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NEW MEXICO'S JUDICIAL AUTHORITY OVER OUT-OF-STATE MALVEASORS

Not many of us would disagree that if we choose to go to an out-of-state doctor who doesn't have contacts in New Mexico, we probably forfeit our right to sue that doctor in New Mexico. However, what if our health insurer forces us to go to an out-of-state doctor? What if that out-of-state doctor specifically contracted with our health insurer to receive New Mexico patients? If we have no choice but to go out of state, do we still forfeit our rights in New Mexico?

In Gallegos v. Frezza, 2015-NMCA-___ (No. 32,605, March 19, 2015), Gonzales v. Frezza (No. 32,606 March 19, 2015),¹ and Montaño v. Frezza, 2015-NMCA-___, (No. 32,403, March 19, 2015), the New Mexico Court of

malpractice and applying the discovery rule to the notice requirements, but did not answer whether the NMTCA will apply in regards to damages or other provisions.

FACTS

In all three cases, the facts were basically the same. The plaintiffs needed bariatric surgery and sought insurance coverage for the procedures from their health insurers, Presbyterian and Lovelace. Gallegos, 2015-NMCA-___, ¶¶ 2-3; Montaño, 2015-NMCA-___, ¶¶ 2-5. Presbyterian and Lovelace provided coverage for the procedures but only if plaintiffs went to Dr. Eldo Frezza at Texas Tech University Health Sciences Center in Lubbock, Texas. Dr. Frezza

was the only bariatric surgeon in their networks at the time. Id. Pursuant to Presbyterian and Lovelace's restrictions, plaintiffs went to Dr. Frezza and suffered injuries as a result of his medical care. Id. In response to Dr. Frezza's malpractice, the plaintiffs filed lawsuits against Dr. Frezza and the health plans in New Mexico. Id.

In all three cases, Dr. Frezza moved to dismiss the plaintiffs' claims for lack of jurisdiction and immunity under Texas law. Dr. Frezza moved to dismiss for lack of jurisdiction arguing that New Mexico did not have general or specific jurisdiction because he was not a New Mexico resident, he did not practice medicine in New Mexico, and he did not treat the plaintiffs in New Mexico. Gallegos, 2015-NMCA-___, ¶¶ 4, 12-14. He moved to dismiss for immunity because he believed that Texas law applied since the surgery occurred in Texas and he was a Texas state employee, and thus immune to

lawsuit under the principles of comity. Montaño, 2015-NMCA-___, ¶¶ 4-5

In both Gallegos and Gonzales, the district court granted Frezza's motion to dismiss for lack of jurisdiction. Plaintiffs appealed and the court of appeals consolidated the appeals for consideration.

In contrast, the district court in Montaño denied both of Dr. Frezza's motions to dismiss, finding the court had personal jurisdiction and that Dr. Frezza was subject to New Mexico law. The court found that the Dr. Frezza directed

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conduct toward New Mexico to justify jurisdiction and found that New Mexico's choice of law rules and comity rules justified applying New Mexico's law instead of Texas law. Since Dr. Frezza would be immune to suit if the district court applied Texas law, he appealed and the court of appeals reviewed the district court's application of the place of wrong and comity principles.

JURISDICTION

Under the limitations of due process, New Mexico cannot exert personal jurisdiction over a non-resident who did not cause an injury in New Mexico. For New Mexico to assert personal jurisdiction, the defendant must either (1) have "continuous and systematic" contact with the state as to render the defendant essentially at home in New Mexico;" or (2) the defendant must have purposely directed conduct toward New Mexico and caused injury as a result of that conduct.³ Gallegos, 2015-NMCA-___, ¶ 6. "Once it has been decided that a defendant purposefully established minimum contact within the

...leaving open the possibility that New Mexico can have jurisdiction depending on the nature of a contractual relationship between the physician and the health plan.

Appeals confronted these questions, particularly whether New Mexico has jurisdiction over the out-of-state doctor, and if so, which state's law applies. For the jurisdiction issue, the court remanded the case to the district court for further factual development, leaving open the possibility that New Mexico can have jurisdiction depending on the nature of a contractual relationship between the doctor and the health plan. For the choice of law question, the court held that under the principle of comity, the New Mexico Tort Claims Act shall apply in regard to permitting lawsuits against the state employee for medical

forum state,” the court must determine whether, based on these contacts, “the assertion of personal jurisdiction would

systematic as to render him essentially at home in New Mexico or establish that he “purposefully availed himself of the protections and benefits of New Mexico law. *Id.*

the court of appeals rejected the district court’s ruling that the contract between the doctor and the health insurers could not create specific jurisdiction.

