DUE PROCESS, TO COMMENCE HER ACTION AGAINST DR. BERRYMAN WITHIN THE STATUTE OF REPOSE

Plaintiff argues that the statute of repose should not bar the claim in this case because “[o]ur Legislature has never enacted a statute of limitations period less than one year in duration.” Answer Brief at p. 19. The issue in this case, however, isn’t whether the period of the statute of repose is reasonable. The duration of the statute of repose is three years, not less than one year, and the three-year period has been held to be constitutionally valid. See NMSA 1978 § 41-5-13; *Garcia v. LaFarge*, 1995-NMSC-019, ¶ 33, 119 N.M. 532, 893 P.2d 428. Therefore, whether or not New Mexico has ever adopted any statute of limitations or repose that is less than one year has no relevance to the case.

Instead, the only real issue is whether, once Plaintiff identified Dr. Berryman as the August 2006 provider, Plaintiff had a constitutionally reasonable time left to commence her malpractice claim within the repose period. *Garcia v. LaFarge*, 1995-NMSC-019, ¶ 33, 119 N.M. 532, 893 P.2d 428. The determination of whether Plaintiff had a constitutionally reasonable time to commence the action requires an analysis of whether Plaintiff exercised reasonable diligence to learn of the malpractice claim. *Cummings v. X-Ray*

Associates, 1996-NMSC-035, ¶ 57 121 N.M. 821, 830, 918 P.2d 1321. See, also, *Tomlinson v. George*, 2005-NMSC-020, ¶ 24, 138 N.M. 34, 116 P.3d 105.

The undisputed facts in the case establish that Dr. Berryman saw Plaintiff on only one occasion, August 8, 2006. Plaintiff did not commence her action against Dr. Berryman until July 9, 2010, almost four years after Dr. Berryman treated Plaintiff. Plaintiff became aware of her possible malpractice claim at the time of her CT scan on September 22, 2008. After becoming aware of her possible claim, Plaintiff had three hundred twenty-one (321) days to file her medical malpractice claim against Dr. Berryman before the statute of repose expired.

Beyond those undisputed facts, the parties disagree as to whether the record shows that Plaintiff had a constitutionally adequate time to commence her claim, but failed to exercise reasonable diligence to do so. Plaintiff's primary argument is that the ten and a half months she had remaining before the statute of repose expired is constitutionally inadequate because she was required to spend three of those months undergoing surgery and the next five months recovering from the surgery and receiving follow-up care.

Dr. Berryman does not, in any way, want to trivialize the seriousness of Plaintiff's condition, surgery, and follow-up care by his arguments in this case.

However, although Plaintiff claims the surgery, recovery, and follow-up care prevented her from learning of her possible malpractice claim against Dr. Berryman, the record establishes that she did have the ability and time to retain legal counsel within about three months after the CT scan and commenced her lawsuit against Lovelace Health System, Inc., Angeline Fitzgerald, M.D., Markus Hamm, M.D., Michelle Layman, P.A., Paul Shelburne, M.D., and Douglas Krell, M.D. in less than seven months. (R.P. 726, p. 103, line 23-p. 104, line 5; R.P. 1).

If Plaintiff's counsel had conducted a cursory of investigation into her treatment, and obtained the applicable EOB and bank account record, which would be evidence of her claim for past medical expenses anyway, then Dr. Berryman's identity would have been immediately discovered in Plaintiff's own records, and Dr. Berryman would have been sued within the statute of repose. Plaintiff's ability to learn of her claims and commence suit against six co-defendants establishes that the time period was constitutionally reasonable.

Plaintiff then contends that she was prevented from learning Dr. Berryman's identity because of Lovelace Sandia Health System's categorization and storage of her medical records. The evidence in the record, however, is that, although Plaintiff sought to obtain her medical records from Lovelace Sandia Health System, neither she nor her counsel ever requested the August 2006 Lovelace Health Plan EOB records, which clearly identified Dr. Berryman. (R.P. 724, p. 96,

lines 4-6; R.P. 734-735). Further, she never reviewed her bank records, which also identified Sandia OB-GYN and were easily accessible to her online. (R.P. 728, p. 130, line 17-p. 133, line 1).

Further, even if Lovelace did not produce the information to Plaintiff when requested, it was Lovelace, not Dr. Berryman, that prevented Plaintiff from learning of her claim. Dr. Berryman should not be deprived of his substantive right under the statute of repose because of claimed wrongdoing by Lovelace.

Plaintiff had three hundred twenty-one days to commence her claim against Dr. Berryman. During that time, she was able to retain counsel and commence her lawsuit against all six co-defendants. If the time was adequate for her to commence a lawsuit against six other parties, that period of time was constitutionally reasonable and adequate for Plaintiff to learn of her potential malpractice claim against Dr. Berryman and to join him in the lawsuit. Therefore, the statute of repose in Section 41-5-13 should be applied and Plaintiff's claim against Dr. Berryman should be held to be time-barred.

III. THE DOCTRINE OF EQUITABLE TOLLING AND FRAUDULENT CONCEALMENT WAS ARGUED BY PLAINTIFF IN THE COURT BELOW, BUT HAS BEEN ABANDONED

Plaintiff argues in the Answer Brief that Dr. Berryman “incorrectly combines two distinct legal concepts: due process . . . and equitable tolling . . . This conflation of two separate legal doctrines demonstrates Appellant's flawed

understanding of the law upon which the District Court's ruling was based and undermines his argument for overturning it." Answer Brief at pp. 24-25. Dr. Berryman did address both fraudulent concealment and due process in the Brief in Chief. However, this was done because Plaintiff Cahn argued fraudulent concealment and equitable tolling as a primary basis, as well as due process, in the Response in opposition to the Motion for Summary Judgment in the District Court. (R.P. 379-384).

Dr. Berryman considered it prudent to address the major legal arguments made by Plaintiff in the Court, below, in the Brief in Chief. It has always been Dr. Berryman's position that the doctrine of fraudulent concealment and, therefore, equitable tolling, has no application in this case. Plaintiff's Answer Brief makes it clear that Plaintiff agrees the doctrine has no application and Plaintiff is no longer pursuing a fraudulent concealment argument. Therefore, the Court need not address fraudulent concealment in ruling on this case.

CONCLUSION

Plaintiff and her counsel had more than ten months after the CT scan to commence her action against Dr. Berryman before expiration of the three-year statute of repose of the Medical Malpractice Act. Although Plaintiff did commence the lawsuit against six co-defendants within three months of learning of her diagnosis, she failed to join Dr. Berryman until almost a year after the statutory repose period expired. Because the record establishes that Plaintiff had a constitutionally adequate time in which to commence her action against Dr. Berryman and did not do so, the Court should reverse the denial of summary judgment based on the Medical Malpractice Act's statute of repose. To hold otherwise is contrary to the important purposes underlying the statute of repose as part of the Medical Malpractice Act's statutory framework.

Therefore, the Defendant-Appellant, John D. Berryman, M.D., would respectfully request the Court reverse the denial of summary judgment and remand this case for dismissal of the Plaintiff's claim against Dr. Berryman as time-barred.

Respectfully submitted,

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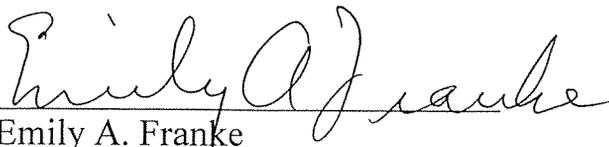
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I hereby certify that I have mailed a true copy of the foregoing Reply Brief to the following this 28th day of April, 2014:

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