

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

KATHERINE FERLIC, as the Personal
Representative of the Estate of PAMELA
SMITH, deceased,

Appellee-Respondent,

v.

No. S-1-SC-40580

No. A-1-CA-41966

No. D-101-CV-2022-01148

LOVELACE HEALTH SYSTEM, LLC, a
New Mexico limited liability company,
d/b/a Lovelace Medical Center, d/b/a
Lovelace Medical Group;

Appellant-Petitioner,

~ and ~

AHS MANAGEMENT COMPANY, INC.,
a Tennessee corporation,

Defendant.

AMICUS CURIAE BRIEF OF NEW MEXICO HOSPITAL ASSOCIATION
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS ON BEHALF LOVELACE HEALTH SYSTEM

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INTRODUCTION

The New Mexico Hospital Association (NMHA) is a voluntary membership organization that represents 47 of New Mexico's hospitals and their nearly 40,000 caring and talented employees. NMHA represents its members and others to improve the health status of the citizens of New Mexico. Several of NMHA's members are qualified health care providers (QHPs) under the New Mexico Medical Malpractice Act. NMHA and its members have an interest in the issue before the Court, because, the issues raised in Lovelace's Petition are currently being litigated in other trial courts in the state. *See* Application at 14. The resolution of this issue will affect the pending cases and those filed in the future where alleged negligence occurred prior to January 1, 2022.

The NMHA submits this amicus brief in support of Appellant-Petitioner's Petition for Writ of Certiorari to the Court of Appeals in order to provide a list of cases of which NMHA is aware in which an issue is whether a QHP hospital¹ is entitled to the protections of the Medical Malpractice Act for claims seeking to hold the hospital liable for the alleged negligence of an employee, agent,

¹ Many of the listed cases include a dispute as to whether the hospital meets the requirements of the Medical Malpractice Act for being a QHP. For purposes of this brief, if a defendant hospital asserts that it is a QHP, it is referenced as a QHP hospital for purposes of brevity.

contractor, or apparent agent of the hospital. The cases listed below are currently being litigated or, in one case, recently concluded.

1. *Jacqueline Smith and Larry Smith vs. Las Cruces Medical Center, LLC, d/b/a Mountainview Regional Medical Center, et al.*, D-307-CV-2021-02162, Judge James T. Martin. This medical malpractice lawsuit alleged negligence by the hospital and individual defendants occurring on or about March 29, 2021. On September 23, 2023, Judge Martin granted in part and denied in part Plaintiffs' motion for partial summary judgment that two nurses who were named as defendants in the case were not Qualified Healthcare Providers (QHPs) under the Medical Malpractice Act. One of the nurses was an agency nurse, employed by a staffing agency and not the hospital. Judge Martin found that she was not a QHP. The other nurse was an employee of the hospital. Judge Martin found that, because the hospital was a QHP, the employed nurse was as well, relying on this Court's decision in *Baker v. Hedstrom*, 2013-NMSC-043. Although some individual defendants were dismissed in late September 2024, the court's docket shows that the case is still open and pending jury trial.

2. *Peter Wirth, as personal representative of the Estate of Santiago Sebastian Ortiz, v. PHS-Las Cruces, Inc. d/b/a Memorial Medical Center., Defendant*, D-101-CV-2020-01561, Judge Maria Sanchez-Gagne. This medical

malpractice and wrongful death lawsuit involves Memorial Medical Center, a QHP hospital, in Las Cruces and one of its employed nurses. The First Amended Complaint, filed 6/21/2023, seeks damages arising from alleged negligence that occurred in August 2017 associated with the birth of the individual Plaintiffs' child. Plaintiffs allege, *inter alia*, that the hospital is vicariously liable for the actions of its nurse and also liable under an ostensible agency theory for alleged negligence of a physician and certified nurse midwife who were named in the original complaint, but were federal employees immune from suit.² On February 1, 2024, Memorial and the defendant nurse moved for summary judgment that the claims against the hospital and its employees or agents are covered by the Medical Malpractice Act. On May 1, 2024, the trial court entered an Order holding in abeyance a decision on the motion until closer to trial. The case is currently set for trial in April 2025.

