



Summer 2016

## **Buying Time with Diligence: New Mexico's Medical Malpractice Statute of Repose After Cahn v. Berryman**

Dominic A. Martinez

### **Recommended Citation**

Dominic A. Martinez, *Buying Time with Diligence: New Mexico's Medical Malpractice Statute of Repose After Cahn v. Berryman*, 46 N.M. L. Rev. 447 (2016).

Available at: <https://digitalrepository.unm.edu/nmlr/vol46/iss2/8>

This Student Note is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: [www.lawschool.unm.edu/nmlr](http://www.lawschool.unm.edu/nmlr)

# BUYING TIME WITH DILIGENCE: NEW MEXICO'S MEDICAL MALPRACTICE STATUTE OF REPOSE AFTER *CAHN V. BERRYMAN*

Dominic A. Martinez\*

## INTRODUCTION

In New Mexico, it is possible for a plaintiff to lose a claim for medical malpractice before he or she even discovers the basis for the claim<sup>1</sup>—even if the plaintiff is fighting cancer, has hired counsel, and has pursued the claim in good faith.<sup>2</sup> Medical malpractice claims in New Mexico are subject to a three-year statute of repose, which means that plaintiffs have three years from when the malpractice occurs to file their claims.<sup>3</sup> Whether they are aware of the act of malpractice or not, the clock is ticking from the moment that it occurs.<sup>4</sup>

In *Cahn v. Berryman*, the plaintiff's claim for medical malpractice arose when the defendant misdiagnosed her ovarian cancer.<sup>5</sup> The plaintiff discovered her cancer over two years later—with ten and one-half months remaining in the statute of repose.<sup>6</sup> However, she no longer lived in New Mexico at that time, and she did not know the defendant's name.<sup>7</sup> She only had one appointment with the defendant, and her medical records did not clearly identify him as the doctor that she visited.<sup>8</sup> Still, she hired counsel to pursue her claim and sent several records requests to her hospital to uncover the defendant's identity.<sup>9</sup> She ultimately uncovered the defendant's identity eleven months after the statute of repose expired, but was permitted to file her claim by the district court.<sup>10</sup> The district court ruled that enforcing the statute of repose would violate the plaintiff's due process rights, so it granted her a due process exception to the statute of repose.

---

\* University of New Mexico School of Law, Class of 2017. I would like to thank Professor Dawinder S. Sidhu for his guidance and feedback, which unquestionably raised the quality of this Note. I would also like to thank Professor Steven K. Homer for “showing me the ropes” in my first legal writing course. Many thanks to Ricardo Roybal, Corrine Mack, Felecia Cantwell, and Javier Garcia for their helpful edits and suggestions as I drafted and revised this Note. Finally, I would like to thank my family and friends for their unwavering love and support.

1. See N.M. STAT. ANN. § 41-5-13 (1976).

2. See *Cahn v. Berryman*, 2015-NMCA-078, ¶ 5, 355 P.3d 58, cert. granted, No. 35,302, 2015 LEXIS 289, at \*1 (N.M. Jul. 17, 2015).

3. See N.M. STAT. ANN. § 41-5-13 (1976); *Cummings v. X-Ray Assocs. of N.M.*, 1996-NMSC-035, ¶ 50, 918 P.2d 1321.

4. See *Cummings*, 1996-NMSC-035, ¶ 50, 918 P.2d 1321.

5. See *Cahn*, 2015-NMCA-078, ¶ 3, 355 P.3d 58.

6. See *id.* ¶ 5.

7. See *id.* ¶¶ 5–6.

8. See *id.* ¶¶ 3, 7.

9. See *id.* ¶¶ 5, 9.

10. See *id.* ¶¶ 6, 13.

But the New Mexico Court of Appeals held that the plaintiff's circumstances did not warrant the due process exception.<sup>11</sup> The court's analysis relied primarily on two earlier NMMMA cases in which a plaintiff sought the exception.<sup>12</sup> In one case, the plaintiff was granted the exception when she discovered the basis for her claim with roughly three months remaining.<sup>13</sup> In the other case, the plaintiff was not granted the exception when she had eighteen months remaining.<sup>14</sup> Since Cahn's case was between the three-month and eighteen-month marks, the *Cahn* court noted that it had "no clear guidance based solely on the amount of time."<sup>15</sup> Nevertheless, the court stressed that the plaintiff had all of the information that she needed to uncover the defendant's identify within her control before the statute expired.<sup>16</sup> As a result, her case did not fall within the "narrow" category of cases in which the due process exception was warranted, and her claim was barred.<sup>17</sup>

The *Cahn* court's decision is troubling both on its own facts and as an indication of the approach that New Mexico courts are taking in medical malpractice statute of repose cases. As the dissenting opinion states, the plaintiff did not "sit on her rights,"<sup>18</sup> she diligently pursued her claim, even in the midst of cancer treatment.<sup>19</sup> Also, the approach that the majority took in deciding the case—to consider the time that the plaintiff had and then consider her circumstances<sup>20</sup>—is inconsistent with due process, which is the basis for the courts' ability to grant the exception. A ten-month window is not the same for all plaintiffs, and the due process exception should be granted for plaintiffs whose circumstances warrant it.

To ensure that the due process exception is granted to deserving plaintiffs, New Mexico courts should adopt a "time-and-circumstances" approach to resolving cases in which plaintiffs seek the exception. In addition to considering the amount of time that plaintiffs have to file their claims, courts should incorporate a consideration of plaintiffs' circumstances into their analyses. These circumstances should include how diligently the plaintiff acted to pursue the claim, as well as any other reasonable justification for the plaintiff's failure to file before the statute of repose expired. By treating time as one factor in a larger analysis, rather than an initial barrier to reach that analysis, the courts can satisfy due process and allow deserving plaintiffs to redress their claims.

Part I of this Note will discuss statutes of repose generally, as well as the purpose of the statute of repose in the New Mexico Medical Malpractice Act. Since statutes of repose operate to deny a person's access to the courts, they implicate due process considerations. I will discuss these considerations, and explain how New Mexico courts adopted the due process exception as a discretionary tool to relax the statute of repose in certain cases. The origin of this exception is important because

---

11. *See id.* ¶ 24.

12. *See id.* ¶ 23.

13. *See id.* ¶ 19.

14. *See id.* ¶ 20.

15. *Id.* ¶ 23.

16. *See id.*

17. *See id.* ¶ 24.

18. *Id.* ¶ 38. (Zamora, J., dissenting).

19. *See id.* ¶ 32. (Zamora, J., dissenting).

20. *See id.* ¶ 23.

the New Mexico Supreme Court stated that it was a product of “the considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions.”<sup>21</sup>

Part II will discuss the approach that New Mexico courts have taken in deciding whether to grant the due process exception to a plaintiff. Before *Cahn*, only three appellate cases had addressed the exception in the medical malpractice context.<sup>22</sup> I will discuss the facts and reasoning of each of these cases, indicating which facts were significant in determining whether the court granted the due process exception.

Part III will discuss the factual background and procedural history of *Cahn*. I will analyze both the majority and dissenting opinions, and assess the reasoning employed by the majority to determine which facts it considered to hold that the plaintiff was not entitled to the due process exception. I will discuss how the majority considered the time that the plaintiff had to file her claim before it considered her circumstances, while the dissent focused on the plaintiff’s circumstances.

Part IV will revisit the four New Mexico appellate decisions (including *Cahn*) that addressed the due process exception. I will illustrate how the courts’ decisions were time-centric, despite the nominal consideration of plaintiffs’ “diligence” in three of the cases.<sup>23</sup> Then, I will discuss the problems with this time-centric approach and argue for a more principled method that New Mexico courts can employ in these cases—to incorporate a consideration of plaintiffs’ circumstances in determining whether to grant the due process exception. This “time-and-circumstances” approach is more consistent with the principles of due process than the courts’ current time-centric approach. Also, this is a fairly modest proposal, because New Mexico courts are already nominally considering plaintiffs’ diligence in pursuing their claims. I will argue that courts should actually consider how diligently plaintiffs pursue their claims, as well as other reasonable justifications that plaintiffs have for their untimeliness.

Finally, Part V will walk through the application of the time-and-circumstances approach in various fact patterns to illustrate how courts should apply it in future cases.

