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-1SC-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.

APPELLEE-RESPONDENT'S ANSWER BRIEF TO APPELLANT-PETITIONER LOVELACE HEALTH SYSTEM, LLC'S BRIEF-IN-CHIEF

Kathy Love
Katie Curry
McGinn Montoya Love Curry & Sievers, PA
201 Broadway Blvd, SE
Albuquerque, NM 87102
Tel: (505) 843-6161
kathy@mcginnlaw.com
katie@mcginnlaw.com

Attorneys for Appellee-Respondent Pamela Smith, deceased, by P.R. Katherine Ferlic

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, undersigned counsel certifies that this response complies with Rule 12-318(F)(3)NMRA, as it contains 8809 words in a proportionately-spaced type. The word count was obtained using Microsoft Word for Microsoft 365 MSO (Version 2501) (2025).

CITATIONS TO RECORD PROPER AND TRANSCRIPTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Legislature did not include nurses in the list of providers eligible to become qualified healthcare providers when it originally drafted the Medical Malpractice Act (MMA). NMSA 1978 § 41-5-3. The Legislature subsequently declined multiple invitations over the years to add nurses to the Act. Because nurses cannot be qualified healthcare providers, *respondeat superior* claims against hospitals for the conduct of nurses do not meet the definition of a "malpractice claim" contained in the MMA. Section 41-5-3; *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 31, 309 P.3d 1047 ("[I]t is the licensure or certification of the *individual* that must be of concern to the Legislature.") (emphasis in original). Thus, vicarious liability claims for the conduct of non-qualified provider nurses are not subject to the terms of the MMA, including the limitations on recovery.

This case includes vicarious liability claims against Lovelace for the reckless actions of nurses in Lovelace Medical Center's post-anesthesia care unit related to administering Fentanyl. The nurses' reckless conduct led to the untimely death of 62-year-old Pamela Smith in the spring of 2021. Lovelace Hospital System, a publicly traded out-of-state healthcare corporation owned largely by private equity investors, including Pure Health, a minority owner from the United Arab Emirates, sought the benefits of the MMA by applying to become a qualified healthcare provider. In so

doing, Lovelace promised to abide by the strictures of the MMA. "The filing of proof of financial responsibility with the superintendent…shall constitute a conclusive and unqualified acceptance of the provisions of the Medical Malpractice Act." NMSA 1978, § 41-5-26. Now, however, Lovelace attempts to expand the parameters of the Act to claims the Legislature purposefully omitted, to the detriment of the PCF and the patients and providers it is intended to serve.

In its Answer, Respondent will explain how the plain language of the MMA, the Act's legislative history and 2021 amendments, and the case law of this state all support the district court's ruling that nurses are not qualified healthcare providers under the Medical Malpractice Act, and that Lovelace is not entitled to the benefit and protections of the Medical Malpractice Act with respect to the conduct of its nurses. This decision is in line with multiple other district courts around the state, which have consistently ruled for years that nursing conduct does not fall within the MMA, and that hospitals' vicarious liability for the negligence of their nurses is not subject to the benefits of the Act. Yet now, when the statute of limitations for claims brought under the pre-2021 amendments to the MMA has run (other than for claims of minors), Lovelace seeks to reverse this tide and obtain a cap on damages for claims the Legislature specifically excluded from the MMA. Allowing out-of-state corporations like Lovelace Healthcare System to reap Patient's Compensation Fund benefits that the Legislature did not contemplate, and that they have not paid for,

improperly drains the PCF and endangers its solvency for the patients and independent providers who depend on it. The decision of the district court granting Plaintiff-Respondent's motion for summary judgment was legally sound and should be affirmed.

QUESTIONS PRESENTED

1. Is nursing conduct subject to the benefits and protections of the Medical Malpractice Act?

2. Do hospitals get the benefits and protections of the Medical Malpractice Act for their vicarious liability for the conduct of employees the Legislature specifically excluded from the Act?

FACTUAL AND PROCEDURAL BACKGROUND

Patients are extremely vulnerable after surgery because they are at risk of anesthesia-caused respiratory depression. RP 226 (Plaintiff's Motion to Compel No. 2 to Lovelace Health System). They must be closely watched by nurses in the post-anesthesia care unit ("PACU") for signs of breathing problems until they have safely come out of anesthesia. RP 6, 7 (Complaint, filed June 29, 2022). Because pain management is often necessary for post-surgical patients, PACU nurses must be well-versed in the rules for safe administration of opioid pain medications, which pose additional risk of slowing a patient's breathing and can cause respiratory arrest. RP 7 (Complaint, filed June 29, 2022). PACU nurses must: 1) not administer opioid pain

medications, such as fentanyl, when a patient exhibits respiratory issues; 2) start by giving the patient the lowest dose of opioid possible; and 3) closely monitor the patient's respiratory rate after administration of opioids. RP 8, 9 (Complaint, filed June 29, 2022). Violating these rules will result in respiratory arrest and death. RP 9 (Complaint, filed June 29, 2022).

Pamela Smith underwent a successful elective back surgery at Lovelace Medical Center in March of 2021. RP 10 (Complaint, filed June 29, 2022). She was transferred to the PACU in stable condition, but began to exhibit breathing problems, documented by nurse Stacy Mapes. *Id.* Instead of contacting the anesthesia team to evaluate Ms. Smith's respiratory status, Nurse Mapes gave Ms. Smith 50 mcg of fentanyl – the highest dose allowed under the range order entered by the anesthesiologist before surgery – followed minutes later by Demerol, another opioid. RP 10, 11 (Complaint, filed June 29, 2022). Critically, Nurse Mapes then left Ms. Smith's bedside to make a phone call regarding another patient, without monitoring Ms. Smith's respiration, waiting to see how she responded to the opioids, or handing her off to another nurse. RP 11 (Complaint, filed June 29, 2022). PACU nurse Michele Hazuda claims she was monitoring Ms. Smith during this time but there is no evidence in the medical records or corroboration from any other witness to support her claim. RP 2526 (Plaintiff's Response in Opposition to Lovelace's Motion for Partial Summary Judgment Regarding Punitive Damages, filed October