The court had greater difficulty with whether the contracts

comport with fair play and substantial justice.” *Id.* ¶ 7 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

between the health insurers and the doctor’s practice group were sufficient to establish general or specific jurisdiction. *Id.* ¶¶ 30-38. The defense argued that Dr. Frezza was not subject to jurisdiction because Dr. Frezza was allegedly not responsible for the contract and he did not purposefully seek the business from New Mexico. *Id.* ¶¶ 12-14, 30-35. Instead, the contract was the product of negotiation between Texas Tech Physicians Associates (hereinafter “TTPA”), an administrative arm of Texas Tech, and the health insurers. *Id.* Dr. Frezza was not “a party to the contract, [but only] a ‘represented physician’ subject to the terms of the contract.” *Montaño*, 2015-NMCA-___, ¶ 3. Dr. Frezza submitted two affidavits, one from himself and another from a TTPA administrator, stating that:

In *Gallegos/Gonzales*, Plaintiffs asserted both general and specific jurisdiction. *Id.* ¶¶ 10-11. Plaintiffs alleged that Dr. Frezza had continuous, systemic, and direct contact with New Mexico which established both general and specific jurisdiction because:

1. Dr. Frezza was licensed to practice medicine in New Mexico;
2. Dr. Frezza’s website was available to New Mexican residents with testimonials from New Mexican patients;
3. Dr. Frezza owned property in New Mexico;
4. Dr. Frezza had a medical book available in New Mexico; and
5. Dr. Frezza had a contract with Presbyterian and Lovelace which encouraged New Mexico citizens to seek medical care from him in Lubbock, Texas. *Id.*

3. Dr. Frezza submitted two affidavits, one from himself and another from a TTPA administrator, stating that:

presuming Dr. Frezza entered into a contractual agreement with the insurance providers that allowed him to injure the plaintiffs in Texas, plaintiffs’ claims were sufficiently connected with Dr. Frezza’s contact to New Mexico to warrant specific jurisdiction.

The court of appeals rejected the plaintiffs’ first four bases for jurisdiction: license, website, property, and book. *Id.* ¶¶ 17-29. The court found that a medical license was insufficient since Dr. Frezza did not actually practice medicine in New Mexico;⁴ the website was insufficient since it was a passive website that did not overtly advertise or market to new Mexican residents;⁵ and the property and the book were insufficient simply because neither were sufficient to show that the Dr. Frezza could “reasonably foresee being haled into court” in the state of New Mexico.⁶ *Id.* In short, the court did not believe that Dr. Frezza’s conduct was sufficiently continuous or

1. Dr. Frezza was not a direct party to the agreement;
2. He was subject to the agreement as a physician of Texas Tech;
3. He did not have a choice to contract with Presbyterian or Lovelace; and
4. He did not have a choice on whether to submit credentialing materials to Presbyterian or Lovelace.

See *Gallegos*, 2015-NMCA-___, ¶¶ 12-14, 30-35; *Montaño*, 2015-NMCA-___, ¶ 3.

Based on these affidavits, the district court ruled that it did not have personal jurisdiction because Dr. Frezza was not a party to the contract and he did not direct

conduct towards New Mexico to warrant general personal jurisdiction. *Gallegos*, 2015-NMCA-___, ¶ 32. Furthermore, the district court ruled that specific jurisdiction did not exist even if a relationship between Dr. Frezza and the health insurers existed because plaintiffs’ claims did not arise out of Dr. Frezza’s contacts in New Mexico, but rather, their medical treatment in Texas. *Id.* ¶ 37. Therefore, it could not exercise “specific jurisdiction over Dr. Frezza because Plaintiffs’ claims were not connected with any contacts between Dr. Frezza and New Mexico.” *Id.* ¶ 36 (alterations omitted).

On appeal, the court of appeals rejected the district court’s ruling that the contract between the doctor and the health insurers could not create specific jurisdiction. *Id.* ¶¶ 37-38. According to the the court, the district court’s rejection of plaintiffs’ claim relied on “an overly narrow construction of the requirement that the claims must arise from Dr. Frezza’s conduct.” *Id.* ¶ 37. The court explained that specific jurisdiction applied when the claims

derived from the defendant’s contact with the state even if plaintiffs’ claims were derivative to the contact. *Id.* The court stated that plaintiffs’ claims did not need to directly arise out of defendant’s contact, but “lie in the wake” of the defendant’s conduct in the state. *Id.* Thus, presuming Dr. Frezza entered into a contractual agreement with the insurance providers that allowed him to injure the plaintiffs in Texas, plaintiffs’ claims were sufficiently connected with Dr. Frezza’s contact to New Mexico to warrant specific jurisdiction. *Id.*

Although the court found that it could exert jurisdiction if Dr. Frezza had participated in the contracts, the court

did not have the information necessary to determine whether Dr. Frezza participated in establishing the contract and pursuing New Mexico patients. Dr. Frezza alleged in his affidavits that he had nothing to do with the contract, but his affidavits raised more questions than they answered. “For instance, it remain[ed] unclear [to the court of appeals] to

he is sued by a New Mexico resident in a New Mexico court.” Montaño, 2015-NMCA-___, ¶ 1. After reviewing the law, the Court of Appeals concluded “that under principles of comity, Dr. Frezza [was] entitled to immunity, but only so far as that immunity is consistent with the New Mexico Tort Claims Act (NMTCA).”