*Cahn* was decided in April 2015, so it has not yet been the subject of any legal scholarship. However, statutes of repose for medical malpractice claims have been widely discussed in a variety of publications.<sup>24</sup> Some have argued that statutes of repose are unconstitutional because they block access to the courts,<sup>25</sup> and others

---

21. *Garcia ex. rel. Garcia v. La Farge*, 1995-NMSC-019, ¶ 36, 893 P.2d 428.

22. *See La Farge*, 1995-NMSC-019; *Cummings*, 1996-NMSC-035; *Tomlinson v. George*, 2005-NMSC-020, 116 P.3d 105.

23. *See Cummings*, 1996-NMSC-035; *Tomlinson*, 2005-NMSC-020; *Cahn*, 2015-NMCA-078.

24. *See, e.g.*, Christopher J. Trombetta, *The Unconstitutionality of Medical Malpractice Statutes of Repose: Judicial Conscience Versus Legislative Will*, 34 VILL. L. REV. 397 (1989); Garris Ference, *Statutes of Repose and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution*, ENVTL. L. INST. (2006); Nancy Lebowitz, *Five Year Statute of Repose on Medical Malpractice Claims That Commences When an Injury Occurs is Constitutional. Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985), 16 UNIV. OF BALT. L. REV. 571 (1987).

25. *See Trombetta, supra* note 24.

have argued that they are unconstitutional because they violate equal protection.<sup>26</sup> Additionally, New Mexico courts' approach to resolving constitutional challenges to the statute of repose was included in a nationwide survey of such approaches.<sup>27</sup> This Note is the first work of legal scholarship that analyzes New Mexico courts' approach to the due process exception and argues for its refinement.

The due process exception was adopted to protect plaintiffs from the harsh results that statutes of repose can yield. However, the current application of the exception afforded no such protection to Sara Cahn. If New Mexico courts adopt a more principled approach to dealing with these cases, perhaps a future plaintiff who faces a ten-month window to file a claim will enjoy a fairer result.

## I. THE NEW MEXICO MEDICAL MALPRACTICE ACT'S STATUTE OF REPOSE AND THE DUE PROCESS EXCEPTION

### A. The New Mexico Medical Malpractice Act's Statute of Repose

The purpose of the New Mexico Medical Malpractice Act ("NMMMA") 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."<sup>28</sup> To that end, the NMMMA provides incentives for insurance carriers to offer coverage to New Mexico's health care providers.<sup>29</sup> One such incentive is the NMMMA's statute of repose.<sup>30</sup> Under the statute of repose, malpractice claims are time-barred if they are not filed within three years of the date that the malpractice occurred.<sup>31</sup> The statute of repose reduces the number of malpractice claims that can be brought against New Mexico health care providers,<sup>32</sup> and therefore makes it more cost-effective for insurance carriers to offer them coverage.

### B. Statutes of Repose and Statutes of Limitations

Statutes of repose should not be confused with statutes of limitations. The key difference between the two is the triggering event that causes the statute to begin running.<sup>33</sup> Statutes of limitations begin to run upon the accrual of the cause of

---

26. See Ference, *supra* note 24.

27. See Peter Zablotsky, *From a Whimper to a Bang: The Trend Toward Finding Occurrence Based Statutes of Limitations Governing Negligent Misdiagnosis of Diseases with Long Latency Periods Unconstitutional*, 103 DICK. L. REV. 455, 481-86 (1999).

28. N.M. STAT. ANN. § 41-5-2 (1976).

29. See N.M. STAT. ANN. § 41-5-6 (1992); N.M. STAT. ANN. § 41-5-13 (1976).

30. N.M. STAT. ANN. § 41-5-13 (1976).

31. See *id.*; *Cummings*, 1996-NMSC-035, ¶ 50.

32. The benefits of the NMMMA, including the statute of repose, only apply to health care providers who are qualified under N.M. STAT. ANN. § 41-5-5 (1992). These qualifications include establishing financial responsibility by providing proof of malpractice liability insurance, and paying a surcharge. See *id.* Because the statute of repose does not apply to non-qualified providers, malpractice claims against non-qualified providers are subject to a three-year statute of limitations, which begins to run when a plaintiff discovers an injury, or should have discovered it through reasonable diligence. *Roberts v. Southwest Cmty. Health Serv.*, 1992-NMSC-042, ¶¶ 19, 27, 114 N.M. 248, 837 P.2d 442.

33. See *Cummings*, 1996-NMSC-035, ¶¶ 49-50.

action.<sup>34</sup> In the medical malpractice context, this is sometimes the date of discovery—when the plaintiff discovers “through medical diagnosis that previous medical care was improper,” or when the plaintiff becomes aware that something is wrong with “the first feelings of pain or discomfort.”<sup>35</sup> Under a statute of limitations, plaintiffs have a fixed amount of time (three years, for example) to file their claim after they discover the basis for it.<sup>36</sup> By contrast, statutes of repose can terminate a claim for malpractice before plaintiffs even become aware that the malpractice occurred.<sup>37</sup> This is because statutes of repose are triggered by a statutorily determined event, such as the act of malpractice itself.<sup>38</sup> Under a statute of repose that is triggered by an act of malpractice, plaintiffs have a fixed amount of time to file their claim from the date that the act of malpractice occurs, regardless of when they discover that their previous medical care was improper.<sup>39</sup> The New Mexico Supreme Court has “consistently construed” the NMMMA “according to its plain meaning” to provide a statute of repose, rather than a statute of limitations.<sup>40</sup>

### C. Due Process Considerations Implicated by the NMMMA’s Statute of Repose

The common function of statutes of repose and statutes of limitations is to deny plaintiffs’ access to the courts when they do not file their claims before a set deadline.<sup>41</sup> With these statutes in place, individuals who could otherwise pursue causes of action are denied that opportunity if they do not act quickly enough.<sup>42</sup> The Supreme Court of the United States has held that legislatures can impose these statutory deadlines for bringing lawsuits without violating due process.<sup>43</sup> There is an exception to this general rule, however, for situations in which legislatures enact new statutory deadlines and attempt to impose them on preexisting claims.<sup>44</sup> In these situations, the new statutory deadlines can apply to preexisting claims only if there is “reasonable time” left for the claims to be filed before the deadline.<sup>45</sup> If there is not reasonable time left, due process is violated and the statute of repose or statute of limitations is unconstitutional as-applied.<sup>46</sup>

---

34. *See id.* ¶ 49.

35. *Id.* ¶ 47.

36. *See id.* ¶ 49.

37. *See id.* ¶ 50.

38. *See id.*

39. *See id.*

40. *Id.* ¶ 50.

41. *See id.* ¶¶ 49–50.

42. *See id.*

43. *See, e.g.,* *Hawkins v. Joshua Barney’s Lessee*, 30 U.S. (5 Pet.) 457, 466 (1831).

44. *See Atchafalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190, 197 (1922).

45. *See id.*

46. *See id.* at 195, 197.

#### D. The Origin and Evolution of the Due Process Exception to the NMMMA's Statute of Repose

In *Terry v. New Mexico State Highway Commission*, the New Mexico Supreme Court adopted this “reasonable time” exception and stretched it to cover a new set of scenarios.<sup>47</sup> The *Terry* court reasoned that “[a]lthough this [reasonable time] rule has been formulated in circumstances where a limitations statute, applied retroactively, operates to bar an existing remedy, we think it is an appropriate general restriction on the Legislature’s right to statutorily limit actions.”<sup>48</sup> Following the *Terry* court’s decision, the constitutionality of all statutory deadlines for bringing lawsuits is subject to the reasonable time analysis—not just those statutory deadlines that are retroactively applied to preexisting claims.<sup>49</sup>

The *Terry* court held that a ten-year statute of limitations on actions against architects, engineers, and contractors was unconstitutional as applied to the plaintiffs’ wrongful death claim.<sup>50</sup> The defendants in *Terry* were an engineer and a contractor on a construction project over a stretch of highway.<sup>51</sup> Nine years and nine months after the completion of the project, two people were killed in a car accident on that stretch of highway.<sup>52</sup> The decedents’ personal representatives brought suit against numerous parties, including the defendants, within three years of the accident.<sup>53</sup> The defendants argued, however, that NMSA 1978, Section 37-1-27 barred the lawsuit, because the plaintiffs’ lawsuit was filed more than ten years after the date of the accident.<sup>54</sup> But the court ruled against the defendants because the plaintiffs only had three months to file their claim before the expiration of the ten-year statute of limitations.<sup>55</sup> The court held that this “abbreviated period” was not a reasonable time, and was therefore a violation of the plaintiffs’ due process rights.<sup>56</sup>

Thirteen years after *Terry*, the New Mexico Supreme Court employed the “reasonable time” analysis to determine the as-applied constitutionality of the NMMMA’s statute of repose.<sup>57</sup> In *Garcia ex rel. Garcia v. La Farge*, the defendant was a doctor who failed to diagnose a child’s heart rhythm disorder, despite seeing the child multiple times.<sup>58</sup> The child subsequently went into cardiac arrest and suffered permanent brain damage.<sup>59</sup> At that time, there were eighty-five days remaining until the NMMMA’s three-year statute of repose would expire and prevent the child’s parents from suing the doctor.<sup>60</sup> Since the child’s parents filed

---

47. 1982-NMSC-047, ¶ 15, 645 P.2d 1375.

