IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WRONGFUL DEATH ESTATE OF
ROSEMARY NAEGELE,

Plaintiff,

v. Civ. No. 19-1165 GBW/SMV

MUHAMMAD KHAWAJA,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT ON ALL CLAIMS

THIS MATTER comes before the Court on Defendant's Motion for Summary Judgment and Memorandum in Support Based on Statute of Limitations. *Doc. 24*. Having reviewed the Motion (*doc. 24*) and its attendant briefing (*docs. 28, 31*), the Court GRANTS the Motion and DISMISSES all of the claims in Plaintiff's complaint with prejudice.[1]

I. UNDISPUTED FACTS

On February 17, 2017, Rosemary Naegele underwent a cholecystectomy at Nor-Lea General Hospital, a health care center operated by the Nor-Lea Hospital District (hereinafter "Hospital District"). *Doc. 1* at 5; *doc 4* at 2; *doc. 24* at 23. The Hospital District is a tax-exempt New Mexico Special Hospital District and a governmental

[1] Defendant has also filed a motion for summary judgment on the issue of punitive damages. *Doc. 36*. The Court DENIES this motion as MOOT because granting the instant motion for summary judgment on the issue of statute of limitations dismisses all of Plaintiff's claims with prejudice.

entity. *Doc. 24* at 6–7; *doc. 28*. Following her surgery, Defendant, a physician hired by the Hospital District under a Physician Employment Agreement, admitted her to the hospital under his care. *See doc. 1* at 4; *doc. 4* at 1; *doc. 24* at 7–22; *doc. 28* at 2–4. The following day, Defendant discharged Ms. Naegele from the hospital. *Doc. 1* at 6, *doc. 4* at 2. Later that day, she died. *Doc. 24* at 2, *doc. 28* at 4.

Shortly after Ms. Naegele's death, her siblings, who constitute her wrongful death estate, consulted with an attorney about bringing a wrongful death action against the Hospital District. *Doc. 24* at 2, 26, 29, 31, 33, 35; *doc. 28* at 4. On March 1, 2017, their then-attorney sent a Notice of Claim pursuant to N.M. Stat. Ann. § 41-4-16 to the Hospital District. *Doc. 24* at 2, 23; *doc. 28* at 4. The notice stated that "[a]t this time, it appears that [Ms. Naegele] was not properly monitored and treated by hospital agents and/or staff during her post-operative stay" and that "[s]he was discharged from Nor-Lea General Hospital in an unstable condition…." *Doc.* 24 at 23.

Over two years later, on May 21, 2019, Plaintiff, now represented by current counsel, filed an Application for Review of Medical Care and Treatment against Defendant with the New Mexico Medical Review Commission. *Doc. 24* at 2, 36; *doc. 28* at 4–5. During the proceedings before this Commission, Defendant did not raise a statute of limitations defense. *Doc. 28* at 5; *doc. 31* at 2. Defendant did, however, notice Plaintiff that he "reserves the right to raise, in any lawsuit filed against [him], any and all legal defenses available to him and that [his] participation in these proceedings is not

a waiver of any such defenses." *Doc. 31* at 14. On September 18, 2019, the Commission found that "there was substantial evidence of professional negligence on the part of [Defendant]." *Doc. 28-2* at 1.

On November 15, 2019, Plaintiff filed this medical malpractice suit against Defendant in the First Judicial District Court of Santa Fe County. *Doc. 1* at 4. Plaintiff alleges that Defendant was negligent in his discharge of and care for Ms. Naegele. *Id.* at 7. On December 11, 2019, Defendant removed the case to this Court. *Id.* at 1. On August 20, 2020, Defendant filed the instant motion for summary judgment. *Doc. 24.*

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(a), this Court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of "show[ing] 'that there is an absence of evidence to support the nonmoving party's case.'" *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once the movant meets this burden, the non-moving party is required to designate specific facts showing that "there are . . . genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex*, 477 U.S. at 324.