1, 2023). She says she does not recall when Ms. Smith's breathing slowed, but when she responded to an alarm, her respiratory rate was a dangerous five breaths per minute. RP 2526 (Plaintiff's Response in Opposition to Lovelace's Motion for Partial Summary Judgment Regarding Punitive Damages, filed October 1, 2023). A code was called, but because of the length of time she was deprived of oxygen, Ms. Smith suffered a hypoxic brain injury. RP 2527 (Plaintiff's Response in Opposition to Lovelace's Motion for Partial Summary Judgment Regarding Punitive Damages, filed October 1, 2023). Pursuant to the advice of her Lovelace providers, she was removed from life-support measures and died on April 18, 2021. *Id.*

On June 28, 2023, the Honorable Kathleen McGarry Ellenwood granted Plaintiff's Motion for Partial Summary Judgment that Registered Nurses are not "Qualified Healthcare Providers" under the Medical Malpractice Act. RP 436-438; see also RP 879-881 (Amended Order permitting request for interlocutory review). In its Order, the district court held 1) that "[r]egistered nurses are not categorically qualified to be qualified healthcare providers under the Medical Malpractice Act," and 2) that Lovelace "is not entitled to the benefit and protections of the Medical Malpractice Act with respect to the conduct of its nurse employees." *Id.* In so ruling, the district court rejected Lovelace's argument that the plain language of the MMA conflicted with its purpose and declined Lovelace's invitation to read into the Act

language that was not there. The district court's decision was in alignment with numerous other district court rulings on the same issue. *See* Section IV, *infra*.

Upon receiving the district court's order, the parties conducted discovery, held a mediation in November 2023, disclosed and deposed experts, and prepared for trial, which was set to begin on January 13, 2025. In December 2023, seven months after the district court entered its order, Lovelace sought interlocutory review, which the Court of Appeals denied on August 26, 2024. See Order, attached as Exhibit A to Lovelace's petition for writ of certiorari. Lovelace subsequently filed a petition for writ of certiorari on October 3, 2024, which Ms. Smith's Estate opposed on the basis that it did not meet the criteria for a writ of certiorari. *See* Response to Petition for Writ, filed October 18, 2024. Lovelace's petition was granted on November 20, 2024.

STANDARD OF REVIEW

Whether the Legislature intended that nursing conduct be encompassed in the Medical Malpractice Act is a question of law. "Interpretation of a statute is a matter of law, as is the determination of whether the language of a statute is ambiguous." *State v. Herrera*, 2024-NMCA-063, ¶ 11, 554 P.3d 743, 747 (internal quotation marks and citations omitted). "Our primary goal when interpreting statutory language is to give effect to the intent of the Legislature." *Id.* "Our inquiry begins with an examination of the language utilized by the Legislature. *State v.*

Burke, 2007-NMCA-093, ¶ 7, 142 N.M. 218, 220, 164 P.3d 99, 101. "Additionally, we may consider the structure, context, history and background of the statute, as well as the likely policy implications of various constructions." *Burke*, 2007-NMCA-093, ¶ 7 (internal quotation marks and citations omitted). Summary judgment is appropriate in the absence of any genuine issues of material fact and where the movant is entitled to judgment as a matter of law. Rule 1-056 NMRA.

ARGUMENT

I. Nurses are not Eligible to be Qualified Healthcare Providers Under the MMA, and Hospitals are not Entitled to the Benefits of the MMA for Vicarious Liability for Nursing Conduct.

The Legislature enacted the Medical Malpractice Act to promote the health and welfare of New Mexicans by making professional liability insurance available to health care providers. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 16, 309 P.3d 1047 (citing NMSA 1978, § 41-5-2, repealed 2021). The Act was enacted to meet a perceived insurance crisis in the state. *Id.*, *see generally* Ruth L. Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M. Law Rev. 5, 6-8 (1976). To solve the problem, the Legislature "create[d] a balanced statutory scheme for the litigation of medical malpractice cases, one that benefited both health care providers and patients." *Leger v. Leger*, 2022-NMSC-007, ¶ 14, 503 P.3d 349 (2021).

A. The plain language of the Medical Malpractice Act makes clear that nursing conduct does not fall within the Act.

"In construing a statute, [the Court's] primary focus is to ascertain and give effect to the intent of the legislature." *Roberts v. Southwest Community Health Servs.*, 1992-NMSC-042, ¶ 12, 114 N.M. 248, 837 P.2d 442. The Court's "interpretation of legislative intent comes primarily from the language used by the legislature, and [the Court] will consider the ordinary meaning of such language unless a different intent is clearly expressed." *Id.* "Where the legislature defines words used in the statute, [the Court] must interpret the statute according to those definitions." *State of N.M., ex rel. NM Gaming Control Bd. v. Ten Gaming Devices*, 2005-NMCA-117, ¶ 6, 138 N.M. 426, 120 P.3d 848. Courts "are not free to construe unambiguous legislation; they may not read language into a statute that is not there, particularly if it makes sense as written." *Lazo v. Bd. of County Comm'rs*, 1984-NMSC-111, ¶ 11, 102 N.M. 35, 690 P.2d 1029. The MMA is in derogation of common law and must therefore be strictly construed. *Wilschinsky v. Medina*, 1989-NMSC-047, ¶ 21, 108 N.M. 511, 775 P.2d 713.

The stated purpose of the Medical Malpractice Act is to "promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." *See* NMSA 1978 § 41-5-2. To accomplish this, the Legislature offered certain health care providers benefits if they participated in the Act. To obtain the benefits, "[h]owever, the legislature conditioned a health care provider's entitlement to these 'benefits' on meeting the

qualifications of the Act." *Roberts*, ¶ 13 (citing Section 41-5-5(A)). "The Act specifically denies any of its benefits to those who do not qualify." *Id.* "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." NMSA 1978 § 41-5-5(C) (1977). "Thus, the legislature encouraged health care providers to become qualified by accepting the burdens of qualification, and offered certain benefits in return." *Roberts*, 1992-NMSC-042, ¶ 13.

Under the version of the New Mexico Medical Malpractice Act that applies to this matter, before the 2021 amendments took effect, nurses are not "qualified health care providers" and nursing conduct is not subject to the Act's cap on damages. The operable definition of a "qualified health care provider" is found in Section 41-5-3(A) (1997) which defines "health care provider" as follows:

> Health care provider means a person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant.

NMSA 1978 § 41-5-3(A) (1997). In 2021, the Legislature made extensive changes to the Medical Malpractice Act, which do not apply to this case because they did not go into effect until January of 2022 and the nursing malpractice that caused Ms. Smith's death occurred on March 29, 2021. RP 1-17 (Complaint, filed June 29, 2022).