48. *Id.*

49. *See id.*

50. *See id.* ¶ 17.

51. *Id.* ¶ 2.

52. *Id.*

53. *Id.* ¶ 3.

54. *See id.* ¶ 4.

55. *See id.* ¶ 16.

56. *See id.*

57. 1995-NMSC-019, ¶ 36.

58. *See id.* ¶¶ 3-7.

59. *Id.* ¶ 6.

60. *Id.* ¶ 37.

their lawsuit after the statute of repose expired, the district court granted summary judgment for the defendant doctor.<sup>61</sup> The plaintiffs appealed, arguing that, because eighty-five days was an unreasonably short period of time for them to file their claim, the statute of repose violated their due process rights.<sup>62</sup> The New Mexico Supreme Court ruled in favor of the plaintiffs, stating that “considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions dictate that when the legislature enacts a limitations period it must allow a reasonable time within which existing or accruing causes of action may be brought.”<sup>63</sup> The court granted the due process exception to the plaintiffs, extending their window to file a claim to three years from the date when they discovered their child’s injury.<sup>64</sup> The court allowed three years from discovery after applying “the three-year accrual-based limitation of [N.M. STAT. ANN. 37-1-8 (1976)], the statute of limitations which would have been applicable” before the NMMMA’s enactment.<sup>65</sup>

In *Cummings v. X-Ray Associates of New Mexico, P.C.*, a plaintiff argued that eighteen months was an unreasonably short period of time to file her malpractice claim, but the New Mexico Supreme Court rejected her argument.<sup>66</sup> The defendant in *Cummings* misdiagnosed the plaintiff’s lung and kidney cancer, which the plaintiff discovered with roughly eighteen months remaining in the three-year window.<sup>67</sup> She did not file any claims within the three-year window, and did not file her claim against the defendant until five years after the misdiagnosis.<sup>68</sup> As a result, the court held that the plaintiff had “lost her medical malpractice claim through her own lack of diligence.”<sup>69</sup> The court stated that it “appreciate[d] [the plaintiff’s] circumstances,” but that it is not the judiciary’s “responsibility to inquire into the harshness of a legislative enactment.”<sup>70</sup> Instead, in determining whether the due process exception is warranted, “[t]he only variable is the date the act of malpractice took place.”<sup>71</sup>

The New Mexico Supreme Court in *Tomlinson v. George* reasoned that the NMMMA’s statute of repose should be relaxed “in unusual cases involving

---

61. *Id.* ¶ 1.

62. *See id.* ¶ 2.

63. *Id.* ¶ 36. It is important to note that the court requires reasonable time for “existing or accruing causes of action” to be brought. *Id.* Under the NMMMA, if a plaintiff does not discover the basis for a malpractice claim within the three-year statute of repose, the cause of action is foreclosed before it exists or accrues. *See Cummings*, 1996-NMSC-035, ¶ 32. Thus, if a plaintiff does not discover the basis for a malpractice claim on time, the plaintiff does not have a right to vindicate in court and cannot allege a denial of access to the courts. *See id.* Consequently, this plaintiff’s due process rights have not been violated. *See id.* By contrast, if a plaintiff’s malpractice claim accrues within the three-year window (via discovery of the basis for the claim), the plaintiff has an existing right to vindicate in court. *See id.* It is a violation of due process to not afford this plaintiff a reasonable time to file suit and vindicate the existing right. *See id.*

64. *See id.* ¶ 38.

65. *Id.*

66. *See* 1996-NMSC-035, ¶ 57, 918 P.2d 1321.

67. *See id.* ¶ 57.

68. *See id.*

69. *Id.*

70. *Id.* ¶ 58.

71. *Id.*



exceptional circumstances as a matter of fairness.”<sup>72</sup> The court stated that district courts should have “some level of discretion” to determine whether plaintiffs are entitled to pursue their claims after the statutory deadline.<sup>73</sup> In *Tomlinson*, the plaintiff discovered her claim for malpractice early in the three-year window, with two years and eight months remaining.<sup>74</sup> The court ruled against the plaintiff, referencing *La Farge* and *Cummings* in its reasoning.<sup>75</sup> *La Farge* illustrated that eighty-five days was a constitutionally unreasonable amount of time to file a claim, and *Cummings* showed that “one and one-half years is not too short a time and that a plaintiff who does not file his or her claim in that period of time loses the claim through a lack of diligence.”<sup>76</sup> The court stated that “*Cummings* thus demarcates the outer boundary of *La Farge*.”<sup>77</sup> Because the plaintiff in *Tomlinson* was on the wrong side of this boundary, her claim for malpractice was time-barred.<sup>78</sup> *Tomlinson*, which was decided in 2005, was the last New Mexico appellate case to address<sup>79</sup> the due process exception to the NMMMA’s statute of repose until *Cahn* was decided by the New Mexico Court of Appeals in 2015.

## II. CAHN V. BERRYMAN

### A. Factual Background

In *Cahn*, the plaintiff, Sara Cahn, went to the emergency room at Lovelace Women’s Hospital on May 17, 2006 because she was experiencing abdominal and pelvic pain.<sup>80</sup> Two days later, she received a pelvic ultrasound at Lovelace West Mesa Medical Center.<sup>81</sup> The ultrasound report stated that she had a complex mass on her left ovary, and “noted that [a] malignancy need[ed] to be excluded.”<sup>82</sup> A few months later, the plaintiff had her only appointment with the defendant, Dr. John Berryman, to review the results of the ultrasound report.<sup>83</sup> The appointment was at the Lovelace Women’s Hospital, though the defendant was not employed by Lovelace.<sup>84</sup> He was employed by Sandia OB/GYN, a separate entity that operated

---

72. 2005-NMSC-020, ¶ 27, 116 P.3d 105.

73. *Id.* ¶ 27.

74. *See id.* ¶¶ 5–6.

75. *See id.* ¶ 24.

76. *See id.*

77. *See id.* ¶ 23.

78. *See id.* ¶ 24.

79. The *Tomlinson* court also addressed the “fraudulent concealment doctrine,” which provides another avenue through which plaintiffs can file their claims after the statute of repose has expired. *See* 2005-NMSC-020, ¶ 2. If a plaintiff does not discover his or her injury within the three-year window as a result of the defendant doctor’s fraudulent concealment, courts can equitably toll the statute of repose and allow the plaintiff to file the malpractice claim. *See id.* ¶ 2.

80. 2015-NMCA-078, ¶ 2.

81. *Id.*

82. *Id.*

83. *Id.* ¶ 3.