3. *Rose Ortega v. PHC-Las Cruces, Inc., et al.*, D-307-CV-2023-01853, Judge Casey Fitch. This is a medical malpractice lawsuit alleging successive

² The United States removed the case to federal court (DNM) in December 2020, and was substituted for the federal employees and entities. There was a stipulated dismissal of the United States while the case was pending in federal court. After the dismissal of the United States, the Court declined to accept supplemental jurisdiction and remanded the case to state court. *Wirth et al. v. PHC-Las Cruces, Inc. d/b/a Memorial Medical Center, et al.*, Civ. No. 20-1340/WJ/KK, Memorandum Opinion and Order [Doc. 71], filed 8/9/21.

negligence by two QHP hospitals, Memorial Medical Center and Mountainview Regional Medical Center, other entities and some individual providers, in December 2020 and January 2021. Four of the individual providers, three doctors and a nurse practitioner, are alleged to be employees, agents, contractors, or apparent or ostensible agents of Mountainview and two individual defendants, a doctor and a registered nurse, are alleged to be employees, contractors, agents, or apparent or ostensible agents of Memorial. Plaintiffs allege that none of the individual defendants were QHPs at relevant times. Both hospitals included in their answers, both filed on 12/20/2023, to Plaintiff's First Amended Complaint, a defense that the Medical Malpractice Act applies to all claims against the hospital. Although there have been no motions regarding the applicability of the Medical Malpractice Act to the hospitals and their employees or agents, the issue exists in this pending case.

4. *Becky Whitson, et al., v. Presbyterian Healthcare Services, Inc., et al.*, D-101-CV-2022-01576, Judge Bryan Biedscheid. The Plaintiffs alleged that Presbyterian, a QHP, was directly and vicariously liable for conduct of providers treating their 13-year-old son in the emergency department of Presbyterian Dan C. Trigg Memorial Hospital in Tucumcari on September 7, 2020. Plaintiffs seek to hold Presbyterian vicariously liable for the alleged negligence of nurses, aids,

techs, and other employees, Am. Compl. ¶ 127, and for the alleged negligence of an emergency room physician employed by another entity, asserting that the physician was an agent or apparent agent of Presbyterian, *id.* at ¶¶ 23, 125.

Plaintiffs do not concede that Presbyterian is a QHP and take the position that the Medical Malpractice Act limitations are unconstitutional. *Id.* at ¶¶ 29, 31.

Presbyterian denies that Dr. Perry was an employee or agent. PHS Answer ¶¶ 23-24. Presbyterian's fourth affirmative defense contends that the Medical Malpractice Act governs Plaintiffs' claims. Although the docket shows no motion practice so far on applicability of the Medical Malpractice Act, whether Presbyterian is entitled to the limits and benefits of the Act for Plaintiffs' claims of vicarious liability for its employees and agents is at issue. The case is set for a jury trial, with jury selection in April 2025.

5. *Isabel Quinones, et al., v. Presbyterian Healthcare Services*, D-202-CV-2023-07782, Judge Erin B. O'Connell. The complaint alleges that the lawsuit is "a premises liability case, not a medical malpractice case." The case alleged that Presbyterian, a QHP, was negligent in allowing a patient to leave angry. The patient forced his way into Plaintiffs' car while Mrs. Quinones was helping Mr. Quinones into the car outside the Presbyterian Kaseman emergency department on or about September 20, 2022. Plaintiffs filed a motion for partial summary

judgment seeking judgment in their favor on Presbyterian's twelfth affirmative defense—that the case falls under the Medical Malpractice Act. After the motion was fully briefed, but before the trial court ruled, Plaintiffs withdrew their motion. The case is still pending and the issue could arise again.

6. *Aaron Boland, as Personal Representative of the Estate of Katie Hall, et al. v Justin Oneese, et al.*, D-101-CV-2021-02254, Judge Bryan Biedscheid. This is a wrongful death case alleging negligence by Lea Regional Hospital, a QHP hospital, Alteon Health New Mexico, LLC, three physicians, and three pharmacists, beginning on or about January 9, 2020. The amended complaint alleges that Lea Regional Hospital is vicariously liable for the alleged negligence of all individual defendants. *See* Am. Compl. at ¶¶ 4, 12. On July 12, 2024, the trial court entered an order granting Plaintiffs' motion for summary judgment on the applicability of the Medical Malpractice Act, finding that pharmacists and nurses were not QHPs and that neither the pharmacists nor the hospital were entitled to coverage under the Act.

