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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **EDITH ELLESS, Individually and as**
3 **PERSONAL REPRESENTATIVE of**
4 **the Estate of HAROLD ELLESS, JR.,**
5 **and JIMMY ELLESS and MICHAEL**
6 **ELLESS, Individually,**

7 Plaintiffs,

8 v.

No. 31,537

9 **ARTESIA GENERAL HOSPITAL,**

10 Defendant/Third-Party Plaintiff-Appellant,

11 v.

12 **JOCELYN RAMOSO, M.D.,**

13 Third-Party Defendant-Appellee.

14 **APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY**

15 **Thomas A. Rutledge, District Judge**

16 Sandenaw Law Firm, P.C.

17 CaraLyn Banks

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19 Las Cruces, NM

20 for Appellant

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22 Emily A. Franke

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1 Albuquerque, NM

2 for Appellee

3 **MEMORANDUM OPINION**

4 **FRY, Judge.**

5 {1} Plaintiff Artesia General Hospital (AGH) appeals the district court's order
6 granting Defendant Dr. Jocelyn Ramoso's motion to dismiss AGH's third-party
7 complaint for indemnification. AGH argues that the district court erred in concluding
8 that: (1) its third-party complaint failed to state a claim for indemnification against
9 Dr. Ramoso; (2) AGH's amended third-party complaint was barred under the Medical
10 Malpractice Act's (MMA) statute of repose, NMSA 1978, Section 41-5-13 (1976); (3)
11 the contractual indemnification provision between AGH and Dr. Ramoso prevented
12 AGH from seeking equitable indemnification; and (4) equitable estoppel barred AGH
13 from pursuing indemnification against Dr. Ramoso because of its previous denials of
14 her negligence. We agree with AGH that it sufficiently stated a claim for equitable
15 indemnification and that the amended third-party complaint related back to the
16 original third-party complaint. We further agree that the issue regarding the
17 contractual indemnification provision is not properly before us and that the record
18 reveals no basis for the district court's application of equitable estoppel. We therefore
19 reverse.

1 **BACKGROUND**

2 {2} On August 28, 2006, the family of Harold Elless, Jr. (the decedent) filed a
3 complaint for medical malpractice and wrongful death against Dr. Ramoso and her
4 employer, AGH. The decedent died on January 7, 2006, while allegedly under the
5 care of Dr. Ramoso after being admitted to the emergency department at AGH. The
6 complaint alleged nine distinct acts of negligence committed by Dr. Ramoso and
7 sought to hold AGH vicariously liable for Dr. Ramoso's acts and omissions as well
8 as for the acts or omissions of other AGH employees allegedly involved in the
9 negligent treatment of Elless. In its answer to the Ellesses' complaint, AGH denied
10 that Dr. Ramoso or any of its employees were negligent in their treatment of the
11 decedent.

12 {3} The Ellesses subsequently filed their first amended complaint against AGH,
13 which dismissed Dr. Ramoso as a defendant but continued to allege her nine separate
14 acts of negligence and AGH's vicarious liability for those acts. AGH, in answer to
15 the Ellesses' first amended complaint, continued to deny that Dr. Ramoso or any of
16 its employees were negligent.

17 {4} The Ellesses later sought and were granted leave to file a second amended
18 complaint. The second amended complaint added a claim against AGH for its alleged
19 negligent hiring and retention of Dr. Ramoso but continued to allege specific

1 negligent acts and omissions by Dr. Ramoso. Consistent with its previous answers,
2 AGH denied that Dr. Ramoso was negligent in her treatment of the decedent.

3 {5} On July 31, 2008, AGH filed a third-party complaint for indemnification
4 against Dr. Ramoso (original complaint). AGH’s original complaint incorporated the
5 Ellesses’ allegations that Dr. Ramoso established a physician-patient relationship with
6 the decedent and that she “departed from the standard of care and failed to possess and
7 apply the knowledge and skill and care ordinarily used by a reasonably qualified
8 physician.” AGH also referenced the Ellesses’ specific allegations of Dr. Ramoso’s
9 negligent acts or omissions and their allegations that AGH was vicariously liable for
10 those acts or omissions. Finally, AGH alleged that if it were “found liable for any
11 portion of an award that [the Ellesses] might receive as a result of the separate acts or
12 omissions of . . . Dr. Ramoso, AGH is entitled to indemnification from Dr. Ramoso
13 for those proportions of such an award that may be attributed to Dr. Ramoso’s
14 negligence.”