84. *See id.* ¶ 8.

inside a Lovelace hospital.<sup>85</sup> At this time, the Lovelace Sandia Health System was a health care provider that consisted of several hospitals and medical centers.<sup>86</sup>

During the plaintiff's appointment with the defendant on August 8, 2006, the defendant did not disclose the results of the ultrasound report.<sup>87</sup> Instead, he diagnosed the plaintiff with endometriosis, a painful disorder in which tissue that normally lines the inside of the uterus grows in other regions.<sup>88</sup> The defendant prescribed contraceptive patches to alleviate the plaintiff's symptoms.<sup>89</sup> Over two years later, when the plaintiff was living in Wyoming, she visited another doctor because she was still experiencing abdominal pain.<sup>90</sup> At this appointment, the doctor reviewed the ultrasound report with the plaintiff, informing her of the complex mass that was found in her left ovary.<sup>91</sup> The doctor then performed further tests on the plaintiff, which revealed that the plaintiff had widespread ovarian cancer.<sup>92</sup> From the date of this appointment—September 22, 2008—the plaintiff knew that she had a medical malpractice claim against the defendant because he misdiagnosed her cancer.<sup>93</sup> At this point, there were roughly ten and one half months left in the three-year window.<sup>94</sup>

Over the next three months, the plaintiff underwent surgery and treatment in New York and Boston, which “included a total hysterectomy to remove her uterus and ovaries.”<sup>95</sup> She hired a lawyer to pursue her malpractice claim against the defendant in December 2008.<sup>96</sup> But the plaintiff did not know the defendant's name, nor was she aware that he was not a Lovelace doctor.<sup>97</sup> While she was receiving treatment for her cancer, she sent eight letters to Lovelace Sandia Health System entities requesting her records.<sup>98</sup> Believing that her appointment with the defendant was shortly after she received the ultrasound, she requested records for May, June, and July 2006—not August 2006.<sup>99</sup> Consequently, none of these records had the defendant's information.<sup>100</sup> The plaintiff also called Lovelace Women's Hospital to review her records and determine if a Lovelace employee could identify the defendant based on a description of him.<sup>101</sup> These efforts also proved fruitless.<sup>102</sup> On April 10, 2009—before the expiration of the three-year statute of repose—the

---

85. *Id.*

86. *Id.*

87. *Id.* ¶ 3.

88. *Endometriosis*, MAYO CLINIC, Diseases and Conditions, <http://www.mayoclinic.org/diseases-conditions/endometriosis/basics/definition/> (last visited Dec. 4, 2015).

89. *Cahn*, 2015-NMCA-078, ¶ 3.

90. *Id.* ¶ 5.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.* ¶ 23.

95. *Id.* ¶ 5.

96. *Id.*

97. *Id.* ¶¶ 6–7.

98. *Id.* ¶ 9.

99. *Id.*

100. *Id.*

101. *Id.* ¶ 10.

102. *Id.*

plaintiff filed a complaint, naming Lovelace, five doctors employed by Lovelace, and “John Doe” as defendants.<sup>103</sup> She did not uncover the defendant’s identity until July 2010, eleven months after the statute of repose expired.<sup>104</sup>

Ultimately, the plaintiff uncovered the defendant’s identity using records which were in her control from the moment she discovered the basis for her malpractice claim.<sup>105</sup> The plaintiff used her debit card to pay the co-payment for her appointment with the defendant.<sup>106</sup> In her online banking statements, the co-payment was issued to Sandia OB/GYN, the defendant’s employer.<sup>107</sup> Additionally, her insurance company mailed her an Explanation of Benefits (EOB) form in August 2006, which listed the defendant as her treating physician.<sup>108</sup> The EOB form was mailed after the plaintiff had moved to Wyoming, but her mail was being forwarded to her new address.<sup>109</sup>

## B. Procedural History

Upon uncovering the defendant’s identity in July 2010, the plaintiff amended her complaint to name Dr. Berryman as a defendant, in the place of “John Doe.”<sup>110</sup> Although the plaintiff originally filed her complaint in April 2009, the defendant was unaware of the litigation until he was served on July 16, 2010.<sup>111</sup> Because this was more than three years after his appointment with the plaintiff, the defendant moved for summary judgment, arguing that the statute of repose barred the plaintiff’s claim.<sup>112</sup> The district court denied the defendant’s motion, ruling that the statute of repose “violates Plaintiff’s substantive due process rights under the United States Constitution and New Mexico Constitution[.]”<sup>113</sup> Following the denial of the motion, the parties entered into a stipulated conditional verdict, in which the statute of repose was the key issue.<sup>114</sup> Under the stipulation, if the statute barred the plaintiff’s claim, she could not recover, but if the statute did not bar her claim, the defendant was liable on her claim.<sup>115</sup> The parties also agreed to the “entry of a directed verdict against Defendant in the amount of \$700,000, plus interest, subject to Defendant’s right to appeal.”<sup>116</sup>

---

103. *Id.* ¶ 12.

104. *See id.*

105. *See id.* ¶ 23.

106. *Id.* ¶ 4.

107. *Id.* ¶ 23.

108. *Id.* ¶ 4.

109. *Id.*

110. *Id.* ¶ 12.

111. *Id.*

112. *Id.* ¶ 13.

113. *Id.*

114. *See id.* ¶ 14.

115. *See id.*

116. *Id.*

### C. Majority Opinion

In a 2-1 split, the New Mexico Court of Appeals reversed the district court's order, holding that ten and one-half months was a constitutionally reasonable time for the plaintiff to file her claim.<sup>117</sup> In its decision, the court traced the due process exception back to *Terry*, stating that the *Terry* court did not provide express guidelines for determining whether a period of time is unreasonable,<sup>118</sup> other than the statement that an unreasonable period of time must be "so short that it in effect prevents an injured party from obtaining relief."<sup>119</sup>

The *Cahn* court began its analysis by comparing the plaintiff's ten-and-one-half month window with the plaintiffs' time periods in *Terry*, *La Farge*, *Cummings*, and *Tomlinson*.<sup>120</sup> The court noted that ten and one-half months was "longer than the three months in *Terry* and the eighty-five days in *La Farge*, but shorter than the eighteen months in *Cummings* and the two years and eight months in *Tomlinson*, so we have no clear guidance based solely on the amount of time."<sup>121</sup> The court then added that the plaintiff had all of the information that she needed to uncover the defendant's identity for the entire ten and one-half months.<sup>122</sup> The court acknowledged that the plaintiff's confusion about the defendant's identity was "understandable."<sup>123</sup> It emphasized, however, that the plaintiff was in "control" of the EOB form and her online banking statements, and also that the plaintiff knew the location of the defendant's previous office in Lovelace Women's Hospital.<sup>124</sup> As she could have uncovered the defendant's identity before the statute of repose expired, the court held that her case did not warrant a granting of the "narrow" due process exception to the statute of repose.<sup>125</sup>

### D. Dissenting Opinion

In her dissenting opinion, Judge Zamora argued that the majority's opinion failed to consider the "plaintiff's diligence in pursuing her claim, especially in light of the entirety of her circumstances."<sup>126</sup> She based this opinion on the courts' analyses in *Terry* and *Cummings*.<sup>127</sup> In *Terry*, the court stressed that the New Mexico legislature had not enacted a statute of limitations that was less than one year.<sup>128</sup> Thus, Judge Zamora wrote, the plaintiff's ten and one-half months is shorter than any period promulgated by the legislature.<sup>129</sup> Additionally, she noted, the *Cummings* court reasoned that a plaintiff's diligence in pursuing his or her claim is important in

---

117. *See id.* ¶ 24.

118. *See id.* ¶ 18 (citing *Terry*, 1982-NMSC-047, ¶¶ 1, 9, 10.).

119. *Id.* (quoting *Terry*, 1982-NMSC-047, ¶ 10.).

120. *See id.* ¶ 23.

121. *Id.*

122. *See id.*

123. *Id.* ¶ 7.

124. *See id.* ¶ 23.

125. *Id.* ¶ 24.

126. *Id.* ¶ 32 (Zamora, J., dissenting).

127. *See id.* ¶ 31 (Zamora, J., dissenting).

128. *See id.* (Zamora, J., dissenting).

129. *See id.* (Zamora, J., dissenting).

a due process exception analysis.<sup>130</sup> Judge Zamora stressed that the plaintiff “diligently pursued her claim while she faced a grave diagnosis, a serious surgery, an eight-month recovery, and years of continued treatment.”<sup>131</sup> Judge Zamora emphasized the plaintiff’s efforts to uncover the defendant’s identity, such as hiring counsel and sending medical records requests to Lovelace.<sup>132</sup>

In addition, Judge Zamora took issue with the majority’s stance that the plaintiff had all of the necessary information “in her control.”<sup>133</sup> The EOB form was mailed to the plaintiff’s New Mexico residence, and although the plaintiff filled out a change of address form she testified that she did not receive the mailed EOB.<sup>134</sup> Also, the plaintiff’s online bank statements indicate that the plaintiff paid her co-pay to “Sandia OB-GYN Assoc.”<sup>135</sup> Because Lovelace was known as Lovelace Sandia Health System at that time, Judge Zamora pointed out that “[i]t is not necessarily fair to assume that Plaintiff would have reviewed her bank statement two years later and deduce that Sandia OB-GYN was an entirely separate entity.”<sup>136</sup> Lastly, Judge Zamora stated that it was not reasonable for the majority to assume that the plaintiff could have physically gone to the defendant’s prior office at the Lovelace Women’s Hospital.<sup>137</sup> The plaintiff was in New York for eight months recovering from surgery, and thereafter was traveling between Wyoming and New York for follow-up care.<sup>138</sup>

Judge Zamora stated that the due process exception to statutes of repose is “rooted in principles of fairness, which are inherent in the Due Process Clauses of the United States and New Mexico Constitutions.”<sup>139</sup> Because of those principles, she would have held that the plaintiff’s case warranted the due process exception.

