IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Plaintiff-Respondent,

v.

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

Defendant-Petitioner,

~ and ~

AHS MANAGEMENT COMPANY, INC., a Tennessee corporation,

Defendant.

No. S-1-SC-40580
No. A-1-CA-41966
No. D-101-CV-2022-01148

BRIEF IN CHIEF OF PETITIONER LOVELACE HEALTH SYSTEM, LLC

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, undersigned counsel certifies that this Brief In Chief complies with the limitations and requirements set forth in Rule 12-318(F)(3) NMRA and is printed in Times New Roman, 14-point type, and contains 7,498 words. This brief was prepared and the word count determined using Microsoft Word 2010.

CITATIONS TO RECORD PROPER AND TRANSCRIPTS

The record proper is cited in this Brief In Chief as "RP (page #)." The hearing transcripts are cited as "Tr. (hearing date), (page:line)." Citations to any digitally recorded transcripts of proceedings are to the date of the proceedings and the time stamp provided by the FTR software.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Over forty years ago, the Legislature passed the Medical Malpractice Act (MMA) "to promote the health and welfare of the people of New Mexico[.]" NMSA 1978, § 41-5-2 (1997) (repealed 2021). "A major purpose of the [MMA] was to meet a perceived insurance crisis" triggered by the withdrawal of the insurer that underwrote insurance for ninety percent of New Mexico's health care providers. *Wilschinsky v. Medina*, 1989-NMSC-047, ¶ 26, 775 P.2d 713. The Legislature recognized that if health care providers "must bear the cost of the patient's injury, there is a powerful disincentive to furnishing services at all." *Otero v. Zouhar*, 1984-NMCA-054, ¶ 15, 697 P.2d 493, *rev'd in part on other grounds*, 1985-NMSC-021. Through the MMA, the Legislature sought to avoid that pitfall "by providing incentives to persons to furnish health care services." *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 16, 309 P.3d 1047.

The MMA provides incentives to qualified health care providers (QHPs) to furnish health care services by offering them various benefits in exchange for satisfying certain financial responsibilities. *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, 267 P.3d 70. "By providing benefits and imposing burdens, the Legislature created a system that inspires widespread participation" by providers. *Baker*, 2013-NMSC-043, ¶ 20. "[T]he MMA and the structure created therein ... help maintain a viable system of medical care and claim resolution in New Mexico." *McAneny v. Catechis*, 2023-NMCA-055, ¶ 12, 534 P.3d 1007. This appeal

seeks to preserve that system, and thereby avert recreating the healthcare crisis the MMA was enacted to avoid.

Lovelace Health System, LLC, is a QHP under the MMA and is therefore entitled to the MMA's benefits, including a limit on damages that may be awarded against it pursuant to "any cause of action" for malpractice. NMSA 1978, §§ 41-5-3(A)&(C), and 41-5-6 (1997). In this case, Plaintiff sued Lovelace for malpractice on grounds that it is vicariously liable for the alleged negligence of its employed registered nurses. Although Lovelace is a QHP, the district court held that the MMA provides Lovelace no protection because its registered nurses are not QHPs. The court further held that Lovelace's employed registered nurses are not entitled to the MMA's protections either because they are "ineligible" to become QHPs in their own right. The court's QHP rulings vitiate the MMA's remedial purpose and wrongfully deprive Lovelace and its employed registered nurses of the MMA's benefits and protections.

Since its inception, the MMA has expressly permitted hospitals to become QHPs so long as they satisfy the MMA's financial responsibility requirements. NMSA 1978, § 41-5-3 (1997). Because hospitals cannot practice medicine, but may only meet their patients' needs through the efforts of skilled medical professionals like registered nurses, the MMA *must* cover them for their employees' negligence. Likewise, medical professionals who are employed by QHP-hospitals *must* also be

covered by the MMA, especially if they are individually "ineligible" to become QHPs, because the Legislature could not have intended to subject them to limitless personal liability.

Errant QHP rulings like those rendered by the district court in this case pose an existential threat to the MMA's remedial purpose of maintaining a viable system of medical care and claim resolution in New Mexico. In response to that threat, the Legislature passed various amendments "Clarifying and Modernizing the Medical Malpractice Act" in 2021, which expressly include hospital "employees" and "agency nurses providing services at the hospital" under the definition of "hospital." 2021 N.M. House Bill 75; NMSA 1978, § 41-5-3(D) (2021) ("'Hospital' includes a hospital's … employees and locum tenens providing services at the hospital; and agency nurses providing services at the hospital."). Although the Legislature has subsequently amended the MMA a couple more times, the defined term "hospital" continues to include hospital "employees" and "agency nurses providing services at the hospital." NMSA 1978, § 41-5-3(E) (2023); *see also, respectively,* 2021 N.M. Laws (2d Spec. Sess.) ch. 5, § 3; and, 2023 N.M. Laws ch. 207, § 1. Through these clarifying amendments, the Legislature has erased any doubt about whether QHP-hospitals and their employed medical providers are covered by the MMA when sued for malpractice: they most certainly are, and always have been. *Swink v. Fingado*, 1993-NMSC-013, ¶ 35, 850 P.2d 978 ("Where a statute or amendment clarifies

existing law, such action is not considered a change because it merely restates the law as it was at the time, and retroactivity is not involved.") (internal quotations and citations omitted).