When a case involves a person or entity from another state, the courts of New Mexico generally determine the choice of law according to “the place of wrong” rule.

As stated above, Dr. Frezza was an employee of Texas Tech, a government institution, and

what extent Dr. Frezza was bound by or benefitted from the agreement, whether the agreement required Dr. Frezza to accept Presbyterian patients, to what extent Dr. Frezza himself sought to become credentialed with Presbyterian, and, perhaps most importantly, whether and how Dr. Frezza became the sole provider of bariatric surgery services to Presbyterian’s members.” Id., ¶ 35. Unfortunately, the plaintiffs did not answer these questions either. Plaintiffs alleged that Dr. Frezza sought the contract and sought New Mexican patients, but did not plead or provide evidence showing the extent and nature of that relationship. Id.

Since neither plaintiffs nor defendant provided clear facts as to Dr. Frezza’s relationship with the health insurance companies, the court had insufficient information to make a determination on whether Dr. Frezza had contact with New Mexico. Id. Thus, the court remanded the case to the district court for further factual development. Id.

CHOICE OF LAW

Even if the court could exert jurisdiction, the court also had to decide whether it would apply New Mexico or Texas law to the case. If Texas law applied, Dr. Frezza would be immune from suit. If New Mexico law applied, then the plaintiffs could maintain their lawsuit against Dr. Frezza. Thus, the issue presented to the court of appeals was “whether Dr. Frezza, [a government employee] should enjoy the immunity granted by the Texas Tort Claims Act (TTCA) when

thus, a state employee. Montaño, ¶ 3. When a case involves a person or entity from another state, the courts of New Mexico generally determine the choice of law according to “the place of wrong” rule. Id., ¶ 10. Under this rule, “the substantive rights of the parties are governed by the law of the place where the wrong occurred.” Id. (quoting Terrazas v. Garland & Loman, Inc., 2006-NMCA-111, ¶¶ 12, 14, 140 N.M. 293). “The place of the wrong . . . is the location of the last act necessary to complete the injury.” Id. The courts may depart from place of wrong rule when “compelling policy arguments [warrant the] departure from the general rule . . .” such as when a lawsuit involves another state’s employee. Id., ¶¶ 11-13.

In this case, the district court determined that place of wrong was New Mexico. Id., ¶¶ 11-12. According to the court, “New Mexico was the location of the last act necessary to complete the injury because [Ms. Montaño’s] injuries manifested themselves in New Mexico.” Id. Based on its decision that the injury manifested itself in New Mexico, the district court concluded New Mexico law applied to the case. Id. Since the court of appeals did not find an error with the district court’s analysis, it did not reverse its decision that the place of wrong was New Mexico. Id.

However, since the case involved a Texas employee, the district court and the court of appeals, felt that as a matter of public policy, they must consider whether they should apply Texas law

under the principles of comity – mutual respect for another state’s sovereignty and laws. Id., ¶¶ 13, 20. Comity is “a principle under which the courts of one state give effect to the laws of another state or extend immunity to a sister sovereign, not as a rule of law, but rather out of deference or respect.” Id., ¶ 19 (quoting State of N.M. v. Caudle, 108 S.W.3d 319, 321 (Tex. App. 2002)). It is a doctrine intended to promote cooperation, respect, and mutuality between the states. Id.

The purpose of comity is to ensure mutual respect and harmonious relationships between states while protecting the forum state’s own policy choices and interests. Id., ¶¶ 20-21. The New Mexico Supreme Court provided four factors for courts to consider when determining whether to extend comity: “(1) whether the forum state would enjoy similar immunity under similar circumstances, (2) whether the state sued has or is likely to extend immunity to other states, (3) whether the forum state has a strong interest in litigating the case, and (4) whether extending immunity would prevent forum shopping[.]” Id., ¶ 21. The most important consideration for a court is whether extending comity will violate or undermine New Mexico’s own important public policies. Id., ¶ 21. If the extension of comity will undermine New Mexico public policy, the court should not apply it.