While the statute specifically lists, for example, "nurse anesthetist," the Legislature omitted registered nurses from the definition of "health care provider." Section 41-5-3(A) (1997). The well-established principle of *expressio unius est exclusion alturios* (the expression of one thing is the exclusion of another) is applicable here. Applying this rule of statutory interpretation, the Legislature's inclusion of various specific types of providers who can be qualified health care providers means any type of provider <u>not</u> mentioned in the definition is <u>not</u> a qualified health care provider under the Act. In short, "Malpractice" refers to departures from the standard of care by a "health care provider," with "health care provider" defined to include only a specific list of providers. NMSA 1978, § 41-5-3 (A), (C) (1977); NMSA 1978, § 41-5-3 (C) (2021). Nurses are not included in that list. *Id.*

It is well understood that the Legislature enacted the Medical Malpractice Act after careful consideration of its implications and of which health care providers needed protections under the MMA. *Roberts v. Southwest Community Health Servs.*, 1992-NMSC-042, ¶ 14, 114 N.M. 248, 837 P.2ds 442 ("Surely, in considering such wide-ranging legislation as the Act, the legislature must have canvassed the current trends in malpractice law.") The Legislature chose to omit registered nurses from the definition of "health care provider" under the Act. This purposeful decision should not be undone in the courts.

B. The history surrounding the Medical Malpractice Act affirms the intent of the Legislature to exclude nursing conduct from the pre-2021 version of the Act.

Events following enaction of the MMA confirm the Legislature's intent to exclude nursing conduct from the MMA. The New Mexico Legislature *rejected* legislation introduced in 2005, 2011, and 2015 that would have expanded the MMA to allow nurses to become qualified health care providers, reflecting a clear understanding that, at the time of Ms. Smith's injury in March of 2021 and subsequent death on April 18, 2021, the Legislature deliberately excluded nursing conduct from the MMA. RP 361-362 (47th Legislature, Sen. Bill 6 (2005); 50th Legislature, Sen. Bill 333 (2011); 52nd Legislature, House Bill 542 (2015)).

The legislative history of the 2021 overhaul to the MMA further confirms that nursing conduct is not subject to the benefits of the pre-2021 Act, and that the Legislature did not intend to leave a loophole for vicarious liability for such conduct. The Legislature's 2021 amendments to the MMA were a result of negotiation and compromise agreement between health care providers, patients, hospitals and lawyers. *See* Plaintiff-Appellee's Response to Application for Interlocutory Appeal, p. 16, filed June 25, 2024. House Bill 75, which ultimately became the amended Medical Malpractice Act, was originally introduced as a bill intended solely to prohibit hospitals from receiving the benefit of the $600,000 cap under the Act. *Id.* One element of that compromise was that certain categories of nurses were, for the first

time, permitted to participate in the Act as qualified health care providers. The definition of a "health care provider" that may qualify to participate in the Act was changed to add "certified nurse practitioner, clinical nurse specialist, or certified nurse-midwife." *See* § 41-5-3 (C) (2021). The nurse lobby was involved in and approved of the amendments to the Act. RP 1236-38 (transcript testimony of Linda Siegel, registered lobbyist for nursing association, before Senate Judiciary Committee, February 22, 2023). Other legislation was introduced during the same session to add limitations on vicarious liability. Senator Liz Stefanics introduced Senate Bill 239, which proposed that the Legislature amend the Medical Malpractice Act to provide that "[i]f a qualified health care provider is sued under a theory of vicarious liability for the actions of an employee…the qualified health care provider is entitled to the protections of the Medical Malpractice Act for the claims of vicarious liability, as well as any direct liability claims." RP 1239, 1246-47 (SB 239). This bill did not pass, and language entitling qualified health care providers to the protections of the Act for vicarious liability was specifically not included in the 2021 amendments to the Act. Instead, the enacted bill increased the cap for hospitals ($4 million for malpractice occurring in 2022, $4.5 million for malpractice occurring in 2023, $5 million for malpractice occurring in 2024, $5.5 million for malpractice occurring in 2025, and $6 million for malpractice occurring in 2026 and thereafter), and, because of the increase in the cap from $600,000 to $4 million (and eventually $6 million in

in 2026 and thereafter), changed the definition of "hospital" to encompass vicarious liability claims by including "employees and locum tenens providing services at the hospital; and agency nurses providing services at the hospital." See Section 41-5-6 (C) – (F)(2021) (limitations of recovery) and 41-4-3 (D) (2021) (definition of hospital).

The history surrounding nurses' attempts to become qualified health care providers under the Act, and the Legislature's continual rejection of those efforts until the definition of a hospital was changed under the 2021 amendments, demonstrates that nursing conduct taking place before the amendments went into effect in January of 2022 is not subject to the benefits and protections of the Act. Similarly, the Legislature's specific decision not to extend the protections of the Medical Malpractice Act to claims of vicarious liability against qualified health care providers establishes that hospitals such as Lovelace do not enjoy the benefits of the Act for claims of vicarious liability involving the actions and omissions of providers excluded from coverage under the Act.

Even with these exclusions, hospitals still gain from the Medical Malpractice Act. Under the MMA prior to the 2021 amendments, hospitals benefited from the cap for their own departures from the standard of care. For example, if in this case the hospital had enacted a policy that did not comply with the standard of care because it required nurses to monitor patients too infrequently after opioid administration, leaving patients unattended during the time they were most vulnerable to respiratory

distress, the cap would apply to the hospital's liability for its own "departure from accepted standards of health care." *See* NMSA 1978 § 41-5-3(C) (1997). As another example, range orders, which give nurses discretion over the dosage and frequency of medication administration within certain parameters, are falling out of favor across the United States. If allowing range orders for medication had been below the standard of care at the time Pamela Smith was in the Lovelace PACU, and the hospital allowed range orders despite this, the hospital would benefit from the MMA caps for its own "departure from accepted standards of health care." *Id.* There are myriad scenarios under which hospitals were protected for their own malpractice. But the legislature did not intend that they benefit from a $600,000 cap for vicarious negligence for providers who were not qualified to participate in the Act until a bargain was struck in 2021 to raise the cap and, in turn, expressly include hospital employees under the definition of "hospital."

C. The 2021 amendments to the MMA confirm that nursing conduct was not included in the previous version of the Act, and that hospitals were not entitled to the MMA's protections for their vicarious liability for non-qualified healthcare providers.