### III. ANALYSIS

#### A. The Time-Based Origin of the Due Process Exception

When the New Mexico Supreme Court originally recognized the due process exception to statutes of repose and statutes of limitations, the exception was entirely time-based.<sup>140</sup> The court in *Terry* remarked that “[t]he constitutionality of statutes of limitation has hinged on the reasonableness of the time provided to pursue a remedy.”<sup>141</sup> Thus, the central issue in *Terry* was whether the plaintiffs’ three-month window to file a lawsuit was a “reasonable time.”<sup>142</sup> The *Terry* court held that three months was not reasonable, and therefore it did not enforce the statute of limitations

---

130. *See id.* ¶ 30 (Zamora, J., dissenting).

131. *Id.* ¶ 38 (Zamora, J., dissenting).

132. *See id.* (Zamora, J., dissenting).

133. *See id.* ¶ 34 (Zamora, J., dissenting).

134. *See id.* (Zamora, J., dissenting).

135. *Id.* ¶ 35 (Zamora, J., dissenting).

136. *Id.* (Zamora, J., dissenting).

137. *Id.* ¶ 36 (Zamora, J., dissenting).

138. *Id.* (Zamora, J., dissenting).

139. *Id.* ¶ 37 (Zamora, J., dissenting).

140. *See Terry*, 1982-NMSC-047, ¶ 14.

141. *Id.*

142. *Id.*

to bar the plaintiffs' claim.<sup>143</sup> The court did not consider the plaintiffs' circumstances in its analysis, to determine, for example, if the plaintiffs actually had the ability to file their claim in the three-month window.<sup>144</sup> Instead, the court only considered, in general, whether three months was a reasonable amount of time to file a malpractice claim.<sup>145</sup>

Similarly, when the due process exception was extended to cases involving the NMMMA's statute of repose, the exception was granted based on time, rather than circumstances.<sup>146</sup> In *La Farge*, the court acknowledged that it is generally the legislature's duty to establish limitations periods, but stated that the courts "may determine that the limitations period selected is unreasonably short."<sup>147</sup> The plaintiffs in *La Farge* only had eighty-five days remaining to file their claim,<sup>148</sup> and there is no indication in the court's opinion that it considered anything aside from this number of days in making its decision.<sup>149</sup> The court did not consider the plaintiffs' dire circumstances,<sup>150</sup> including the fact that their son had just suffered permanent brain damage after going into cardiac arrest.<sup>151</sup> However, since the court ultimately granted the due process exception because of the unreasonable eighty-five-day window,<sup>152</sup> perhaps the court was content with resolving the issue before it without unnecessarily expanding the due process exception.

#### B. New Mexico Courts' Continued Use of a Time-Centric Analysis

The parties' arguments and the court's reasoning in *Cahn* illustrate how time is still prioritized in determining whether the due process exception is granted. In his Brief in Chief, the defendant argued that the plaintiff had "approximately four times as long as the plaintiff in *LaFarge* [sic]" to file her malpractice claim.<sup>153</sup> As a result, although the plaintiff's ten-month window to file her claim was shorter than the eighteen-month window in *Cummings*, the defendant contended that ten months was constitutionally reasonable.<sup>154</sup> In response, the plaintiff argued for the court to not "simply employ a reductive day counting analysis," but to instead consider "the reasoning behind the *LaFarge* [sic] and *Cummings* outcomes, as well as our legislature's intent."<sup>155</sup> After hearing both of these arguments, the New Mexico Court of Appeals began its analysis by day-counting.<sup>156</sup> The court compared the plaintiff's ten-month window with the corresponding windows in *La Farge*, *Cummings*, and

---

143. *See id.*

144. *See id.*

145. *See id.*

146. *See La Farge*, 1995-NMSC-019, ¶ 36.

147. *Id.* ¶ 37.

148. *Id.* ¶ 37.

149. *See id.*

150. *See id.*

151. *Id.* ¶ 6.

152. *See id.* ¶ 37.

153. Brief of Appellant at 20, *Cahn v. Berryman*, 2015-NMCA-078, 355 P.3d 58 (No. 33, 087).

154. *See id.*

155. Brief of Appellee at 18, *Cahn v. Berryman*, 2015-NMCA-078, 355 P.3d 58 (No. 33, 087).

156. *See Cahn*, 2015-NMCA-078, ¶ 23.

*Tomlinson*.<sup>157</sup> Because ten months fell between the constitutionally unreasonable eighty-five days in *La Farge* and the constitutionally reasonable eighteen months in *Cummings*, the court concluded that it had “no clear guidance based solely on time.”<sup>158</sup> After reaching this initial conclusion, the court’s decision turned on the fact that the plaintiff was in “control” of the information that she needed to file her malpractice claim for the entire ten-month period.<sup>159</sup>

The troubling aspect of the *Cahn* court’s decision is how the time (day-counting) analysis functioned as a gatekeeper before reaching the circumstances (control of information) analysis.<sup>160</sup> The court’s decision ultimately rested on its consideration of the plaintiff’s circumstances—those related to her control of information, at least.<sup>161</sup> Yet, it appears that the court would not have even considered these circumstances if the plaintiff’s window to file her claim was either shorter than the window in *La Farge* (eighty-four days, for example) or longer than the window in *Cummings* (eighteen months and one day). Any window shorter than that in *La Farge* would warrant the exception, and any window longer than that in *Cummings* would not. The problem with this reasoning can be illustrated by pushing it to its outer limits, in situations where the plaintiff’s window is still between the windows in *La Farge* and *Cummings*, but is extremely close to one or the other. If a plaintiff has eighty-six days, rather than eighty-four, then perhaps her circumstances will be considered; if she has seventeen months and twenty-nine days, rather than eighteen months and one day, her circumstances also may be considered. By using a day-counting exercise as a gatekeeper before considering a plaintiff’s circumstances, the courts are employing an analytical framework that not only lacks a principled basis, but that can yield nonsensical results.

### C. New Mexico Courts’ Nominal Consideration of Diligence

In *Cummings*, the New Mexico Supreme Court seemed to introduce a new consideration into its due process exception analysis that could have eliminated the potential for nonsensical results.<sup>162</sup> The *Cummings* court stated that “[t]he most determinative fact against [the plaintiff] is that she did not exercise diligence when she first learned [of her malpractice claim].”<sup>163</sup> This reasoning stands in contrast with the reasoning in earlier cases—*Terry* and *La Farge*—which only questioned the reasonableness of the time remaining for the plaintiff’s claim to be filed.<sup>164</sup> The *Cummings* court seemed to incorporate a separate inquiry of diligence into the due process exception analysis.<sup>165</sup> But within the same paragraph, the court equated diligence with time.<sup>166</sup> The court stated that the plaintiff “sat on her rights and did

---

157. *See id.*

158. *Id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See* 1996-NMSC-035, ¶ 56.

163. *Id.* ¶ 56.

164. *See Terry*, 1982-NMSC-047, ¶ 14; *La Farge*, 1995-NMSC-019, ¶ 37.

165. *See* 1996-NMSC-035, ¶ 56.

166. *See id.*

not file any claim for more than two years,” and as a result she “lost her medical malpractice claim through her own lack of diligence.”<sup>167</sup> Aside from time, the court did not consider any other factors in determining whether the plaintiff was diligent.<sup>168</sup> Even more damning to the diligence analysis, the court later stated that “[t]he only variable is the date the act of malpractice took place.”<sup>169</sup> Thus, although the *Cummings* court appeared to be considering the plaintiff’s diligence as a separate inquiry in whether to grant the exception, the court was actually just considering time by another name.