In this case, the court found that New Mexico’s public policies outweighed extending comity to Dr. Frezza. Specifically, the court found that extending comity violated New Mexico’s public policy because it would afford Dr. Frezza greater protections than New Mexico provided to its own state doctors, and it would deny plaintiffs access to the courts, which contradicts New Mexico’s strong and “particular interest in providing compensation [and] access to the courts to residents of the state.” Id., ¶ 30. Although Texas also has an interest in a cause of action concerning its state’s employee, and both states have an interest in preventing

forum shopping, the court found that New Mexico's interest in the case outweighed extending comity.

In making its decision, the court emphasized that the New Mexico legislature demonstrated that New Mexico has a significant interest in permitting lawsuits against state employees when it passed the New Mexico Tort Claims Act. *Id.* ¶ 33. The Act permits plaintiffs to bring lawsuits against state entities and employees to a far greater extent and with less stringent limitations than Texas law. *Id.* If Texas 'Tort Claims Act were to apply, then the plaintiffs would have no recourse to bring a lawsuit since the Texas Tort Claims Act prohibits lawsuits against state employees, it limits causes of actions to only three types of conduct, and it calculates the notice requirement from the date of injury. *Id.* ¶¶ 35-39. All of these provisions are significantly more prohibitive than New Mexico's Tort Claims Act, which permits direct lawsuits against state employees, more types of cases, and calculates

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the notice deadline from the date of discovery, rather than the date of injury. *Id.* Therefore, since extending comity would undermine plaintiffs' rights as New Mexicans, the court of appeals found that comity did not apply. *Id.*

However, the court limited the denial of comity only to the three provisions of the NMTCA mentioned above: permitting lawsuits against state employees, permitting more types of lawsuits, and calculating damages from date of discovery. *Id.* ¶¶ 39, 42. The court did not rule that the New Mexico Tort Claims Act applied to Dr. Frezza in its entirety. *Id.* In an attempt to limit its holding, the court stated that

the NMTCA only applies for purposes of permitting the lawsuit against the doctor and calculating the notice deadline. The court deliberately left open the determination of whether such provisions as the NMTCA higher cap on damages will apply or Texas's lower cap. Therefore, it is unclear whether the damages or other provisions of the NMTCA will apply.

CONCLUSION

The court of appeals had an opportunity to preserve the rights of New Mexican patients from health networks forcing patients to seek care from out of state. However, the court of appeals limited its holdings by (1) remanding the case to further factual development to determine jurisdiction issue and (2) limiting the application of the NMTCA to permitting the lawsuit against a state employee and the calculation of the notice requirement. The court concluded that Dr. Frezza's contract with Presbyterian Health plan could establish general or specific jurisdiction for medical malpractice; however, it did not answer some more important questions, i.e. what type of information is required to show sufficient contact, and will the court extend comity regarding Texas Tort Claims Act's provisions on damages. Given the court's insufficient answers to the larger questions the cases posed (i.e. do we lose our rights in New Mexico simply because our network forces us out of state), we will likely see additional appeals out of this case down the road as the district court attempts to figure out what type of contractual relationship will create jurisdiction and whether the cap of damages will apply.

ENDNOTES

- 1 The Court of Appeals consolidated Gallegos and Gonzales in one decision. Therefore the decision for both cases is cited as Gallegos v. Frezza, the first case appearing in the caption.

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- 2 "A state exercises general jurisdiction over a nonresident defendant when its affiliations with the state are so continuous and systematic as to render it essentially at home in the forum state." Gallegos, 2015-NMCA-___, ¶ 6 (citing Sproul v. Rob & Charlies, Inc., 2013-NMCA-072, ¶ 9, 304 P.3d 18).
- 3 "Specific jurisdiction may apply 'if a defendant's contact do not rise to the level of general jurisdiction, but the defendant nevertheless purposefully established contact with New Mexico.'" *Id.* (quoting Sproul, 2013-NMCA-072, ¶ 12. "[F]or New Mexico to assert specific jurisdiction over a nonresident defendant, the plaintiff's claim must 'lie in the wake' of the defendant's [conduct] in New Mexico." *Id.* ¶ 36 (quoting Sproul, 2013-NMCA-072, ¶ 17).
- 4 "[W]e conclude that possession of a medical license is not sufficient in and of itself to subject Dr. Frezza to general jurisdiction in New Mexico courts." Gallegos, 2015-NMCA-___, ¶ 26.
- 5 "Establishment of a passive website that can be viewed internationally is not sufficient to support general personal jurisdiction absent some showing that the website targeted New Mexico." *Id.* ¶ 17.
- 6 "[T]he mere presence of property in a [s]tate does not establish a sufficient relationship between the owner of the property and the [s]tate to support the exercise of jurisdiction over an unrelated cause of action." *Id.* ¶ 27 (citing Rush v. Savchuk, 444 U.S. 320, 328 (1980)).