The 2021 amendments to the Medical Malpractice Act are inapplicable in this case, which concerns nursing negligence on March 29, 2021, that lead to Ms. Smith's death in April of 2021. There is no legitimate basis to claim that the amended MMA "clarifies" the prior version of the Act. Instead, the amended MMA was a result of a bargain struck among interested parties that included raised caps in

exchange for allowing coverage of additional types of providers under the Act. Whether any type of nurse should be included in the amended definitions was a hotly contested issue in the 2021 legislative session. Ultimately, only certain high-level nurses – certified nurse practitioners, clinical nurse specialists, certified nurse-midwives – were allowed to participate in the MMA. *See* NMSA 1978 § 41-5-3(D) (2021). Registered nurses, licensed nurse practitioners, and others were intentionally excluded from the definition of those independent providers permitted to participate in the Act. Consistent with this interpretation, in December 2020, the Office of Superintendent of Insurance published a "Medical Malpractice Act/Patient's Compensation Fund Modification Report," dated December 31, 2020 (RP 367, 370-71) which makes clear that registered nurses were not permitted to participate in the MMA. The report discusses the proposed expansion of the definition of a "health care provider," and specifically whether the definition should be changed to include nurses. Then-Superintendent Russ Toal wrote that "[s]ome stakeholders suggest that the definition of health care provider should be expanded to include all persons licensed in the state to provide health care services. This would include nurses…." RP 370-71.

Superintendent Toal's report disproves Lovelace's claim that the 2021 amendments "clarified" that nurses were in fact qualified healthcare providers under the Act. The amendments were not a retroactive clarification; rather, they significantly

rewrote sections of the Act to overhaul the types of providers included (NMSA 1978, § 41-5-3 (D) (2021)); the definition of "hospital" (NMSA 1978, § 41-5-3 (E) (2021)); and the limits on liability for qualified providers going forward (*e.g.,* NMSA 1978, § 41-5-6 (E) (2021)). "The law of statutory construction presumes that when the legislature amends a statute, it intends to change the existing law." *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶ 14, 453 P.3d 434, 439 (internal citations omitted). Further, there is no evidence the Legislature intended the amendments to apply retroactively. "New Mexico law presumes a statute to operate prospectively unless a clear intention on the part of the legislature exists to give the statute retroactive effect." *Coleman v. United Eng'rs & Constructors, Inc.*, 1994-NMSC-074, ¶ 12, 118 N.M. 47, 52, 878 P.2d 996, 1001(internal citations omitted).

Lovelace advances the fragile argument that because the title of the bill that ultimately became the amended Medical Malpractice Act reads "Clarifying and Modernizing the Medical Malpractice Act," the amendments should be read to apply retroactively to nursing conduct, and the vicarious liability of hospitals for such conduct. In order to accept this theory, the Court must ignore the unambiguous statutory language excluding nurses from the pre-2021 version of the Act – NMSA 1978, § 41-5-3(A) (1992) – as well as the aforementioned legislative history surrounding the deliberate exclusion of nursing conduct pre-2021. In contrast, the plain language of the 2021 amendments establish that they created substantively new

and different provisions that apply to medical malpractice claims against qualified healthcare providers after January of 2022. These include a new definition of "hospital" that "includes a hospital's…employees and locum tenens providing services at the hospital; and agency nurses providing services at the hospital." NMSA 1978, § 41-5-3(E) (2021). Hospitals no longer participate in the medical review process under amended Act. Section 41-5-5(D) (2021). Separate caps were established for claims against independent providers, outpatient facilities, and hospitals. NMSA 1978, § 41-5-6 (2021). A patient's compensation fund advisory board was created to oversee the setting of surcharges for participating providers, advise the superintendent, and report to the Legislature on the financial condition of the fund. NMSA 1978, § 41-5-25.1 (2021).

Lovelace urges the court to ignore the plain language of the MMA in favor of looking to the title of the bill that ultimately became the amended Act, in an attempt to justify retroactive application of the 2021 amendments. Such an approach improperly encroaches on the purview of the Legislature. "It is not the business of the courts to look beyond the plain meaning of the words of a clearly drafted statute in an attempt to divine the intent of the Legislature. *State v. Ellenberger*, 1981-NMSC-056, ¶ 6, 96 N.M. 287, 288, 629 P.2d 1216, 1217. "We are not permitted to read into a statute language which is not there, particularly if it makes sense as written." *State ex rel. Barela v. N.M. State Bd. of Educ.*, 1969-

NMSC-038, ¶ 7, 80 N.M. 220, 222, 453 P.2d 583, 586-87. This Court has long applied the following rule:

> The rule which permits reading the title of an act in aid of statutory construction applies only in cases where the legislative meaning is left in doubt by failure to clearly express it in the law. Moreover, the ambiguity which justifies a resort to the title must arise in the body of the act; an ambiguity arising from the title is not sufficient. * * * The title of an act cannot limit the plain meeting of the text. * * * The title is not conclusive in regard to the meaning of a statute.

Ellenberger, 1981-NMSC-056, ¶6 (quoting 73 Am.Jur.2d, *Statutes*, § 98 (1974). Thus, the starting point of statutory analysis must always be the statute itself, which represents the primary expression of the intent of the Legislature. *Id.* "The heading to an article represents little more than a convenient tag to an organizational grouping of statutes; it therefore cannot be used to create an ambiguity in an otherwise clear expression of the intent of the Legislature." *Ellenberger*, 1981-NMSC-056, ¶ 6 (citing *Hewatt v. Clark*, 1940-NMSC-044, ¶ 14, 44 N.M. 453, 457, 103 P.2d 646, 649 (1940) ("We know that the meaning of the act must primarily be determined from the language of the act itself.")

The plain language of the MMA is clear: nurses were not included in the definition of healthcare provider in the pre-2021 MMA, and the benefits of the Act do not apply to the malpractice of non-qualified providers. The 2021 amendments to the Act significantly changed the law, and to elevate the importance of a bill's

title over the actual text the Legislature passed into law is contrary to basic tenets of statutory construction. *See Ellenberger*, 1981-NMSC-056, ¶6.

II. In Vicarious Liability Claims, the Status of the Active Tortfeasor Controls in Determining Whether the MMA Applies.

Under the applicable law, in situations where registered nurses are active tortfeasors, it is their status that controls. The New Mexico Supreme Court has made clear that for vicarious liability claims, the status of the active tortfeasor determines whether the MMA applies.