In order to vindicate the MMA's remedial purpose and avert the healthcare crisis it was designed to avoid, the Court should reverse the district court's decision. The need to correct that decision cannot be overstated. Specific to this case, the decision strips Lovelace of its rights under the MMA by exposing it and its employed registered nurses to uncapped compensatory damages. More broadly, as reflected in the trial court orders attached to the parties' pleadings and in the lawsuits referenced in the New Mexico Hospital Association's amicus filing, the issues presented impact all QHPs in New Mexico that have been sued for medical negligence predating the MMA's clarifying amendments. This Court should hold that Lovelace and its employed registered nurses are entitled to the MMA's benefits and protections. Until the Court so holds, health care providers will be wrongfully exposed to unknown tort liability, contrary to the Legislature's intent and all to the detriment of New Mexicans' health and welfare.

QUESTIONS PRESENTED

1. Is a hospital that is a Qualified Health Care Provider under the Medical Malpractice Act entitled to the Act's protections with respect to malpractice claims seeking to hold it vicariously liable for the alleged negligence of its employed registered nurses?

2. Is an individual healthcare provider whose scope of practice is not specifically listed in the Medical Malpractice Act as eligible to become a Qualified Health Care Provider, but who is employed by a Qualified Health Care Provider-hospital, entitled to the Act's protections?

SUMMARY OF FACTS AND PROCEEDINGS

Plaintiff sued Lovelace for malpractice based on the keystone allegation that its employed registered nurses negligently treated Pamela Smith in the post-anesthesia care unit (PACU) after she underwent back surgery at Lovelace Medical Center in March 2021. RP 1-17 (Complaint for Negligence, Negligent Hiring, Training, and Retention, Wrongful Death, and Unfair Trade Practices, filed 6/29/2022). Plaintiff alleged that the conduct of Lovelace's employed registered nurses — whom she did not sue as party defendants — caused Ms. Smith to become hypoxic, which then caused her to experience cardiac arrest and an anoxic brain injury, and which ultimately resulted in her death. *Id.*, ¶¶ 67-89. According to Plaintiff, the registered nurses who treated Ms. Smith were "[a]t all times pertinent to this case … employees, agents, [or] apparent agents" of Lovelace. *Id.*, ¶ 8. Based on those allegations, Plaintiff contended that Lovelace "is liable for their acts and omissions pursuant to the doctrines of *respondeat superior*, agency, and apparent agency." *Id.* (italics in original).

Plaintiff moved for partial summary judgment on the legal issue of whether Lovelace's employed registered nurses are QHPs under the MMA. RP 111-171

(Plaintiff's Motion for Partial Summary Judgment: Registered Nurses Are Not "Qualified Healthcare Providers" Under the New Mexico Medical Malpractice Act, filed 2/23/2023). In her summary judgment papers, Plaintiff made three arguments. *First*, she argued that registered nurses are not eligible to become QHPs because they are not listed in the MMA's definition of "health care provider." RP 116-119 (citing NMSA 1978, § 41-5-3(A) (1997)). *Second*, she argued that because registered nurses are not and cannot become QHPs, Lovelace is not entitled to the MMA's protections for their conduct, notwithstanding that Lovelace is itself a QHP. RP 360-375 (Plaintiff's Reply in Support of Her Motion for Partial Summary Judgment, filed 2/23/2023). *Third*, she argued that the QHP issue presented in her motion "should be decided now" because it is "a basic legal issue" that "affects the insurance coverage applicable to [her] claims" and "will be a critical factor in negotiations" to resolve this matter. RP 364-365.

Lovelace acknowledged that registered nurses are not expressly identified in the MMA's definition of "health care provider," but noted that a hospital *is* and that a hospital's QHP status *is not* dictated by that of its employees. RP 174-196 (Lovelace's Response to Plaintiff's Motion for Partial Summary Judgment, filed 3/20/2023). Lovelace asked the district court to heed this Court's warning against strictly construing the MMA, because varying Lovelace's QHP status based on which of its employees allegedly was negligent would lead to absurd results and

undermine the Legislature's intent. RP 178 (citing *Baker*, 2013-NMSC-043, ¶ 15). After all, a hospital like Lovelace, "as an entity, cannot practice medicine, diagnose an illness, or prescribe a course of treatment" to its patients. *Id.* (citing *Reynolds v. Swigert*, 1984-NMCA-086, ¶ 17, 697 P.2d 504). As a result, a hospital "cannot commit medical negligence itself; it can only do so through the actions of its employees, like the nurses involved in the care at issue." RP 182. Accordingly, a hospital's QHP status must extend to the acts of its employees in order to give that status meaningful effect. "[W]ithout coverage under the MMA for the acts and omissions of [its] employees, the Legislature's intent in establishing the MMA would be entirely foiled." *Id.*

In further support of its argument, Lovelace noted that Plaintiff's motion "glosse[d] over" the Legislature's amendments to the MMA in 2021 which "specifically include[d] employees of hospitals" within the MMA's definition of "hospital." RP 182. Lovelace argued that "[w]hile the amendments became effective on January 1, 2022, they should be applied in this case, as the statute was amended for the purposes of *clarifying* the existing definitions of the MMA." *Id.* (emphasis added). Lovelace thus requested that the district court deny Plaintiff's QHP motion because, like the plaintiffs in *Baker*, Plaintiff espoused a wooden interpretation of the MMA that defied common sense and was irreconcilable with the MMA's remedial purpose.