15 {6} Meanwhile, AGH also began attempting to settle the underlying lawsuit with
16 the Ellesses. The parties reached a confidential settlement on the Ellesses’ claims, and
17 the underlying lawsuit was dismissed on December 16, 2008. AGH had notified Dr.
18 Ramoso of the “tentatively” scheduled date for the formal mediation. However, the

1 record does not reflect that Dr. Ramoso or her professional liability carrier participated
2 in the settlement attempts.

3 {7} Following settlement, AGH filed an unopposed motion for leave to amend its
4 original complaint. AGH sought, among other things, to amend the original complaint
5 to reflect the dismissal of the underlying lawsuit. AGH also removed its denials of Dr.
6 Ramoso's and its own negligence that were included in the original complaint. The
7 district court granted AGH's motion, and AGH filed the amended third-party
8 complaint for indemnification (amended complaint) on May 18, 2009, three years and
9 four months after the decedent's death.

10 {8} On January 26, 2010, Dr. Ramoso filed her first motion to dismiss the amended
11 complaint. Dr. Ramoso argued that the amended complaint was, in fact, a "new"
12 complaint that "converted [AGH's] indemnification cause of action into a medical
13 negligence one." Therefore, Dr. Ramoso argued that the amended complaint was
14 subject to the MMA's three-year statute of repose and should be barred as untimely.
15 *See* § 41-5-13. The district court concluded that the amended complaint related back
16 to the filing of the original complaint and denied the motion to dismiss.

17 {9} Dr. Ramoso then filed a motion for summary judgment arguing that the
18 indemnity provision in Dr. Ramoso's employment contract prevented AGH from
19 pursuing common law indemnification claims against Dr. Ramoso. Dr. Ramoso

1 contended that the contractual indemnity provision set out the parties' full
2 understanding of Dr. Ramoso's indemnity liability and that AGH's equitable
3 indemnification theories should not be used to circumvent the specific agreement of
4 the parties. The district court found that there were genuine issues of material fact and
5 denied Dr. Ramoso's motion for summary judgment.

6 {10} Following the district court's denial of summary judgment, this Court decided
7 *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, which held that claims for
8 equitable indemnification between a hospital/employer and a doctor/employee are
9 "malpractice claim[s]" and subject to the MMA's statute of repose. 2011-NMCA-
10 112, ¶ 15, 267 P.3d 70 (internal quotation marks omitted), *cert. quashed*, 2012-
11 NMCERT-005, 294 P.3d 447. Soon thereafter, Dr. Ramoso filed a second motion to
12 dismiss on the same basis as her first motion to dismiss, this time with the added
13 authority of *Christus St. Vincent*, and she further argued that the amended complaint
14 failed to allege medical negligence by Dr. Ramoso. The district court granted Dr.
15 Ramoso's second motion to dismiss, from which AGH now appeals.

16 **DISCUSSION**

17 **Standard of Review**

18 {11} This appeal arises from an order dismissing a complaint for failure to state a
19 claim upon which relief may be granted. Therefore, we apply the following standard:

1 A motion to dismiss pursuant to Rule 1-012(B)(6) NMRA . . . tests the
2 legal sufficiency of the complaint. In reviewing an order granting a
3 motion to dismiss, we accept as true all facts properly pleaded. A
4 complaint is subject to dismissal under Rule 1-012(B)(6) only if under
5 no state of facts provable thereunder would a plaintiff be entitled to
6 relief. . . . Under this standard of review only the law applicable to such
7 claim is tested, not the facts which support it.

8 *Hovet v. Lujan*, 2003-NMCA-061, ¶ 8, 133 N.M. 611, 66 P.3d 980 (alterations,
9 internal quotation marks, and citation omitted).