III. ANALYSIS

The parties do not dispute any relevant, material facts.[2] *See doc. 28* at 3–5; *doc. 31* at 1–3. Rather, they dispute which statute of limitations/repose applies to these facts and whether Defendant may raise this defense. *See generally docs. 24, 28, 31.* Defendant asserts that the two-year statute of limitations in the New Mexico Tort Claims Act (hereinafter "TCA") bars all of Plaintiff's claims against him because he was a public employee when he treated and discharged Ms. Naegele and Plaintiff failed to file suit against him within two years of discovering the occurrence and cause of Ms. Naegele's death. *Doc. 24* at 3–4.

Plaintiff does not contest that the TCA statute of limitations bars its claims if it applies and Defendant may raise it.[3] *See doc. 28*. Rather, it argues the following: (i) the three-year statute of repose in the New Mexico Medical Malpractice Act (hereinafter "MMA") applies to its claims instead of the TCA statute of limitations because Defendant was an independent contractor for, not an employee of, the Hospital District, *id.* at 7–10; (ii) this statute of repose controls even if Defendant was an employee of the

[2] The parties do dispute whether Defendant was an employee of the Hospital District. *See doc. 24* at 2, *doc. 28* at 3. This dispute, however, is legal, rather than factual, in nature. The parties do not disagree about Defendant's job description, compensation, or any other fact related to the work that Defendant performed for the Hospital District. Rather, they disagree about whether, based on these undisputed facts, Defendant was an independent contractor for, or employee of, the Hospital District.

[3] The TCA statute of limitations starts to run "when the plaintiff knows or with reasonable diligence should have known of the injury and its cause." *Maestas v. Zager*, 152 P.3d 141, 147 (N.M. 2007). Defendant alleges that Plaintiff knew of Ms. Naegele's death and its cause on or before March 1, 2017 when Plaintiff sent a Notice of Claim to the Hospital District. *Doc. 24* at 4. Plaintiff offers no facts or evidence to contest this allegation. *See doc. 28*.

Hospital District because he was also a qualified health care provider at the time, *id.* at 12–15;[4] and (iii) Defendant is estopped from raising the TCA statute of limitations defense because he failed to assert it during the proceedings before the New Mexico Medical Review Commission, *id.* at 15–17.

All of Plaintiff's arguments fail. The two-year statute of limitations in the TCA applies to its suit against Defendant because he is a public employee and its application to Defendant, notwithstanding his status as a qualified health care provider, conforms with the legislative intent behind the TCA and MMA. Defendant is also not estopped from raising this defense. Therefore, all the claims that Plaintiff asserts in its complaint are time-barred.

1. ***Defendant Was a Public Employee, Not an Independent Contractor, When He Treated and Discharged Ms. Naegele***

Under the TCA, a public employee is "an officer, employee, or servant of a governmental entity, excluding independent contractors."[5] N.M. Stat. Ann. § 41-4-3(F).

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[4] Plaintiff also asks the Court to certify to the New Mexico Supreme Court the question of what statute of limitations/repose applies to a public employee who is also a qualified health care provider as it "may be determinative of an issue in pending litigation … and there is no controlling appellate decision, constitutional provision, or statute." *Doc. 28* at 11 (quoting N.M. Stat. Ann. § 39-7-4). Federal courts, however, should not run to a state supreme court "every time an arguably unsettled question of state law comes across [their] desks." *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007). If, like the issue here, there is a reasonably clear and principled course for resolution, then the federal court should resolve the matter. *See id.* (citations omitted).

[5] The TCA also provides that the following independent contractors are public employees: (i) licensed medical, psychological or dental arts practitioners providing services to the corrections department pursuant to contract; (ii) members of the board of directors of the New Mexico insurance pool; (iii) licensed medical, psychological or dental arts practitioners providing services to the children, youth and families department pursuant to contract; (iv) volunteers, employees and board members of court-appointed special advocate programs; (v) individuals participating in the state's adaptive driving

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