The district court held a hearing on Plaintiff's motion on June 14, 2023. Tr. 6/14/2023, 1:03:06-1:45:50. The parties reiterated the arguments presented in their legal briefs. As in its response, Lovelace argued that "when the word 'hospital' as an entity was used in the earlier version of the [MMA], prior to January 2022, 'hospital' was intended to include its employees who were providing medical care for the hospital …." *Id.*, 1:32:15-1:33:46. The "recent amendment to the [MMA] is a clarification of who is encompassed within a 'hospital'" *Id.* It was "a recognition that without that clarification the [MMA] would be, the wording of it was being misused, to frustrate its purpose which was to put in place these reciprocal obligations and rights between patients and the QHP providers." *Id.* In order to properly construe the MMA, Lovelace implored the court to adhere to "the [uniform] jury instructions, which is corporations can only act through their employees. Otherwise, the nurses, they are 'sitting ducks' … [a]nd they are [being used as] an end-run around the [MMA]." *Id.*, 1:33:43-1:35:45. The dilemma is particularly acute in this case because "the court is being asked to make a judicial determination regarding the rights of [nurses] who are not present" and who are not even named as a "party to the case." *Id.*

In rebuttal, Plaintiff disputed Lovelace's contentions, including that it was necessary for her to individually sue the registered nurses in this lawsuit. *See id.*, 1:36:40-1:37:27. According to Plaintiff, "[t]his is about Lovelace's *respondeat*

superior liability for the nursing claims" *id.*, "not about the nurses being personally liable or something." *Id.*, 1:37:48-1:39:35. Plaintiff asserted that the registered nurses' "insurance comes through the hospital" such that "[t]here's no functional difference" in naming or not naming them as defendants in the lawsuit. *Id.*, 1:36:40-1:37:27. In her view, "[t]he issue is that because nurses cannot be qualified providers, Lovelace … just has to go by that status when they are [sic] … liable for their conduct." *Id.*

As for the Legislature's amendments to the MMA in 2021, Plaintiff argued that they have no impact on this case because it is "very clear that those amendments don't go into effect until January 1, 2022," *id.*, 1:37:48-1:39:35, after Ms. Smith died. Plaintiff acknowledged that in "cases after that date, there's clarity" and that, "[g]oing forward, this won't be an issue." *Id.*, 1:37:48-1:39:35. But in her view, the Legislature's clarification of a hospital's coverage under the MMA was not really a clarification, at all. Instead, it was "part of a very purposeful, very intentional negotiation and exchange" whereby the "caps for hospitals [were] raised but more of their employees fall under the Act now." *Id.*

After hearing argument of counsel, the district court granted Plaintiff's QHP motion. RP 436-438 (Order Granting Plaintiff's Motion for Partial Summary Judgment: Registered Nurses Are Not "Qualified Healthcare Providers" Under the New Mexico Medical Malpractice Act, filed 6/28/2023). The court found that

"[r]egistered nurses are not categorically qualified to be qualified healthcare providers under the [MMA]" and, therefore, Lovelace "is not entitled to the benefit and protections of the [MMA] with respect to the conduct of its nurse employees." *Id.*, ¶¶ 2-3. In short, the court adopted Plaintiff's theory that Lovelace's QHP status is dictated by that of its employees.

Lovelace subsequently moved the district court to certify its QHP order for interlocutory appeal, after the parties participated in an unsuccessful mediation in November 2023 due to their disparate views on whether Lovelace is covered by the MMA for the alleged negligence of its nurses. RP 505-556 (Lovelace's Motion To Certify For Interlocutory Appeal The Court's Decision That It Is Not Covered By The Medical Malpractice Act For Its Nurse Employees' Alleged Negligence, filed 12/11/2023); RP 593-615 (Plaintiff's Response, filed 1/10/2024); RP 647-651 (Lovelace's Reply, filed 1/29/2024). After reviewing the parties' certification papers and hearing oral argument, the court granted Lovelace's motion to certify the Order for interlocutory appeal. RP 879-881 (Amended Order, filed 5/24/2024). The court's Amended Order retains all the same QHP rulings prescribed in the Order, but it also includes a paragraph certifying the QHP rulings for interlocutory appeal pursuant to the criteria set forth in NMSA 1978, § 39-3-4. *Id.*

In accordance with Rule 12-203(A) NMRA, Lovelace timely filed its application for interlocutory appeal in the Court of Appeals, RP 940-1169, to which

Plaintiff timely responded. RP 1176-1275. The Court of Appeals denied Lovelace's application for interlocutory appeal on August 26, 2024, without providing any rationale. *See* Order, attached as Exhibit A to Lovelace's petition for writ of certiorari. In accordance with this Court's Order entered on September 19, 2024, Lovelace timely filed its petition for writ of certiorari on October 3, 2024, which the Court granted on November 20, 2024.

STANDARD OF REVIEW

Lovelace's appeal of the district court's QHP order presents a question of law, which this Court reviews de novo. *See Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 150 P.3d 971 ("An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed *de novo*."). Because summary judgment is a "drastic" remedy, this Court "looks to the whole record and views matters in the light most favorable to" Lovelace as the non-moving party. *See, e.g., North v. Public Servs. Co.*, 1982-NMCA-012, ¶ 5, 640 P.2d 512. "All reasonable inferences are construed in favor of the non-moving party." *Portales Nat'l Bank v. Ribble*, 2003-NMCA-093, ¶ 3, 75 P.3d 838.

Likewise, the core issues of whether Lovelace and its employed medical providers are entitled to the MMA's benefits for negligence committed in the scope and course of their employment are questions of law. A de novo standard of review applies because this Court is not bound by the district court's interpretation of the MMA's scope, meaning, or effect. *Baker*, 2013-NMSC-043, ¶ 10 ("Our task is to

determine whether the Legislature intended Defendants to be eligible to qualify as 'health care providers' under the MMA so as to receive the Act's benefits.") (This issue "presents an issue of statutory construction, which is a question of law that this Court reviews de novo.").