> [W]e conclude that it is the licensure or certification of the *individual* that must be of concern to the Legislature…[U]nder the doctrine of *respondeat superior*, the legal organization as the passive tortfeasor is only liable to the extent of the legal liability of the individual medical professional who is the active tortfeasor.

Baker v. Hedstrom, 2013-NMSC-043, ¶ 31, 309 P.3d 1047 (emphasis in original) (citing *Harrison v. Lucero*, 1974-NMCA-085, 86 N.M. 581). Thus, if the hospital is vicariously liable for the negligence of an active tortfeasor who is a qualified health care provider, such as a physician, nurse anesthetist, or physician's assistant, then the hospital receives the benefits of the Medical Malpractice Act. If the active tortfeasor is not a qualified health care provider, then the hospital as a passive tortfeasor is not entitled to the benefits of the Act. Because nurses are not entitled to the protections of the Medical Malpractice Act, their employers are not entitled to the protections of the Act for their conduct. *See Baker*, 2013-NMSC-043, ¶ 31.

In cultivating the MMA landscape, the Legislature considered that claims could be brought vicariously against hospitals. *See Baker*, 2013-NMSC-043, ¶¶ 37-38 (reviewing the MMA's references to *respondeat superior*). The application procedure and the selection of a medical review panel under the MMA are different when claims are brought vicariously. *Id.*; *see also* NMSA 1978, § 41-5-16(C) (1976); NMSA 1978, § 41-5-17(E) (1976). Despite acknowledging the potential for vicarious claims and providing for them procedurally, the Legislature did not include hospital employees within the definition of "healthcare providers" or otherwise provide for any hospital employees' inclusion under the MMA. The Legislature clearly knew how to account for vicarious lability but did not extend the MMA's protections to malpractice claims against non-qualified provider employees for whom a qualified provider hospital could be vicariously liable. "[W]e presume that a [L]egislature says in a statute what it means and means in a statute what it says." *State v. Rael*, 2024-NMSC-010, ¶ 40 (internal quotation marks and citation omitted).

The MMA's definition of "malpractice claim" does not require a different result. Regardless of whether certain acts and omissions fall within the definition of malpractice in the MMA, the fact remains that only qualified healthcare providers are entitled to the benefits of the Act, and it is only the malpractice of *healthcare providers* that is covered. Section 41-5-3(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." Section 41-5-5(C). "The Act specifically denies any of its benefits to those who do not qualify. Section 41-5-5(C)." *Roberts v. Southwest Community Health Servs.,* 1992-NMSC-042, ¶ 13. Nurses do not qualify, and their conduct is omitted from the protections of the Act.

Lovelace touts *Baker v. Hedstrom*, 2013-NMSC-043 as considering a "mirror image of the question presented in this appeal." BIC at 16. In *Baker,* the issue was whether several professional corporations, which the Office of Superintendent of Insurance had treated as qualified healthcare providers and from which the Office of the Superintendent of Insurance had accepted surcharges, should be afforded protections under the MMA. The Court of Appeals and Supreme Court held that these professional corporations were entitled to the protections of the Act. In doing so, the Supreme Court found "several provisions in the Act indicate that the Legislature intended professional medical organizations like Defendants [the professional doctor groups] to be covered by the Act." 2013-NMSC-043, ¶ 1, 309 P.3d 1047. The court analyzed the definitions of a qualified healthcare provider and the Professional Corporations Act and found that professional corporations were within the definition of health care provider and thus entitled to the protection of the MMA. Here, by contrast, the Legislature specifically rejected including registered

nurses in the definition of health care provider on multiple occasions, as explained in detail in Section II(A), *supra*.

Further, the professional medical organizations considered by the Supreme Court in *Baker* were practice groups the defendant physicians operated under to provide health care. For example, Misbah Zmily, M.D. practiced under Misbah Zmily, P.C.; Lee Caruana, M.D. practiced under Family Practice Associates, P.C.; and Omkar Tiku, M.D. practiced under Omkar Tiku, P.C. "Were we to accept Plaintiffs' interpretation, we would be forcing individual providers to choose between either being fully protected by the MMA by operating as a sole proprietorship or limiting their exposure to other types of liability besides malpractice by practicing under the umbrella of a business entity." *Baker* at ¶ 21. "Therefore, we determine that the Legislature recognized that individual medical professionals may operate as a corporation or some other type of legal entity, and by doing so, the legal entity shall likewise be entitled to qualify under the Act." *Id.* These types of physician groups under consideration in *Baker* stand in stark contrast to Lovelace Health System, which is part of the Ardent Health Services conglomerate, the fourth largest privately held healthcare system in the United States.

Further, to read healthcare providers into the Act that the Legislature purposefully excluded would result in a misuse of Patient's Compensation Fund proceeds when surcharges were not calculated in amounts sufficient to cover the

negligence of non-qualified health care providers like nurses. Lovelace takes the position that the Medical Malpractice Act's cap on damages applies to both direct medical malpractice claims against Lovelace, as well as its vicarious liability for all types of employees, whether they are eligible to be covered under the Act or not. Under Lovelace's proposed extension of the Act, coverage even for the actions and omissions of employees the Legislature specifically chose not to include as covered health care providers comes from an underlying $200,000.00 policy through Preferred Professional Insurance Company, with the remaining $400,000 coming from the New Mexico Patient's Compensation Fund. These policies, and in particular the Patient's Compensation Fund, should not cover any actions or omissions by registered nurses, as it would be a misuse of qualified health care provider funds to pay for harm caused by non-qualified healthcare providers and for which surcharges were not collected. In addition to its coverage obtained through the Medical Malpractice Act, Lovelace has a self-insured retention of $7.5 million, a $20 million professional liability excess policy through Lloyd's Syndicate, $15 million in excess coverage with Illinois Union Insurance Company, and $10 million with National Fire & Marine Insurance Company. RP 1270-1273 (Lovelace 2nd Supp. Answer to Interrogatory No. 1). It is this coverage that should apply to liability for the acts and omissions of employees who do not fall within the purview of the Medical Malpractice Act, consistent with the clear directive of the Legislature.

Baker v. Hedstrom addressed a different legal question with a different factual background. Nothing found in *Baker* weighs in favor of extending the liabilities of the Patient's Compensation Fund to cover negligence the Legislature did not intend to include.