7. *Annice Gouveia, et al. v. Presbyterian Healthcare Services d/b/a Lincoln County Medical Center, et al.*, D-202-CV-2023-07775, Judge Elaine P. Lujan. This case involves alleged medical malpractice January 2021 at Lincoln County Medical Center, a QHP hospital, and by a nurse practitioner employed by

the hospital. On June 16, 2024, Plaintiffs filed two motions for partial summary judgment on the applicability of the Medical Malpractice Act to the hospital and to the nurse practitioner, respectively. The motions are set for hearing on November 20, 2024.

8. *Anna Bonin v. Presbyterian Healthcare Services, et al.*, D-202-CV-2022-06655, Judge Nancy J. Franchini. The case involves alleged medical malpractice beginning in November 2019, involving two Presbyterian Healthcare Services hospitals, Kaseman and Presbyterian Hospital in Albuquerque, both QHP hospitals, and three individuals employed by Presbyterian Healthcare Services. Defendants' answer to the complaint asserts an affirmative defense that the Medical Malpractice Act governs Plaintiff's claims and that Defendants are entitled to the protections of the Act. Plaintiff filed a motion for summary judgment on applicability of the Act, based on illusory insurance coverage. The court denied the motion by order entered on 4/24/24, finding that genuine issues of material fact exist. Although the issue of whether Presbyterian and its employees are covered by the Act when its employees allegedly are not QHPs does not appear to have been addressed yet, it is inherent in the case. The case is currently set for trial in February 2025.

9. *Hogan, et al., v. Las Cruces Medical Center d/b/a Mountainview Regional Medical Center*, D-307-CV-2023-00107, Judge James. T. Martin. An issue in this medical malpractice case is whether the hospital is liable for the negligence of an emergency room provider not employed by the hospital and, if so, whether the hospital's liability is governed by the Medical Malpractice Act when the hospital is a QHP. On 2/14/24, Plaintiffs moved for partial summary judgment on the issue of whether the Act would apply if the hospital is found liable for the alleged negligence of the emergency department physician. On August 16, 2024, the trial court entered an order finding that the Act does not apply to a hospital's liability for the conduct of an ostensible agent. The case is pending a jury trial, with docket call and jury selection scheduled for July 2025.

10. *Kristin Beall v. Presbyterian Healthcare Services.*, D-202-CV-2023-02511, Judge Elaine Lujan. The case involved claims of alleged premises liability, negligence, and medical malpractice against Presbyterian, a QHP, arising on or about November 21, 2021, at Presbyterian Hospital in Albuquerque. Plaintiff filed a motion for partial summary judgment seeking a determination that the Medical Malpractice Act did not apply to actions involving hospital security guards, who had allegedly wheeled the plaintiff outside while improperly she was restrained in a wheelchair by an ETOH belt, arguing that the guards' actions were ordinary

negligence, not medical malpractice. The court denied the motion, noting that whether a claim amounted to medical malpractice or ordinary negligence was a question of fact for the jury.³

NMHA does not represent that this is an exhaustive list of all cases pending in this state that include the same issue as in the Petition for Writ of Certiorari to the Court of Appeals. However, the list shows that there are cases other than this one pending or recently concluded in three judicial districts before seven different judges and involving seven different hospitals. A timely decision in this proceeding may provide guidance to courts in the pending cases, as well as any others filed.

Therefore, NMHA respectfully requests that the Petition for Writ of Certiorari to the Court of Appeals be granted.

³ This case was dismissed in August 2024, after the parties resolved their dispute. The court retains jurisdiction to resolve any issues related to payment by the Patient's Compensation Fund. Although the case is not currently pending, it is included as a recent case involving the issue of a qualified health care provider hospital's employee's status under the Medical Malpractice Act..

Respectfully submitted,

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