ARGUMENT

I. The Legislature Passed The Medical Malpractice Act As Remedial Legislation To Benefit The Citizens Of New Mexico

The MMA is remedial legislation. It is a complex statutory framework that was designed to benefit all New Mexicans, including both patients and health care providers alike. The Legislature passed the MMA in 1976 to avert a healthcare crisis triggered by the withdrawal of the insurer that underwrote insurance for ninety percent of New Mexico's health care providers. *Baker*, 2013-NMSC-043, ¶ 18. The Legislature understood the gravity of that crisis, because "[a]vailability of health care depends on providing incentives to persons to furnish health care services." *Otero*, 1984-NMCA-054, ¶ 15. If health care providers "must bear the [entire] cost of the patient's injury, there is a powerful disincentive to furnishing services at all," a disincentive that "may be met by making professional liability insurance available" through the MMA. *Id.*

The MMA encourages health care providers to become "qualified" by offering various benefits to them in exchange for satisfying certain financial responsibility requirements. *Baker*, 2013-NMSC-043, ¶ 18. To qualify under the

MMA, a provider must "pay an annual surcharge into the statutorily-created patient's compensation fund [PCF] and either provide proof of professional liability insurance of at least $200,000 per occurrence or, for an individual health care provider, have a continuous deposit of $600,000 with the superintendent of insurance." *Siebert v. Okun,* 2021-NMSC-016, ¶ 5, 485 P.3d 1265 (citing NMSA 1978, §§ 41-5-3(A) (1977), -5(A), -25 (1997)). The PCF is funded entirely through surcharges paid by QHPs. NMSA 1978, § 41-5-25.

In exchange for satisfying the MMA's financial responsibility requirements, QHPs are entitled to "various benefits." *Siebert,* 2021-NMSC-016, ¶ 5 (citing *Baker*, 2013-NMSC-043, ¶ 18). "Among those benefits, the MMA caps nonmedical, nonpunitive damages awards at $600,000 and limits the [QHP's] personal liability to $200,000." *Id.* (citing NMSA 1978, § 41-5-6; NMSA 1978, § 41-5-7(E) (1992); *see also, specifically,* NMSA 1978, § 41-5-6(A) (stating that the $600,000 cap concerns "the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice … per occurrence."). Any judgment amount "exceeding the personal liability cap is paid out of the [PCF]." *Id.* (citing NMSA 1978, §§ 41-5-7(E), -25(G)).

The Legislature balanced benefits to QHPs with benefits to patients. For example, the MMA provides a reliable source of recovery for prevailing patients through insurance and the PCF, and it covers the expense of expert witnesses for

plaintiffs who have prevailed at medical legal panels. *See* NMSA 1978, §§ 41-5-25 (PCF), and 41-5-23 (expert witness). The PCF is of particular significance because it relieves injured patients of the risk that their future medical needs will go unmet, a statutory benefit provided to no other class of plaintiff other than injured workers covered by the Workers' Compensation Act. The Court should broadly construe the MMA to maintain the balance struck by the Legislature and further the remedial goals it is designed to achieve. *Baker*, 2013-NMSC-043, ¶ 13; *Mem'l Med. Ctr., Inc. v. Tatsch Constr., Inc.*, 2000-NMSC-030, ¶ 26, 12 P.3d 431 ("generally, remedial statutes are to be read broadly.").

II. Lovelace And Its Employed Medical Providers Are Entitled To The MMA's Benefits And Protections For All Malpractice Claims

Hospitals have been eligible to become QHPs since the day the MMA was first promulgated. *See* NMSA 1978, § 41-5-3(A) (1977) (defining "health care provider" to include "a person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a … hospital …"). There is no dispute in this case that Lovelace is a QHP. The only questions presented in this appeal are: first, whether Lovelace is stripped of its QHP status when a plaintiff sues it under a vicarious liability theory for the alleged negligence of any employees who lack independent QHP status; and, second, whether its employees are unprotected by the MMA if they are ineligible to independently become QHPs because their scope of practice is not expressly listed

in the MMA's definition of "health care provider." As explained below, in order to honor the Legislature's intent and fulfill the MMA's remedial purpose the answer to both questions is "no."

A. Lovelace is covered under the MMA for both direct and indirect malpractice claims

One of the benefits of becoming "qualified" is that the MMA caps the damages that may be recovered against a QHP "by all persons for or arising from any injury or death to a patient as a result of malpractice." NMSA 1978, § 41-5-6(A)&(D) (1997). The MMA defines "malpractice claim" as including "**any cause of action** against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient, **whether the patient's claim or cause of action sounds in tort or contract**, and includes but is not limited to actions based on battery or wrongful death[.]" NMSA 1978, § 41-5-3(C) (emphasis added). The only exclusion from this expansive definition is that "'malpractice claim' does **not** include a cause of action arising out of the driving, flying or nonmedical acts involved in the operation, use or maintenance of a vehicular or aircraft ambulance." *Id.* (emphasis added).