The cases cited by Lovelace do not support a new extension of the MMA to include claims arising from the acts and omissions of nurses. Lovelace points to *Wilschinsky v. Medina*, 1989-NMSC-047, a case in which a woman with a debilitating migraine headache visited her doctor, who administered several drugs that could impair her ability to drive. *Wilschinsky* at ¶¶ 3-4. The woman was involved in a serious car crash shortly after leaving the doctor's office, causing serious injuries to the plaintiff, who brought claims against both the woman and her doctor, a qualified healthcare provider. *Id.* The Court of Appeals determined the Medical Malpractice Act applied to the plaintiff's claims against the doctor, noting that if it did not so hold, "an unreasonable classification would result, as only patients with direct injuries from acts of malpractice would be denied full recovery under the Act." *Id.* at ¶¶ 26, 28. The case did not involve the conduct of nurses, *respondeat superior* liability of hospitals, or a dispute regarding whether the defendant doctor was a qualified healthcare provider. No part of the *Wilchinksy* court's discussion informs the decision before the Court in this case.

Lovelace next turns to *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, but again, the case does nothing to advance its position. In *Christus*, a patient sued a non-QHP hospital and QHP doctors who worked at the hospital. The QHP doctors successfully moved for dismissal based on the MMA's three-year statute of repose. *Id.* ¶ 4. The hospital filed a third-party complaint against the doctors for indemnification for any amount the hospital might pay based on vicarious liability for the doctors' medical malpractice. *Id.* ¶ 5. The court held the indemnification claim was subject to the MMA statute of repose. The court explained that "a claim may be construed as a malpractice claim within the meaning of the MMA if 'the gravamen of the third-party action is predicated upon the allegation of professional negligence by a practicing physician.'" *Id.* ¶ 15 (quoting *Wilschinsky v. Medina*, 1989-NMSC-047, 108 N.M. 511). *Duarte-Afara*, like *Wilschinsky*, addresses the parameters of third-party claims against doctors who were undisputedly qualified healthcare providers under the MMA. It does not contemplate the conduct of nurses, *respondeat superior* liability of hospitals, or attempts to expand the MMA beyond those providers the Legislature included in the Act. *Duarte-Afara* does nothing to advance Lovelace's position.

III. Hospitals Benefit Greatly from QHP Status, Despite the Fact that Their Vicarious Liability for the Acts of Certain Employees, Such as Nurses, is Not Covered by the Pre-2021 Act.

Lovelace contends that the *Baker* rule – the QHP status of the active tortfeasor controls in determining whether the provisions of the MMA apply – "render[s] the MMA's protections for hospitals illusory." BIC at 16. This is not true. A serious and unanticipated injury to a patient may give rise to several types of claims against a hospital. Some of these – *respondeat superior* claims against the hospital for the acts of employed nurses or doctors, for example – are ***vicarious liability*** claims. Other claims against hospitals – such as negligent credentialing, negligent training and supervision, negligent hiring and retention – are ***direct liability*** claims. Thus, as Lovelace acknowledges, a corporation can only act through its officers and employees (*see* UJI 13-409 NMRA). This does not mean, however, that every claim against a hospital is a vicarious liability claim.

This case provides an example. The issue presently before the Court involves Ms. Smith's vicarious liability claim against Lovelace for the actions of the PACU nurses in choosing to administer Fentanyl and Demerol when she was exhibiting breathing problems, and choosing not to closely monitor her after administering these opioids, leading to respiratory arrest. RP 2525-2527. For a vicarious liability claim such as this, it is the conduct of the active tortfeasor that controls whether the MMA applies. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 31, 309 P.3d 1047.

In addition to vicarious liability claims, Plaintiffs have direct negligence claims against Lovelace not at issue before this Court. A determination as to whether

the MMA applies to direct liability claims against hospitals depends on whether the conduct fits the definition of "malpractice" in NMSA 1978, § 41-5-3.[1] One such claim against Lovelace involves the hospital's decision to use out-of-date monitors in its PACU that did not monitor patients' respiratory rates, despite knowing that PACU patients are the population most vulnerable to respiratory depression. RP 2524-2525. This is a direct liability claim against Lovelace for its own actions in choosing not to obtain appropriate equipment for its PACU. The MMA, including its cap on damages, does not apply because the claim does not involve medical judgment or skill. *See Richter*, 2014-NMCA-056, ¶ 23.

Other direct claims against a hospital are subject to the MMA. At the time of Ms. Smith's PACU admission, Lovelace had in place a policy allowing range orders (orders allowing nursing discretion with regard to dosage and timing in administering some medications) that gave PACU nurses a certain amount of discretion in determining how much Fentanyl to administer after a surgery. RP 2525. If, by way of example, the medical experts in this case took issue with the fact that Lovelace allowed range orders, such a claim, because it involves medical judgment

[1] "Whether a claim involves ordinary negligence or medical malpractice is a fact-dependent inquiry." *Richter v. Presbyterian Healthcare Servs.*, 2014-NMCA-056, ¶ 23, 326 P.3d 50. The Court of Appeals in *Richter* recognized that "'[n]ot all cases involving health or medical care automatically qualify as medical malpractice claims.'" The test for determining whether claims constitute medical malpractice or ordinary negligence is whether the conduct at issue involves the exercise of medical judgment and skill or is ministerial in nature. *Richter,* 2014-NMCA-056, ¶¶ 23, 30.

as to the wisdom of allowing nurses to determine the dosage of certain medications within a range, would be a direct claim against a hospital subject to the MMA's cap on damages.

The MMA does not cover all claims against all medical providers. Each claim must be evaluated to determine 1) whether it involves the active conduct of a qualified healthcare provider, and 2) whether it meets the definition of medical malpractice. While it is understandable that Lovelace wishes to expand the coverage of the MMA to all claims against hospitals, the Court is bound to apply the MMA and its cap on damages to only those types of claims the Legislature chose to include in the Act.

IV. Extending the Financial Obligations of the Patient's Compensation Fund Beyond What the Legislature Contemplated Risks the Stability of the Fund at the Expense of New Mexico Patients and Independent Providers.