10 **The District Court Did Not Reverse Its Previous Denial of Summary Judgment**

11 {12} We agree with AGH that the issue regarding the contractual indemnity
12 provision, which was raised in Dr. Ramoso’s denied motion for summary judgment,
13 is not properly before us. Having reviewed the record, we understand that AGH felt
14 compelled to raise this issue in its appeal because the district court included in its
15 order granting Dr. Ramoso’s second motion to dismiss certain findings of fact and
16 conclusions of law regarding this issue. Nevertheless, we conclude that these findings
17 of fact and conclusions of law were not an appropriate means by which the district
18 court could have effectively reversed its previous denial of Dr. Ramoso’s motion for
19 summary judgment, especially because the district court gave no indication that it
20 intended to do so.

21 {13} As noted above, the district court initially concluded that there were genuine
22 issues of material fact as to whether the contractual indemnity provision limited

1 AGH’s right to indemnity from Dr. Ramoso to the specific circumstances listed in the
2 indemnity provision. The district court denied summary judgment on this basis.
3 Following this denial, Dr. Ramoso did not attempt to revive her argument on this issue
4 either in her second motion to dismiss or at the hearing on her second motion to
5 dismiss. However, at the conclusion of the hearing on Dr. Ramoso’s second motion
6 to dismiss, the district court asked the parties to submit proposed findings of fact and
7 conclusions of law. This was an unusual request, given that a motion to dismiss tests
8 the sufficiency of a claim rather than the facts supporting a claim. *See Hovet*, 2003-
9 NMCA-061, ¶ 8. Dr. Ramoso, in addition to proposing factual findings consistent
10 with her second motion to dismiss, submitted proposed findings of fact and
11 conclusions of law relevant to her previously denied motion for summary judgment.
12 The district court adopted these findings, including a factual finding that the
13 circumstances listed in the contractual indemnity provision granting a right to
14 indemnity were not present under the facts of this case and a conclusion of law that
15 “[c]ontractual claims for indemnification control over common law claims for
16 indemnification.”

17 {14} We have emphasized before that findings of fact and conclusions of law are
18 improper when granting summary judgment “because the basic premise underlying
19 an award of summary judgment is the absence of any genuine issues of material fact.”

1 *Durham v. Sw. Developers Joint Venture*, 2000-NMCA-010, ¶ 45, 128 N.M. 648, 996
2 P.2d 911; *see Cordova v. State Taxation & Revenue, Prop. Tax Div.*, 2005-NMCA-
3 009, ¶ 37 n.4, 136 N.M. 713, 104 P.3d 1104 (“We once again emphasize that it is not
4 necessary, nor is it even proper, for orders granting summary judgment to include
5 findings of fact because such findings are inconsistent with the very premise of a
6 motion for summary judgment.”). This similarly holds true in the context of a motion
7 to dismiss for failure to state a claim for relief. “The purpose of a motion to dismiss
8 for failure to state a claim for relief is to test the legal sufficiency of the claim, not the
9 facts that support it.” *Trujillo v. Berry*, 106 N.M. 86, 87, 738 P.2d 1331, 1332 (Ct.
10 App. 1987).

11 {15} In this case, Dr. Ramoso did not file a motion for reconsideration following
12 denial of her summary judgment motion, nor did she attempt to re-argue the issue in
13 the context of her second motion to dismiss. Consequently, AGH had no notice that
14 Dr. Ramoso was attempting to revive the issue. Furthermore, the district court gave
15 no indication that it was reconsidering its previous ruling on Dr. Ramoso’s motion for
16 summary judgment. Under these circumstances, we will not construe the district
17 court’s ruling on the second motion to dismiss as also reversing its previous denial of
18 summary judgment based only on the inclusion of unnecessary and improper findings
19 of fact and conclusions of law. Therefore, we disregard the district court’s findings

1 of fact and conclusions law and proceed to consider only whether the district court
2 properly granted Dr. Ramoso’s second motion to dismiss on the basis of failure to
3 state a claim under Rule 1-012(B)(6).

4 **The District Court Erred in Granting Dr. Ramoso’s Second Motion to Dismiss**

5 {16} AGH assigns two errors to the district court’s ruling. First, AGH argues that
6 the district court erred in concluding that the amended complaint failed to state a claim
7 because it did not make explicit allegations of medical negligence by Dr. Ramoso.
8 Second, AGH argues that the district court erred in concluding that its amended
9 complaint for indemnification was barred by the MMA’s statute of repose. *See* § 41-
10 5-13 (“No claim for malpractice arising out of an act of malpractice . . . may be
11 brought against a health care provider unless filed within three years after the date that
12 the act of malpractice occurred[.]”). We address each of these contentions in turn.