More recently, in *Tomlinson*, the New Mexico Supreme Court made clear that diligence is not a separate inquiry in the current due process exception analysis.<sup>170</sup> The *Tomlinson* court relied on *Cummings* in its decision to not grant the due process exception to a plaintiff who had two years and eight months to file her claim.<sup>171</sup> The court characterized *Cummings* as holding that “one and one-half years is not too short a time and that a plaintiff who does not file his or her claim in that period loses the claim through a lack of diligence.”<sup>172</sup> Rather than recognizing plaintiffs’ diligence as an independent factor, the *Tomlinson* court instead collapsed it into the time inquiry, referring to plaintiffs’ lack of diligence as the reason why they would not file their claim on time.<sup>173</sup>

The problem with this reasoning is that the court is willing to automatically label plaintiffs as lacking diligence if they do not file a claim within the designated window. Although not filing a claim on time might signal a lack of diligence, plaintiffs’ diligence is more clearly revealed by the actions that they actually took in trying to file a claim. But the *Tomlinson* court’s reasoning does not consider these actions.<sup>174</sup> Instead, *Tomlinson* recognizes the eighteen-month window in *Cummings* as the “outer boundary” of the due process exception.<sup>175</sup> If a plaintiff has more than eighteen months to file his or her claim, the exception will not be granted, regardless of the circumstances, including how diligently the plaintiff acted to pursue the claim.

#### D. The Time-and-Circumstances Approach

The courts’ current, time-centric analysis in due process exception cases is inconsistent with the reason why the exception is recognized. The exception is founded upon the “considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions.”<sup>176</sup> However, the courts’ current analysis of whether to grant the due process exception lacks any consideration of whether a fair outcome would result. The *Cummings* court acknowledged that it is not the courts’ responsibility to “inquire into the harshness of a legislative

---

167. *Id.*

168. *See id.*

169. *Id.* ¶ 58.

170. *See* 2005-NMSC-020, ¶ 24.

171. *See id.*

172. *Id.*

173. *See id.*

174. *See id.*

175. *Id.* ¶ 23.

176. *La Farge*, 1995-NMSC-019, ¶ 36.



enactment.”<sup>177</sup> While this is true, in assessing the fairness of a result, the courts would not be opining on the wisdom of a statute, or otherwise invading the province of the legislature. The due process exception itself is a judicial creation, and the basis for the exception is fairness. It is the courts’ responsibility to inquire into the very reason why the courts recognize the exception. With the due process exception, courts are given “some level of discretion to relax [the statute of repose] in unusual cases involving exceptional circumstances as a matter of fairness.”<sup>178</sup> Instead of employing a rote day-counting exercise, the courts should use their discretion to relax the statute of repose for plaintiffs whose circumstances truly warrant it.

In deciding whether to grant the due process exception to a plaintiff, courts should consider both time and circumstances in every case. The time portion of this analysis should operate much like the courts’ current analysis. Plaintiffs with more time to file their claims are less likely to be entitled to the due process exception. For example, if a plaintiff has over two and one-half years to file a claim, his or her circumstances would need to be especially compelling to warrant the exception. But if the plaintiff only has six months, less compelling circumstances could warrant the exception. Unlike in the courts’ current approach, there should be no amount of time established as an “outer boundary,” beyond which plaintiffs are absolutely barred from receiving the due process exception. Regardless of the amount of time that a plaintiff has to file a claim—up to the full three years—his or her circumstances should be considered to determine if the exception is warranted. In the circumstances portion of this analysis, courts should consider plaintiffs’ diligence by examining the actions that they took before the statute of repose expired. These actions should include whether the plaintiff hired counsel to pursue the malpractice claim, whether the plaintiff collected his or her medical records, and whether the plaintiff had access to (or was “in control” of) the other information necessary to file a claim. In addition to diligence, courts should consider whether the plaintiff’s circumstances include any other reasonable justification for not filing the claim on time, such as a serious health condition that inhibited the plaintiff from filing his or her claim.<sup>179</sup> By allowing courts to consider any other “reasonable justification,” this approach grants flexibility to judges to exercise discretion for the benefit of deserving plaintiffs.

If the time-and-circumstances approach were applied in *Cahn*, a court would have likely granted the due process exception to the plaintiff. Under this approach, the time analysis would have been mostly inconsequential, because either side could argue about whether the plaintiff’s ten-month window was sufficient. For example, the defendant doctor could argue (as he, in fact, did)<sup>180</sup> that ten months is much longer than the eighty-five days in *La Farge*, which is the only precedential NMMMA case in which a court granted the due process exception. Contrarily, the

---

177. 1996-NMSC-035, ¶ 58.

178. *Tomlinson*, 2005-NMSC-020, ¶ 27.

179. The “other reasonable justification” component of the time-and-circumstances approach is not an invitation for courts to engage in qualitative assessments of plaintiffs’ health conditions and injuries. Rather, it is aimed to provide a means by which courts can account for the incapacitation caused by some conditions/ injuries. The crux of this component of the analysis is whether the plaintiff is justified in claiming that he or she was inhibited from filing a malpractice claim, as a result of a serious health condition or something else.

180. Brief of Appellant, *supra* note 149, at 20.

plaintiff could argue (as she did)<sup>181</sup> that ten months is an insufficient window because the New Mexico Legislature has not enacted any limitations period that is shorter than one year. As such, the enforcement of a ten-month window would run contrary to legislative intent. Both of these arguments are valid, which is why the consideration of the plaintiff's circumstances is necessary.

If a court considered the plaintiff's circumstances in *Cahn*, it would likely conclude that the plaintiff acted diligently in pursuing her claim, and that she had another reasonable justification to excuse her untimeliness. First, the plaintiff was diligent because she hired counsel to pursue her claim just three months after she learned of the misdiagnosis.<sup>182</sup> She and her attorney sent several records requests to uncover the defendant's identity,<sup>183</sup> and even filed a claim against Lovelace and "John Doe" before the statute of repose expired.<sup>184</sup> She did not "sit on her rights" and first attempt to file her claim after the statute had expired.

Second, the plaintiff's health condition qualifies as a reasonable justification for her untimeliness. After she learned of the misdiagnosis, she underwent a serious surgical procedure to remove her uterus and ovaries, which was followed by an eight-month recovery period and years of continued treatment.<sup>185</sup> Because the plaintiff's health condition and the ensuing course of treatment inhibited her from pursuing her malpractice claim, her health condition constitutes a reasonable justification for her untimeliness.

It could be argued that the plaintiff's untimeliness is unjustifiable because she was in control of the information needed to file her claim throughout the ten-month window.<sup>186</sup> Indeed, this is the determinative fact in the *Cahn* court's opinion.<sup>187</sup> However, because this information was "confusing,"<sup>188</sup> as the New Mexico Court of Appeals acknowledged, the persuasive value of this fact is diminished. In sum, as the plaintiff hired counsel and otherwise acted diligently to pursue her claim, in spite of her dire health condition, the time-and-circumstances approach would entitle her to the due process exception.

One potential criticism of the time-and-circumstances approach is that it would expand the due process exception such that the NMMMA's purpose would be obstructed. The NMMMA was enacted by the New Mexico Legislature to make it more cost-effective for insurance providers to extend coverage to New Mexico doctors.<sup>189</sup> If the courts were to adopt the time-and-circumstances approach, many plaintiffs who failed to file their claims on time would argue that their circumstances warrant the due process exception. Some of these plaintiffs would be granted the exception, allowing them to pursue malpractice claims against their healthcare providers. This process would result in a swelling of medical malpractice litigation,

---

181. Brief of Appellee, *supra* note 151, at 19.

182. See *Cahn*, 2015-NMCA-078, ¶ 5.

183. See *id.* ¶ 9.

184. See *id.* ¶ 12.

185. See *id.* ¶ 38 (Zamora, J., dissenting).

186. See *id.* ¶ 23.

187. See *id.*

188. *Id.* ¶ 7.

189. See N.M. STAT. ANN. § 41-5-2 (1976).

making it costlier for insurance providers to extend coverage to New Mexico doctors, which is the outcome that the NMMMA was enacted to avoid.