A refrain in Lovelace's brief-in-chief is that corporations act through their agents and employees and, if not covered for vicarious liability, "for what conceivable purpose did [Lovelace] become a QHP?" BIC at 17. While healthcare corporations may act through their administrators, providers and staff, it does not follow that the acts and omissions of all types of employees fall within the Medical Malpractice Act. The MMA makes no such guarantee, and indeed, it unambiguously excludes certain types of providers. Lovelace enjoys the benefits of the MMA, including its cap on damages, for its own "departure from accepted standards of health care." *See* NMSA

1978 § 41-5-3(C) (1997). Lovelace also reaps MMA benefits in claims of vicarious liability for *the types of employees the Legislature chose to include* in the MMA and for which it must pay the independent provider surcharge to participate in the Patient's Compensation Fund: doctors of medicine, doctors of osteopathy, chiropractors, podiatrists, nurse anesthetists and physician assistants. NMSA 1978, § 41-5-3(A). It is *not* entitled to the benefits of the MMA for those providers the New Mexico Legislature chose not to include, such as nurses. *See* Section I, *supra*.

Contrary to Lovelace's assertions, this does not render the MMA meaningless. The "conceivable purpose" for which Lovelace became a QHP is presumably the enormous financial benefit afforded this private-equity-owned multistate healthcare corporation by becoming part of a state fund that limits financial exposure when New Mexicans are injured due to negligence at one of its six hospitals in the state. Lovelace chose to become a QHP because it made business sense to pay the surcharge assessed by the Superintendent of Insurance and purchase a mere $200,000 in insurance for qualifying settlements or judgments, relying on the Patient's Compensation Fund to pay the remaining $400,000 for each such claim. Lovelace then obtained private insurance for those acts and omissions not covered by the MMA. RP 1270-1273 (Lovelace 2nd Supp. Answer to Interrogatory No. 1).

Lovelace contends that because the Superintendent of Insurance admitted Lovelace to the Patient's Compensation Fund as a QHP, it is entitled to the MMA's

cap on damages regardless of whether the claims history and risk of non-QHP nurses were considered in setting the surcharges for Lovelace, or whether Lovelace paid surcharges to the Patient's Compensation Fund to cover the acts and omissions of non-QHP nurses (as opposed to surcharges for Lovelace's own qualifying acts of negligence, or the *respondeat superior* liability of those providers who fall within the MMA). BIC at 20. Lovelace proffered <u>no evidence</u> showing the acts and omissions of its nursing staff were considered in setting the surcharges for Lovelace, or that Lovelace paid surcharges to cover the acts and omissions of its nursing staff, as opposed to surcharges for PHS's own negligence, in response to Plaintiff's Motion for Summary Judgment. RP 174-182 (Lovelace MSJ Response). To the extent Lovelace is advancing an argument that its nurse employees should be named individually in order for the plain text of the MMA to apply, this would lead to an absurd result: hospitals would enjoy the benefits of the MMA, including its cap on damages, if an employee nurse was not a named defendant, and would remain uncapped for claims related to the nurse's conduct if the nurse were individually named - despite the fact there is no dispute the hospital carries the professional liability insurance for its employed nurses.

Lovelace's proposed expansion of the PCF's responsibility to claims related to acts and omissions of non-qualified provider nurses is problematic for several reasons. To impose a financial burden on the PCF for vicarious liability claims when

the acts and omissions of the providers involved were neither assessed for risk, nor calculated into the PCF surcharge, would constitute a drain on the PCF that the State of New Mexico, and in particular the patients depending on the PCF for future medical care, can ill afford. In order to survive, the PCF would be required to assess additional surcharges to its independent physician and mid-level providers to cover the impact caused by hospitals. This would result in an unfair result, contrary to the original intent of the Medical Malpractice Act. *See* NMSA 1978 § 41-5-2. Lovelace's requested extension of the Act to include claims the Legislature did not anticipate impacting the Patient's Compensation Fund would improperly drain the Fund and compromise the healthcare of those patients who rely on it for future medical needs. Additionally, it could leave independent providers who properly qualified and paid surcharges into the fund with no coverage for malpractice claims against them. The ultimate result would be litigation against the Superintendent of Insurance for mismanagement of the PCF.

Lovelace, like any other defendant, should use the private insurance it obtained to cover claims that fall outside the MMA – such as vicarious liability claims for non-QHP nurses – rather than requesting the state fund cover such acts of negligence. Extending the PCF's financial responsibility as requested by Lovelace would have real impact on real lives. The Court should decline to extend the MMA beyond what the Legislature intended.

V. The Plethora of District Court Opinions Holding, as the District Court in This Case Did, that Nursing Conduct is Excluded from the MMA, are Well-Reasoned and Have Been Relied on By Litigants.

Lovelace implies it has long operated under the impression that nursing conduct is subject to the protections of the MMA, and that the issue has gone unaddressed by the Courts. While there is no appellate decision on this issue of which Respondent is aware, the district court's ruling in this case that nursing conduct does not fall within the MMA is consistent with other district court orders around the state – including multiple cases in which Lovelace Health System was a defendant – demonstrating that Lovelace has long been on notice that nursing conduct was not covered by the MMA.[2] These district court opinions comply with the principle that statutes in derogation of the common law, such as the MMA, must be strictly construed. *Wilschinsky v. Medina*, 1989-NMSC-047, ¶ 21, 108 N.M. 511, 775 P.2d 713; *Bd. of Educ. v. Jennings*, 1985-NMSC-054, ¶ 16, 102 N.M. 762, 765, 701 P.2d 361, 364.

For example, in July of 2020, in *Granger v. Lovelace Health System, LLC, et al.*, Judge Nancy Franchini ruled that a nurse was not a qualified healthcare provider

[2] In its application for interlocutory appeal to the Court of Appeals, Lovelace attached one contrary order, from Judge Manuel Arrieta, denying a plaintiff's motion for summary judgment and finding nursing conduct to be covered by the MMA. RP 1055. Respondent is aware of a similar ruling in Martinez v. St. Vincent Hospital, et al., D-101-CV-2018-01078 (Order on Defendant St. Vincent Hospital d/b/a Christus St. Vincent Regional Medical Center's Motion for Partial Summary Judgment Regarding Application of the Medical Malpractice Act to Plaintiffs' Vicarious Liability Claims, filed 4/15/2021 (Mathew, J.)).

under the Medical Malpractice Act. The ruling was "based on the plain language of the definition of a healthcare provider under the Medical Malpractice Act, as well as a review of the legislative history of the Medical Malpractice Act, and our Supreme Court's holding in *Baker v. Hedstrom*, 2013-NMSC-043, 309 P.3d 1047." RP 1224-25. In May of 2022, Judge Joshua Allison, in *Torres v. Lovelace Health System, LLC, et al.*, ruled that "Plaintiff's vicarious liability claim against Lovelace…for Nurse Practitioner Costales' conduct are not subject to the New Mexico Medical Malpractice Act." RP 1215-16. In June of 2022, Judge McGarry Ellenwood, in *Lopez v. Lovelace Health System, Inc.*, likewise found that "Lovelace is not entitled to the protections of the MMA for *respondeat superior* claims involving the care of Frank Reedus, NP, as he is not categorically qualified to be a QHP under the MMA." RP 1222-23. In August of 2022, Judge Joshua Allison, in *Ramos v. Lovelace Health System, et al.*, ruled that the conduct of nurses was not subject to the Medical Malpractice Act, denying Lovelace's request for language in the Order allowing an interlocutory appeal. RP 1226. In September of 2022, Judge Maria Sanchez-Gagne, in *Gregerson v. Lovelace Health System, Inc.*, concluded that "LHS is not entitled to the benefits and protections of the Medical Malpractice Act with respect to the conduct of its nurse employees." RP 1213-14.