Based on the MMA's comprehensive language, this Court has recognized that "[t]he legislature foresaw and intended broad application of the concept of a 'malpractice claim.'" *Wilschinsky v. Medina*, 1989-NMSC-047, ¶ 25. Accordingly,

our courts have expansively interpreted the definition of "malpractice claim" to include third-party claims and claims for indemnification. *Id.* at ¶ 28 (interpreting "malpractice claim" to include a claim brought by a third-party plaintiff injured in an automobile accident caused by the *non-injured* patient of the QHP doctor-defendant); *see Christus St. Vincent Reg'l Med. Ctr. v. Duarte- Afara*, 2011-NMCA-112, ¶¶ 1, 18, 267 P.3d 70 (interpreting "malpractice claim" to include a hospital's claim for indemnification against a practicing doctor). The "controlling inquiry in determining whether a claim constitutes a malpractice claim under the [MMA] is merely whether the gravamen of the claim is predicated upon the allegation of professional negligence." *Id.*, ¶ 18.

In accordance with *Wilschinsky* and *Duarte- Afara*, the MMA covers "any" malpractice claim against a QHP-hospital, whether based on its own negligence or that of its employees, and whether based on a tort or contract theory. Nothing in the MMA remotely suggests that a QHP-hospital's entitlement to the MMA's benefits turns on whether its tortfeasor-employee is herself/himself a QHP. Any such requirement would render the MMA's protections for hospitals illusory. After all, a hospital like Lovelace, "as an entity, cannot practice medicine, diagnose an illness, or prescribe a course of treatment" to its patients. *Reynolds*, 1984-NMCA-086, ¶ 17. By extension, a hospital cannot commit malpractice; only its employees and agents can. *See, e.g.*, UJI 13-409 NMRA ("A corporation can act only through its officers

and employees."); *see also* UJI 13-1120A NMRA ("A hospital is responsible for injuries proximately resulting from the negligence of its employees").

The vast majority of professionally licensed or certified hospital employees are not physicians — or even "midlevel" providers such as physician assistants and certified nurse practitioners — but rather nurses, technicians, therapists, nutritionists, pharmacists, medical assistants, and the like. Yet, none of the latter professionals are expressly included within the MMA's definition of "health care provider." NMSA 1978, § 41-5-3(A) (1977). When the Legislature enacted the MMA it surely was aware of this, just as it was surely aware that hospitals may be held vicariously liable for malpractice committed by its employed nurses. *See, e.g., Westbrook v. Lea Gen. Hosp.*, 1973-NMCA-074, ¶¶ 6-15, 510 P.2d 515 (reversing dismissal of vicarious liability claim against hospital for nurse's negligence); *Garrison v. Safeway Stores*, 1984-NMCA-116, ¶ 10, 692 P.2d 1328 ("The legislature is presumed to be aware of existing law").

If Lovelace were unprotected against vicarious liability claims for negligence committed by its employed providers who are not QHPs, for what conceivable purpose did it become a QHP? Or, if the MMA's damage caps apply to Lovelace's vicarious liability for nursing negligence, but a patient could evade the caps by simply suing the nurses individually and then forcing Lovelace to indemnify them, what purpose has the MMA accomplished? These questions are so absurd that they

answer themselves. But they are also answered by the MMA's sheer breadth. By extending the MMA to "any cause of action" for malpractice, the Legislature contemplated that *all* malpractice claims against hospitals would fall within the MMA's scope, including vicarious liability claims.

In *Baker*, this Court confronted similar questions when it considered whether the corporate entities under which individual doctors and doctors' practice groups typically operate could qualify for the MMA's protections even though such entities were not listed in the definition of "health care provider." 2013-NMSC-043, ¶¶ 2–9. The plaintiffs asked this Court to rule that the Legislature did not intend the MMA to cover such entities because "the plain language of the definition of a 'health care provider'" "expressly exclude[d]" them. *Id.*, ¶ 14. This Court rejected that request as it would "lead[] to absurdities, or … conflict[] with the Legislature's purpose for enacting the [MMA]." *Id.*, ¶ 15. This Court could "discern no reason why the Legislature would intend to cover individual medical professionals under the [MMA] while excluding the business organizations that they operate under to provide health care." *Id.*, ¶ 21. Construing the MMA that way would "defeat [the MMA's] intended purpose." *Id.* (internal quotations omitted).

Likewise in this case, to promise the MMA's protections to a hospital like Lovelace while subjecting its employees to unlimited personal exposure — and then visiting vicarious liability for that exposure upon the hospital — would destroy the

hospital's protections as surely as if the MMA had denied them in the first place. The only sensible reading of the MMA is one that caps damages against the QHP-hospital *and* its employees.

In her effort to avoid the consequences of Lovelace's QHP status, Plaintiff advanced several arguments. *First*, Plaintiff argued that because Lovelace's employed registered nurses are "ineligible" to become QHPs, it follows that Lovelace is not entitled to the MMA's benefits and protections. Tr. 6/14/2023, 1:36:40-1:37:27 ("The issue is that because nurses cannot be qualified providers, Lovelace … just has to go by that status when they are [sic] … liable for their conduct."). But this proposition is a non sequitur and, unsurprisingly, Plaintiff offered no competent authority to support it. *See McNeill v. Rice Eng'g & Operating, Inc.*, 2010-NMSC-015, ¶ 11, 229 P.3d 489 (ruling that where parties fail to cite authority for their legal propositions, appellate courts "will presume that no such authority exists"). As previously explained, the MMA explicitly provides that hospitals may become QHPs, it offers coverage to them with respect to "any cause of action" for malpractice that may be asserted against them, and it contains not one word excluding vicarious liability claims. By allowing hospitals to become QHPs, the Legislature intended to protect hospitals as *institutions* that provide comprehensive health care services to their communities through their employees, and not merely to provide redundant coverage insofar as they employ individuals

who are themselves QHPs. *Baker*, 2013-NMSC-043, ¶ 31 (rejecting an approach that would require "redundant" QHP-certification of both medical organizations and the individual professionals they employ).