13 {17} In *Christus St. Vincent*, this Court considered whether claims for equitable
14 indemnification fall within the MMA’s broad definition of “malpractice claim[s].”
15 2011-NMCA-112, ¶¶ 13-15. In examining the nature of equitable indemnification,
16 this Court reiterated that to state such a claim the plaintiff “must allege that the
17 defendant [or indemnitor] caused some *direct harm* to a third party and that the
18 plaintiff or [indemnitee] discharged the resulting liability from this harm.” *Id.* ¶ 14
19 (alterations in original) (internal quotation marks and citation omitted). In other

1 words, the “indemnitor must be at least partly liable to the original plaintiff for his or
2 her injuries.” *Id.* (internal quotation marks and citation omitted) A claim for
3 equitable indemnification and a claim of malpractice may overlap when the
4 “gravamen of the third-party action is predicated upon the allegation of professional
5 negligence by a practicing physician.” *Christus St. Vincent*, 2011-NMCA-112, ¶ 15
6 (internal quotation marks and citation omitted).

7 {18} AGH’s amended complaint incorporated the Ellesses’ allegations in the
8 underlying lawsuit regarding Dr. Ramoso’s specific and separate acts or omissions
9 that constituted alleged departures from the standard of care. It further incorporated
10 the Ellesses’ allegations that AGH was vicariously liable for Dr. Ramoso’s acts or
11 omissions. Finally, for each count of indemnification, AGH alleged that, to the extent
12 that it was found liable for the decedent’s injuries, it was entitled to indemnification
13 from Dr. Ramoso. Based upon these allegations, we conclude that AGH stated a
14 claim for equitable indemnification against Dr. Ramoso. The amended complaint
15 sufficiently provided notice of the acts or omissions of Dr. Ramoso that allegedly
16 caused direct harm to the decedent, and it provided the basis for AGH’s potential
17 obligation to discharge the resulting liability from this harm. *See Christus St. Vincent*,
18 2011-NMCA-112, ¶ 14.

1 {19} To the extent that Dr. Ramoso argues that AGH’s failure to explicitly admit Dr.
2 Ramoso’s negligence is fatal, we disagree. The amended complaint, like the original
3 complaint, repeatedly referred to Dr. Ramoso’s alleged acts and omissions in treating
4 the decedent as “purported negligence.” Under our liberal notice pleading standard,
5 regardless of whether the allegations of negligence were characterized as purported
6 or actual, they were sufficient to apprise Dr. Ramoso of the basis of AGH’s claims.
7 General allegations are sufficient “as long as they show that the party is entitled to
8 relief and the averments are set forth with sufficient detail so that the parties and the
9 court will have a fair idea of the action about which the party is complaining and can
10 see the basis for relief.” *Schmitz v. Smentowski*, 109 N.M. 386, 389-90, 785 P.2d 726,
11 729-730 (1990). Furthermore, given this Court’s ruling in *Christus St. Vincent*,
12 hospitals seeking indemnification from a negligent doctor will be required, in some
13 instances, to file their indemnification claim while the underlying lawsuit is pending
14 or risk having their indemnification claim barred by the statute of repose. *See*
15 *Christus St. Vincent*, 2011-NMCA-112, ¶ 15. Were we to adopt Dr. Ramoso’s
16 argument, a hospital would be required to decide between foregoing its
17 indemnification claim or admitting its employee’s negligence during the pendency of
18 the underlying lawsuit. That would be an unjust burden, and we accordingly reject Dr.

1 Ramoso’s invitation to impose it upon AGH in this case. *See* Rule 1-008(F) NMRA
2 (“All pleadings shall be so construed as to do substantial justice.”).