Another argument against the time-and-circumstances approach is that it would cause the due process exception to “swallow the rule.” In other words, by considering both time and circumstances, the courts’ analysis would run afoul of the legislature’s intent to establish a solely time-based statute of repose. It is within the province of the legislature to enact statutes of limitations and statutes of repose. And as a result, the courts have thus far treaded lightly in applying the due process exception.<sup>190</sup> For example, the *Cahn* court referred to it as a “narrow” exception,<sup>191</sup> and the *Cummings* court stated that may only be applied in “very few exceptional circumstances.”<sup>192</sup>

Both of these counterarguments can be addressed by recalling the foundation of the exception: the considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions.<sup>193</sup> The legislature is able to establish a statute of repose to curtail insurance costs, unless doing so infringes upon a constitutional right. The due process exception was established for this very purpose—to ensure that plaintiffs’ due process rights were safeguarded from the statute of repose. Therefore, although the policy underpinning the NMMMA might be negatively affected, this would only occur because the courts are protecting plaintiffs’ due process rights. The courts have been careful to characterize the exception as “narrow” and applicable in “very few” circumstances, presumably to avoid signaling a judicial overreach into the legislative sphere. However, it is within the province of the judiciary to strike down legislative enactments or carve out exceptions in order to protect constitutional rights. These exceptions can be as broad or narrow as necessary. In this case, the due process exception should be expanded to protect plaintiffs’ rights, and it should be expanded as broadly as due process requires.

The time-and-circumstances approach could also be criticized for allowing plaintiffs too much time to file their claims, at the expense of both their doctors and the quality of evidence for malpractice litigation. First, it could be argued that, as doctors expect only to be sued within three years of the act of malpractice, any extension of this window would violate doctors’ rights. Second, it could be argued that extending the three-year window would diminish the quality of the evidence in malpractice lawsuits, since medical records would be more difficult to collect and witnesses’ memories would fade.

In light of these counterarguments, we must recall that the time-and-circumstances approach does not allow all plaintiffs to file their claims with a total disregard for timeliness. Only plaintiffs whose circumstances are compelling enough, given the time they have to file their claim, are granted the exception. Further, even those plaintiffs who are granted the exception are not granted an indefinite extension to file their claim. When the *La Farge* court granted the due process exception, it shifted the plaintiffs’ window to file their claim to three years

---

190. See, e.g., *Cahn*, 2015-NMCA-078, ¶ 24; *Cummings*, 1996-NMSC-035, ¶ 53.

191. *Cahn*, 2015-NMCA-078, ¶ 24, 355 P.3d 58.

192. *Cummings*, 1996-NMSC-035, ¶ 53, 918 P.2d 1321.

193. See *La Farge*, 1995-NMSC-019, ¶ 36.

from the date that they discovered their son's injury. Under this precedent, the maximum amount of time that plaintiffs will have to file their claims is six years, given that they discover their injury on the final day of the original three-year window. After six years, medical records should still be collectible, and witnesses' memories should still be sufficiently clear. And although doctors may be sued beyond three years of their malpractice, they can only be sued by the subset of plaintiffs whose due process rights are at-risk.

#### IV. APPLICATION OF TIME-AND-CIRCUMSTANCES APPROACH

To illustrate how the time-and-circumstances approach is an improvement over the courts' current, time-centric approach, we can apply the time-and-circumstances approach to the fact patterns from *La Farge*, *Cummings*, and *Tomlinson*. These three applications are below, along with the outcome of each application—whether the plaintiff in each case would be granted the due process exception. Additionally, each of the cases' fact patterns is accompanied by a “modified fact pattern,” in which the facts are modified to result in the opposite outcome. For example, if applying the time-and-circumstances approach to the original *La Farge* fact pattern would result in the exception being granted, applying the approach to the modified *La Farge* fact pattern would result in the exception being denied. These six applications aim to both illustrate the merits of the time-and-circumstances approach, and demonstrate how it can be applied in future cases.

##### A. La Farge Fact Pattern

If the time-and-circumstances approach were applied in *La Farge*, the plaintiffs would have been granted the due process exception, as they were under the time-centric approach.<sup>194</sup> The plaintiffs had a very limited period of time to file their claim.<sup>195</sup> Their son went into cardiac arrest with just eighty-five days remaining before the statute of repose expired,<sup>196</sup> which is a short period of time from multiple perspectives. Eighty-five days is less than one-twelfth of the full, three-year statute of repose, and it is less than one-fourth of a year, which is the shortest statute of limitations that has been enacted by the New Mexico Legislature.<sup>197</sup> Also, from a practical perspective, eighty-five days is a limited amount of time to collect medical records, contact an attorney, and file a complaint. It is feasible to file a complaint within eighty-five days, but the *La Farge* plaintiff's window is still relatively short.

As a result of the relatively short window, the plaintiffs' circumstances do not need to be especially compelling to warrant the due process exception. Nevertheless, the *La Farge* plaintiffs seem<sup>198</sup> to have acted diligently upon

---

194. See *La Farge*, 1995-NMSC-019, ¶ 38, 893 P.2d 428.

195. See *id.* ¶ 37.

196. *Id.*

197. See, e.g., N.M. STAT. ANN. § 30-1-8(D) (2009).

198. Each of the six applications in this Note relies, to an extent, on assumptions about the plaintiffs' diligence in pursuing their claims. Since the courts in *La Farge*, *Cummings*, and *Tomlinson* employed a time-centric analysis, they did not include many details about plaintiffs' actions in their opinions. Thus, given the limited information that is available in these cases' opinions and dockets, we must make assumptions about when plaintiffs hired counsel, requested medical records, etc. Since the time-and-

discovering the basis of their claim for malpractice. Their son's injury occurred on November 17, 1991, and they filed an application with the Medical Review Commission<sup>199</sup> on February 24, 1992—just sixteen days after the statute of repose expired. In this interim period, they presumably hired counsel and collected medical records from their son's visits with the defendant. In addition to being diligent, the plaintiffs had a reasonable justification for their failure to file on time. As their nine-year old son went into cardiac arrest and suffered irreversible brain damage,<sup>200</sup> it is reasonable for them to monitor his health and withhold from filing a malpractice claim over the following three months. Because of the plaintiffs' reasonable justification and their diligence, as well as their relatively short, eighty-five-day window, the plaintiffs would be granted the exception under the time-and-circumstances approach.

### B. Modified La Farge Fact Pattern

However, if we modify just three of the facts from the *La Farge* fact pattern, the plaintiffs would no longer be granted the exception. The first modification is an extension of the plaintiffs' window to file their claim from eighty-five days to one year. The second modification is that the plaintiffs did not hire counsel until six months after the expiration of the statute of repose. Finally, the third modification is a reduction in the severity of the plaintiffs' son's injury. Rather than going into cardiac arrest and suffering irreversible brain damage, their son's injury was a broken wrist that was improperly set and casted by the defendant.

As a result of the first modification, the plaintiffs' time to file their claim equals the amount of time that the New Mexico Legislature has set for some statutes of limitations.<sup>201</sup> Because of this lengthened window, the plaintiffs' circumstances would need to be more compelling to warrant the due process exception. And in this modified fact pattern, the plaintiffs' circumstances are not as compelling as in the original fact pattern. The plaintiffs were not as diligent in pursuing their claim as they were in the original fact pattern, since they did not hire counsel until six months after the statute of repose expired. Also, because the plaintiffs' son's injury is less severe, it is less reasonable for them to withhold from filing their claim in order to monitor his health. The combination of more time to file a claim, less diligence within that time, and a less reasonable justification for their untimeliness means that the plaintiffs in this modified fact pattern would not be granted the due process exception.

---

circumstances approach has a diligence component, opinions from courts that employed this new approach would contain more details about the actions that plaintiffs took to pursue their claims.

199. Under the NMMMA, plaintiffs must file an application to the Medical Review Commission before filing a medical malpractice claim against a qualified health care provider. N.M. STAT. ANN. § 41-5-15 (1976). Although the plain language of the statute states that the commission must render a decision allowing the claim before the plaintiff can file in court, this construction has been rejected by the New Mexico Court of Appeals. *See Rupp v. Hurley*, 2002-NMCA-023, ¶ 1, 131 N.M. 633, 41 P.3d 914. For purposes of the time-and-circumstances approach, an early application to the Medical Review Commission would signal that a plaintiff acted diligently in pursuing his or her claim.

200. *La Farge*, 1995-NMSC-019, ¶ 7.

201. *See, e.g.*, N.M. STAT. ANN. § 30-1-8(D) (2009).