Second, Plaintiff argued that because Lovelace's employed registered nurses did not qualify as QHPs, "it would be a misuse of QHP funds to pay for harm" they caused. RP 363 (Reply at 4). This argument is premised on the presumption that Lovelace had to but did not make a payment to the PCF on their behalf. *See id.* But the MMA does not require a hospital to make a specific payment to the PCF for individually named providers to become a QHP. The requirements to become a QHP are spelled out in Section 41-5-5 of the MMA. With respect to the hospitals, among other things, that section mandates that "the superintendent shall determine, **based on a risk assessment of each hospital** …, each hospital's … base coverage or deposit and additional charges for the [PCF]." NMSA 1978, § 41-5-5(B) (1997) (emphasis added). That section also mandates that "[t]he superintendent shall arrange for an **actuarial study**, as provided in Section 41-5-25 NMSA 1978." *Id.* (emphasis added). There is no dispute that Lovelace fulfilled those requirements in order for it to be admitted to the PCF.

Third, Plaintiff argued that *Baker* stands for the proposition that it is "the status of the active tortfeasor [that] determines whether the MMA applies." RP 362 (Reply at 3). If that were true, the MMA's coverage of QHP-hospitals would be

entirely illusory, as a hospital cannot "actively" practice medicine or commit malpractice; it can do those things only through the medical professionals it employs. *Reynolds*, 1984-NMCA-086, ¶ 17.

Plaintiff has misconstrued this Court's observation in *Baker* that "any claim for malpractice brought against a legal organization can only be brought under the doctrine of *respondeat superior* for the alleged malpractice of the licensed or certified medical professionals listed" as a "health care provider." 2013-NMSC-043, ¶ 31. In context, this Court was referring to the particular "legal organizations" that the plaintiffs had sued in those cases. Malpractice claims can most certainly be brought, and indeed are regularly brought, against hospitals for the alleged malpractice of their employed nurses — individuals whom the MMA does not identify as potential QHPs. The notion that only "active tortfeasors" are protected by the MMA is without merit as it would remove from the MMA's purview all non-corporeal entities that are incapable of practicing medicine but that employ the individuals who do.

To hold that the MMA affords hospitals no protection for claims involving their non-QHP employees "leads to absurd results that the Legislature could not have intended." *Baker*, 2013-NMSC-043, ¶ 33. Acceptance of Plaintiff's argument would "circumvent the provisions that the Legislature intended to benefit the [QHP]" by enabling patients to target a defendant upstream or downstream from the health care

provider that has qualified for the MMA's benefits. *Id.*, ¶ 35. Any such manipulation of vicarious liability under the doctrine of *respondeat superior* would effect an "end run around" the MMA, there by "effectively divest[ing]" QHPs from the MMA's protection." *Id.* If the Legislature intended to exclude from the MMA's scope vicarious liability claims against hospitals for the conduct of the non-QHPs they employ, it surely would have done so, just as it did for claims involving ambulances. That it did not do so speaks volumes. *Mira Consulting, Inc. v. Bd. of Educ., Albuquerque Pub. Schools*, 2017-NMCA-009, ¶ 13, 389 P.3d 306 ("The Legislature knows how to include language in a statute if it so desires").

In view of the foregoing discussion, the Court should reject Plaintiff's arguments and reverse the district court's QHP order. Not doing so would permit the MMA's benefits and protections for hospitals to be easily circumvented in contravention of the MMA's remedial purpose. *See, generally, Padilla v. Montano*, 1993-NMCA-127, ¶ 23, 862 P.2d 1257 ("We will not construe a statute to defeat [its] intended purpose").

B. Lovelace's employed medical providers are entitled to the MMA's protections for malpractice irrespective of their QHP status

The Court should also hold that registered nurses and other medical providers employed by QHP-hospitals are entitled to the MMA's benefits and protections. As noted, Section 41-5-3 of the MMA does not include registered nurses in the definition of "health care provider." However, this Court has rejected strict

interpretations of the phrase "health care provider" when such an approach "leads to absurdities, or conflicts with the Legislature's purpose for enacting the [MMA.]" *Baker*, 2013-NMSC-043, ¶ 15. Rather, this Court has recognized that a broad interpretation of that phrase is necessary to effect the Legislature's remedial purpose in enacting the MMA. *Id.*

In *Baker*, this Court considered the mirror image of the question presented in this appeal. 2013-NMSC-043, ¶¶ 2-9. The individual defendants in the consolidated cases were QHPs, but they were providing medical care to their patients as employees of professional entities. The plaintiffs argued that because those professional entities were not expressly listed in the MMA's definition of "health care provider," they were not eligible to become QHPs, such that vicarious liability claims against them fell outside the MMA. This Court rejected those arguments, holding that if the MMA "was interpreted literally," it would exclude the defendants' employers and thereby abrogate the benefits and protections afforded to the QHP physicians. *Id.*, ¶ 13.

In support for its decision, this Court reasoned that it could "discern no reason why the Legislature would intend to cover individual medical professionals under the MMA while excluding the business organizations that they operate under to provide health care." *Id.*, ¶ 21. Nothing in the MMA hinted at such a purpose, and "covering individuals without offering the same benefits to the companies that they

form **or operate under** disturbs the balanced scheme originally set up by the Legislature." *Id.*, 2013-NMSC-043, ¶¶ 2-9 (emphasis added).