3 {20} For similar reasons, we also hold that the district court erred in concluding that
4 AGH’s amended complaint was barred by the MMA’s statute of repose. *See* § 41-5-
5 13. AGH’s original complaint, undisputedly filed within the three-year statute of
6 repose, included qualifying language denying that Dr. Ramoso was negligent. After
7 AGH settled the underlying case, AGH’s unopposed motion to amend the original
8 complaint was granted by the district court. Because the amended complaint removed
9 AGH’s denials of Dr. Ramoso’s negligence and sought indemnification for the
10 settlement amounts paid by AGH, Dr. Ramoso argued that the amended complaint
11 was effectively transformed into a “new” complaint. Therefore, Dr. Ramoso argued
12 that the amended complaint should be barred since it was filed after the statute of
13 repose deadline expired. *See Christus St. Vincent*, 2011-NMCA-112, ¶¶ 13-15
14 (holding that hospital’s equitable indemnification claims against a doctor arising out
15 of alleged acts of professional negligence were “malpractice claim[s]” for the
16 purposes of MMA and subject to the MMA’s three year statute of repose).

17 {21} Dr. Ramoso’s attempts to characterize the amended complaint as a “new”
18 complaint are unpersuasive. In denying Dr. Ramoso’s first motion to dismiss on this
19 basis, the district court originally, and correctly, concluded that the amended

1 complaint related back to the original complaint. Under Rule 1-015(C) NMRA, an
2 amendment to a pleading may relate back to the original filing date when “the claim
3 . . . asserted in the amended pleading arose out of the conduct, transaction[,] or
4 occurrence set forth or attempted to be set forth in the original pleading.” The basis
5 of AGH’s amendments reflected the underlying settlement but still arose out of the
6 same facts forming the basis of the original complaint. Furthermore, even if we were
7 to agree with Dr. Ramoso that the amended complaint stated a new claim or cause of
8 action, we would still conclude that the amended complaint related back to the
9 original filing date. “A new cause of action may be alleged in an amended complaint,
10 provided [that] it is founded on facts not wholly foreign to the facts originally
11 pleaded.” *Newbold v. Florance*, 54 N.M. 296, 299, 222 P.2d 1085, 1087 (1950).
12 Therefore, because the original complaint was timely filed, we hold that the amended
13 complaint was not barred by the MMA’s statute of repose.

14 **Equitable Estoppel Does Not Apply to AGH’s Amended Complaint**

15 {22} Dr. Ramoso only peripherally mentioned the doctrine of equitable estoppel in
16 her second motion to dismiss, and she completely failed to mention the doctrine at the
17 hearing on her second motion to dismiss. Nevertheless, the district court adopted
18 findings that the doctrine of equitable estoppel bars AGH’s claims for indemnification
19 against Dr. Ramoso. For that reason alone we express the same reservation regarding

1 this issue on appeal as we did for those findings of fact and conclusions of law
2 adopted by the district court relevant to the summary judgment issue discussed above.

3 {23} However, we also note that application of equitable estoppel requires more than
4 a party simply taking an inconsistent position. *See Vill. of Angel Fire v. Bd. of Cnty.*
5 *Comm'rs of Colfax Cnty.*, 2010-NMCA-038, ¶ 21, 148 N.M. 804, 242 P.3d 371
6 (listing six elements of an equitable estoppel claim). Among the myriad of factors that
7 a district court is to consider, we have emphasized that there must be some showing
8 of a material and detrimental change in position by the party invoking equitable
9 estoppel. *Envtl. Control, Inc. v. City of Santa Fe*, 2002-NMCA-003, ¶ 23, 131 N.M.
10 450, 38 P.3d 891 (“[T]he party claiming estoppel must assert that in reliance on the
11 conduct of the party to be estopped, it was induced to take or for[e]go a position to its
12 prejudice or detriment.”). Because Dr. Ramoso failed to make this showing, we hold
13 that the district court erred in concluding that the doctrine of equitable estoppel barred
14 AGH’s claims for indemnification.

15 **CONCLUSION**

16 {24} For the foregoing reasons, we reverse the district court’s order granting Dr.
17 Ramoso’s motion to dismiss.

1 {25} **IT IS SO ORDERED.**

2

3

CYNTHIA A. FRY, Judge

4 **WE CONCUR:**

5

6 **TIMOTHY L. GARCIA, Judge**

7

8 **M. MONICA ZAMORA, Judge**