It is important to note that, in the *La Farge* fact pattern, the plaintiffs are not personally injured as a result of the defendant's malpractice—their son is injured. This is a fairly unique situation in the medical malpractice context. It fits in the same category as situations in which a person dies as a result of malpractice and his or her estate sues the defendant. In this category of situations, the fact that the plaintiff is suing on behalf of someone else can be taken into account in the time-and-circumstances approach. Because these plaintiffs are not injured, they are less able to use health considerations as a reasonable justification for not filing their claim on time. The plaintiffs should be granted some latitude if a relative died or was seriously injured (like in *La Farge*) as a result of malpractice. However, the death or injury of a relative does not inhibit a person from filing a claim in the same way that a personal injury does. Thus, plaintiffs who are not personally injured must still act diligently to pursue their claim, because their relatives' injuries are less likely to be deemed reasonable justifications than their own injuries would be.

### C. Cummings Fact Pattern

The original *Cummings* fact pattern presents the closest call on whether a plaintiff would be granted the due process exception under the time-and-circumstances approach. Yet, as with the time-centric approach,<sup>202</sup> the plaintiff would not be granted the exception. In *Cummings*, the plaintiff discovered that her cancer was misdiagnosed with eighteen months remaining in the statute of repose.<sup>203</sup> This window is longer than one year, is roughly half of the full three-year window, and is a reasonable amount of time to collect medical records, hire counsel, and file a claim. As a result, the plaintiff's circumstances would need to be compelling to warrant the due process exception.

But in fact, the plaintiff's circumstances were not compelling, primarily because she filed a separate claim for her injuries over a year before she filed her claim against the defendant. The plaintiff discovered that her lung cancer had spread in January 1992, which left her with an "extremely bleak prognosis."<sup>204</sup> About six months later, in July 1992, she filed malpractice claims against the hospital and its corporate affiliates, but did not file a claim against the defendant, the company that performed her X-rays, which revealed a mass in her left lung.<sup>205</sup> The plaintiff ultimately filed a claim against the defendant in December 1993, one year and five months after her initial claim. In a diligence analysis, it cannot be argued that the plaintiff was as diligent as possible in pursuing her claim against the defendant because of the large gap between her two claims. There is no indication that the plaintiff was unaware that the defendant performed her X-rays,<sup>206</sup> so she should have included the defendant in her initial complaint. In addition, although the plaintiff's health condition included an extremely bleak prognosis, this is not a reasonable justification because of her initial complaint. If the plaintiff's health condition truly inhibited her from filing her claim against the defendant on time, she would not have

---

202. See *Cummings*, 1996-NMSC-035, ¶ 56.

203. See *id.*

204. See *id.* ¶ 6.

205. See *id.* ¶ 8.

206. See *id.*

been able to file a different claim over one year and five months prior. Because the plaintiff did not file her claim against the defendant with her initial claim, she would not be granted the due process exception under the time-and-circumstances approach.

#### D. Modified Cummings Fact Pattern

Since the original *Cummings* fact pattern presents a close call under the time-and-circumstances approach, only slight modifications need to be made for the plaintiff to be granted the due process exception. For example, the plaintiff learned that her lung cancer had spread and that she had an extremely bleak prognosis in January 1992.<sup>207</sup> If she would have sued the defendant at the same time as she sued the hospital and its corporate affiliates, in July 1992,<sup>208</sup> she would be granted the exception. In this modified situation, it could no longer be argued that the plaintiff was not diligent in pursuing a claim against the defendant. In six months, she hired counsel and collected her medical records to file a claim, and there was no lag between her initial complaint and her complaint against the defendant. Also, the plaintiff's health condition—widespread cancer and an extremely bleak prognosis—would become a reasonable justification for not filing her claim on time. Unlike in the original *Cummings* fact pattern, where the plaintiff's condition was not a reasonable justification because she had already filed a separate claim, this is the plaintiff's first claim in the modified fact pattern. As a result, her serious health condition and her diligence in pursuing her claim would warrant the due process exception.

#### E. Tomlinson Fact Pattern

The original *Tomlinson* fact pattern provides a clear example of when a plaintiff would not be granted the due process exception under the time-and-circumstances approach. First, the plaintiff had two years and eight months to file her claim against the defendant.<sup>209</sup> This is almost the entire three-year window, and it is almost certainly enough time to collect medical records, hire counsel, and file a claim. Thus, the plaintiff's circumstances would need to be especially compelling to warrant the due process exception. And although the plaintiff's actions after she discovered the basis of her claim are not discussed in the court's opinion, there is nothing to suggest that she acted diligently to pursue her claim.<sup>210</sup> The plaintiff was informed of the defendant's malpractice by a second doctor roughly four months into the three-year window.<sup>211</sup> But she presumably did not hire counsel to pursue her claim until much later, since she did not file her application with the Medical Review Commission until almost three years later.<sup>212</sup> Additionally, the plaintiff's malpractice claim is based on the defendant's failure to properly set her broken wrist.<sup>213</sup> This

---

207. *See id.* ¶ 6

208. *See id.* ¶ 8.

209. *Tomlinson*, 2005-NMSC-020, ¶ 2.

210. *See id.*

211. *See id.* ¶ 4.

212. *See id.* ¶ 5.

213. *See id.* ¶ 6.

injury might incapacitate a person temporarily, but it is not a reasonable justification for withholding from filing a claim for two years and eight months. The plaintiff underwent “several surgeries and numerous treatments” during this period,<sup>214</sup> but it remains doubtful that her condition would inhibit her from filing a claim. Because of the plaintiff’s extended window to file a claim, presumed lack of diligence, and lack of another reasonable justification, she would not be granted the due process exception.

#### F. Modified Tomlinson Fact Pattern

For the *Tomlinson* plaintiff to be granted the due process exception, provided that she still had two years and eight months to file her claim, her circumstances would need to be especially compelling. The plaintiff would need to act exceedingly diligently in pursuing her claim, and would need a reasonable justification for not filing it on time. We can borrow some facts from *Cahn* and pair them with new facts to illustrate this level of diligence and this type of a reasonable justification.

For example, we can imagine that the plaintiff hired counsel within a week of discovering the basis of her claim. And similar to the situation in *Cahn*, the plaintiff’s medical record was “confusing” and did not clearly reveal the defendant’s identity. Still, the plaintiff and her attorney sent several medical records requests, made phone calls, and visited the hospital in an attempt to uncover the defendant’s identity. We can imagine that the plaintiff and her attorney made these attempts throughout the two-year-and-eight-month period, but still were unable to uncover the defendant’s identity until after the statute of repose expired. After discovering the defendant’s identity, the plaintiff filed her claim within one week. This type of diligence would be required to offset a two-year-and-eight-month window. Additionally, we can imagine that the plaintiff’s health condition were as serious as the plaintiff’s in *Cahn*. Instead of having an improperly set broken wrist, the plaintiff had widespread ovarian cancer, which required a total abdominal hysterectomy, as well as months of continued treatment across the country. The plaintiff’s recovery required her to spend the majority of her two-year-and-eight-month window in New York to recover from her surgery. If the *Tomlinson* plaintiff had this reasonable justification and acted this diligently, she would be entitled to the due process exception, despite having two years and eight months to file her claim.

### CONCLUSION

This Note aimed to offer a new approach for New Mexico courts to apply in determining whether to relax the statute of repose for plaintiffs in medical malpractice actions. Rather than focusing this determination solely on the amount of time that plaintiffs have to file their claims, courts should also account for plaintiffs’ circumstances during this time period. This Note argued that the “time-and-circumstances” approach is both more principled than the current, time-centric approach, and more consistent with due process. This Note also provided several

---

214. See *id.* ¶ 4.



examples of how the time-and-circumstances approach could be applied to various fact patterns.

Statutes of repose and statutes of limitations lie at the intersection of the legislative and judicial processes. Legislatures may opt to place deadlines for bringing certain types of lawsuits, based on policy decisions. However, it is the judiciary's role to ensure that individuals' constitutional rights are not infringed upon by such legislative policymaking. The due process exception to the NMMMA's statute of repose is an example of a judicial creation intended to protect the right of access to the courts from a legislative enactment. But there is a fine line for the judiciary to tread, between protecting individual rights and invading the province of the legislature. To ensure that New Mexico courts do not invade the province of the legislature in the medical malpractice context, it is important that they grant the due process exception on a principled basis to plaintiffs whose due process rights depend on it. Hopefully, the time-and-circumstances approach proposed in this Note can provide a principled framework to assist the courts in this important and challenging task.