The same result should obtain here. Hospitals employ many health care providers who are not expressly eligible to become QHPs under the MMA, but whose work enables hospitals to provide a full range of medical services to their patients. As a matter of *respondeat superior*, any act or omission of a hospital employee within the scope of her/his employment is attributable to the hospital. Indeed, as this Court explained in *Baker*, "'**the employer and the employee are treated as one entity** for purposes of assigning liability'" under that doctrine. *Id.*, ¶ 32 (quoting Restatement (Third) of Torts: Apportionment of Liability § 7 cmt. j (2000)) (emphasis added). If many categories of healthcare providers employed by QHP-hospitals were not covered by the MMA, not only would this rewrite the MMA by imposing criteria upon hospitals nowhere found in the statute but it would "conflict[] with the doctrine of respondeat superior language as it is used in the MMA." *Id.*, ¶ 33. This result would also increase a hospital's burdens and expenses of delivering medical care to New Mexicans and thereby inhibit them from hiring those providers. Making it more difficult and more expensive for hospitals and their employees to partake in the MMA, and otherwise exposing them to unknown tort damages, disincentivizes them from providing medical care and undermines the MMA's remedial purpose.

Moreover, allowing a plaintiff to recover against both a QHP-hospital and its non-QHP employees would serve no legitimate purpose. This is true because "the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice is $600,000 per occurrence." NMSA 1978, § 41-5-6(A) (stating that the $600,000 cap concerns). Any judgment amount "exceeding the personal liability cap is paid out of the [PCF]." *Id.* (citing NMSA 1978, §§ 41-5-7(E), -25(G)). Yet, if a plaintiff could circumvent that protection by pursuing the non-QHP employees of QHP-hospitals, the MMA's purpose would be undermined.

In relation to Lovelace's nurse-employees, Plaintiff asserted essentially the same arguments she advanced relative to Lovelace. Again, these lack merit. *First*, Plaintiff argued that under the plain language of Section 41-5-3(A), registered nurses are not included within the definition of "health care provider," and therefore cannot become QHPs. As previously described, this ignores *Baker's* holding that Section 41-5-3(A) is not to be interpreted literally but is instead to be broadly interpreted in a way that gives meaningful effect to the Legislature's intent. Even if registered nurses may not be able to become QHPs as individuals practicing on their own, the MMA does not prohibit them from enjoying the MMA's benefits and protections as employees of QHP-hospitals. To hold otherwise would effectively deprive QHP-hospitals of the MMA's benefits, thereby exposing them and their employed medical

providers to limitless liability. This is manifestly inconsistent with the MMA's purpose and design.

Second, Plaintiff argued that Lovelace's registered nurses made no effort to qualify as QHPs and paid no surcharges to the PCF. However, nothing within the MMA requires them to do so. As previously explained, the nurses are employed by a QHP (Lovelace), which is subjected to a risk assessment and must pay a surcharge based on an actuarial study commissioned by the Superintendent of Insurance. NMSA 1978, § 41-5-5(B) (1997). If Plaintiff were to establish that the nurses were negligent, then Lovelace would be held vicariously liable for their negligence, since the medical care they provided to Ms. Smith was exclusively in their capacity as Lovelace employees. Nothing in the MMA required Lovelace to pay a surcharge for specific individual employees to become a QHP. Instead, Lovelace was only required to satisfy the financial conditions set forth in Section 41-5-5 and quoted above. It is undisputed that Lovelace did so.

C. The Legislature's recent amendments to the MMA erase any doubt about whether Lovelace and its employed medical providers are entitled to the MMA's protections in this case

The Legislature's intent to cover QHP-hospitals along with their employees may be gleaned from the MMA's broad definition of "malpractice claim" and the statute's remedial purpose. If there were any reasonable doubt about the scope of a hospital's coverage, the Legislature erased it by "Clarifying and Modernizing the Medical Malpractice Act" in 2021. 2021 N.M. House Bill 75; NMSA 1978, § 41-5-

3(D) (2021). Through that legislation, the Legislature amended the MMA's definition of "hospital" to expressly include "employees and locum tenens providing services at the hospital; and agency nurses providing services at the hospital." *Id.; see also* NMSA 1978, § 41-5- 3(E) (2023) (continuing to so define "hospital" despite other ensuing amendments to the MMA). In clear and unmistakable terms, the Legislature confirmed that all hospital employees who furnish medical services at the hospital come within the MMA's protections.

Although Plaintiff has obliquely acknowledged the Legislature's amendments to the MMA, she has contended that they should have no impact on this case because "those amendments [didn't] go into effect until January 1, 2022." *Id.*, 1:37:48-1:39:35. Plaintiff has recognized that in malpractice "cases after that date, there's clarity" and that, "[g]oing forward, this won't be an issue." *Id.*, 1:37:48-1:39:35. Despite using the term "clarity," Plaintiff has suggested that the amendments were not really a clarification but should be viewed instead as "part of a very purposeful, very intentional negotiation and exchange" whereby the "caps for hospitals [were] raised but more of their employees fall under the Act now." *Id.* This is not a reasonable or accurate characterization.

In amending the MMA, the Legislature made explicit on the face of the statute what has been understood at least since *Baker*. That is, patients cannot opt out of the legislature's "balanced scheme" for medical malpractice reform, *Baker*, 2013-

NMSC-043, ¶ 17, by choosing to sue one of the entities vicariously responsible for the QHP's conduct, or one of the individuals for whose conduct the QHP is vicariously responsible.