Courts around the state in cases against other New Mexico hospitals have likewise held that nurses are not qualified healthcare providers under the MMA, and

nursing conduct is not subject to the benefits and protections of the Act. For example, in March of 2020, Judge Abigail Aragon, in *Romero v. Christus Health*, ruled that the "Medical Malpractice Act does not apply to vicarious liability imputed to SVH, if any, arising out of the acts or omissions of any SVH employee who is not a Qualified Healthcare Provider, as that term is defined in NMSA 1978 § 41-5-3(A)," that Plaintiffs' vicarious liability claims against the hospital arising out of the acts and omissions of a certified nurse midwife were not included in the definition of "malpractice claim" under Section 41-5-3, and that those vicarious liability claims were not subject to the terms of the MMA, including the limitations on recovery. RP 1217-19. Interlocutory appeal language was included in the Order, and the Court of Appeals granted an application for interlocutory appeal in June of 2020. *Id.* The case subsequently resolved, and the appeal advanced no further.

Also in March of 2020, Judge Bryan Biedsheid, in *Davis v. Legacy Medical Svcs.*, Case No. D-101-CV-2019-012, ruled that the Medical Malpractice Act, including its limitations on recovery, did not apply to the conduct of a nurse practitioner. RP 1205-1207. In January 2021, the Court of Appeals denied a motion for interlocutory appeal from the district court's order. RP 1204 (*Davis v. Legacy Medical Svcs.*, Case No. A-1-CA-38888, Order Denying Application for Interlocutory Appeal, filed 01/19/2021).

In September of 2020, Judge Maria Sanchez-Gagne, in *Lopez v. Presbyterian Healthcare Services,* ruled that "[w]ith respect to alleged negligence of its nurses and EMT's and its vicarious liability therefor, Presbyterian Healthcare Services (hereinafter "PHS") does not meet the categorical requirement to qualify under Section 41-5-3(A) of the New Mexico Medical Malpractice Act." RP 1230-31. In March of 2021, the Court of Appeals denied Presbyterian's request for interlocutory appeal of this order. RP 1208 (*Lopez v. Presbyterian*, No. A-1-CA-39377; Order Denying Application for Interlocutory Appeal, filed 03/15/2021).

In February of 2021, Judge Maria Sanchez Gagne, in *Lopez v. Otero County Hospital Association*, ruled that the plaintiff's vicarious liability claims against Defendant Otero County Hospital Association for the conduct of its nurses were not subject to the Medical Malpractice Act. RP 1232-33. In September of 2022, Judge Matthew Wilson, in *Gonzales v. McDaniel*, ruled that nurses are not qualifiable under the New Mexico Medical Malpractice Act. RP 1234-35. In December of 2023, Judge Bryan Biedscheid, in *Ruyle v. Lea Regional Medical Center, et. al,* ruled that "nurses are not health care providers as defined in the New Mexico Medical Malpractice Act" and that any vicarious liability claim against Lea Regional Hospital, LLC for the conduct of its nurses is not subject to the limitations of the Medical Malpractice Act. RP 1274-75. District court opinions are not binding on the Court. However, such an accumulation of well-reasoned and consistent decisions

over time can have persuasive value and shed light on the legal landscape in which litigants have been proceeding.

Further, because this issue arises only under the version of the MMA in effect before the 2021 amendments, it is self-limiting to cases arising before those amendments took effect. Because the statute of limitations for medical malpractice is occurrence-based, it is increasingly unlikely there are pending cases in which the question of nursing conduct being excluded from the MMA can arise – the statute of limitations has passed on all such cases, other than those brought by minors. The uniform interpretation of the MMA that has applied to cases predating this matter should continue to apply as the remaining cases pending under the pre-2021 version of the act wend their way to conclusion.

CONCLUSION

For all of the foregoing reasons, the Court should uphold the district court's order holding 1) that "[r]egistered nurses are not categorically qualified to be qualified healthcare providers under the Medical Malpractice Act," and 2) that Lovelace "is not entitled to the benefit and protections of the Medical Malpractice Act with respect to the conduct of its nurse employees."

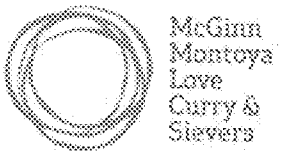
STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 12-319(B)(1) NMRA, Respondent states that oral argument would be helpful to a resolution of the issues because this matter involves issues of

statutory interpretation and the breadth of claims for which the Patient's Compensation Fund is financially responsible.

Dated: March 17, 2025

Respectfully submitted,



By: ***s/ Katie Curry***
Kathy Love
Katie Curry
201 Broadway Blvd SE
Albuquerque, NM 87102
p: (505) 843-6161
f: (505) 242-8227
kathy@mcginnlaw.com
katie@mcginnlaw.com

Attorneys for Plaintiff-Respondent Pamela Smith, deceased, through Personal Representative Katherine Ferlic

CERTIFICATE OF SERVICE

I HEREBY CERTIFY I served a copy of the foregoing pleading on all counsel of record electronically through regular email and through the Odyssey File & Serve system this the 17th day of March, 2025, as follows:

Larry J. Montaño	----	lmontano@hollandhart.com
Olga Serafimova	----	omserafimova@hollandhart.com
R. Nelson Franse	----	nfranse@rodey.com
Paul R. Koller	----	pkoller@rodey.com
Robert E. Hanson	----	rhanson@peiferlaw.com
Matthew Jackson	----	mjackson@peiferlaw.com
Greg P. Williams	----	gwilliams@peiferlaw.com

By: ***/s/ Katie Curry***
Katie Curry