New Mexico has long recognized that an amendment may "clarify existing law, rather than change the law, if the statute was ambiguous or unclear prior to the amendment." *Wasko v. New Mexico Dep't of Labor, Employment Sec. Div.*, 1994-NMSC-83, ¶ 9, 879 P.2d 83; *see also Resolution Trust Corp. v. Binford*, 1992-NMSC-068, ¶22, 844 P.2d 810 (noting that "the Supreme Court prefer[red] to indulge the presumption that the legislature was aware that the law was not clear, and thus interpret[ed] the amendment as a clarification of existing law.") (citation omitted); accord *Swink*, 1993-NMSC-013, ¶ 30 (holding that when a statutory amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive).

Nor may 2021 N.M. House Bill 75's title be so easily dismissed, as Plaintiff wrongly suggests. It is a constitutional requirement that the Legislature clearly express the subject of the bill in its title. Const. art. 4, Sec. 16 ("The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed

in its title, only so much of the act as is not so expressed shall be void."). Additionally, by statute, headings and titles in enrolled and engrossed statutes may be used in construing those statutes. NMSA 1997, § 12-2A-13; *see also Blackwood & Nichols Company v. New Mexico Taxation and Revenue Dept.*, 1998-NMCA-113, ¶ 15, 964 P.2d 137 (courts may look to the title of the act); *State v. Richardson*, 1944-NMSC- 059, ¶ 21, 154 P.2d 224 (for purpose of determining legislative intent, court may look to the title of statute, and ordinarily it may be considered as part of the statute if necessary to its construction).

The title of 2021 N.M. House Bill 75 — "Clarifying and Modernizing the Medical Malpractice Act" — establishes that the Legislature's intent was, in part, to clarify and modernize the MMA. "Clarify" as a single word means "'to explain clearly ... to make less complex or less ambiguous ....'" Webster's New International Dictionary 415 (3d. ed. 1971). "Modernizing" as a single word means "to make modern (as in taste, style, or usage)." *Id.* In accordance with Const. art. 4, Sec. 16, each of those words is legally significant because they must "clearly express" the bill's "subject" and what it is intended to accomplish.

Construing the word "clarify" in context, the title of 2021 N.M. House Bill 75 transforms into a declarative statement by the Legislature that it was endeavoring "to explain clearly" what the MMA means and to make its provisions "less ambiguous." In context, that can only mean that the Legislature sought to clarify that

the term "hospital" is not limited to bricks and mortar but instead extends to "employees and locum tenens providing services at the hospital; and agency nurses providing services at the hospital." *Id.* This is true because no other extant definition in the MMA was amended by the word "includes," which evinces the Legislature's intent that the prior definition was ambiguous and did not fully convey its intent. On its face, the Legislature sought to clarify an ambiguous term — "hospital" — that was being misconstrued, misapplied, and wrongly limited. As a clarification, the Court should apply that term to prior versions of the MMA in order to effect the Legislature's intent.

Similarly, construing the word "modernizing" in context, the title of 2021 N.M. House Bill 75 transforms into a declarative statement by the Legislature that it was endeavoring "to make modern" the usage of the phrase "health care provider." By modernizing the definition of "health care provider" to include nurse practitioners, it was bringing the MMA up to current practice. When originally enacted, the MMA did not categorically address most nurses since they practiced under physicians. However, by way of example, "certified nurse practitioners" have since been recognized as separately licensed providers authorized to engage in independent primary practice. *See* 1991 N.M. Laws, ch. 190 §§ 1, 14(B), (F). In expanding their practices, the Legislature placed certified nurse practitioners in the same category of advanced practice and enhanced risk as nurse anesthetists and

physician's assistants, both of whom were expressly named in the original MMA. By extension, the Legislature expressed an intent for certified nurse practitioners and a couple other independent nurse classifications to be treated the same as nurse anesthetists and physician's assistants under the MMA. It is this amendment to the MMA that may be rightly characterized as the "modernization" of the MMA.

In light of the foregoing principles of statutory construction, Plaintiff's argument is without merit. It wrongly assumes that the amendments were nothing more than a "give and take." But that assumption is undermined by the bill's use of the word "clarifying." As noted, the bill's scrivener was obligated to clearly and faithfully notify the legislators what they were voting on and what the governor was being asked to sign into law, as she did. As with any canon of construction, a bill's title is not dispositive, but it is entitled to considerable weight. And here, it makes clear that the Legislature intends and has always intended to protect the employees of QHP-hospitals for malpractice claims.

CONCLUSION

For all of the reasons stated, Lovelace Health System, LLC, respectfully requests that this Court reverse the district court's decision, hold that QHP-hospitals are entitled to the MMA's benefits for claims arising from the alleged negligence of their employed nurses, hold that employees of QHP-hospitals are likewise entitled to the MMA's protections, and grant Lovelace any other relief deemed just and proper under the premises.

STATEMENT REGARDING ORAL ARGUMENT

This appeal presents significant issues regarding whether QHP-hospitals are entitled to the MMA's benefits for claims arising from the alleged negligence of their employed nurses, and whether employed medical providers of QHP-hospitals are likewise entitled to those benefits. In order to ensure that any and all of the Court's questions are fully addressed, Lovelace respectfully requests that the Court allow oral argument in this appeal.

Dated: February 11, 2025.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2025, I filed this **BRIEF IN CHIEF** through the Court's Odyssey Filing System, which caused all counsel of record to be served electronically.

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