IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

KIMBERLY MONTAÑO,

Plaintiff-Appellee,

vs. **No. 32,403**

ELDO FREZZA, M.D., and
LOVELACE INSURANCE COMPANY,
a domestic for-profit Corporaton,

Defendants-Appellants.

ON PETITION FOR WRIT OF ERROR TO THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEW MEXICO

PLAINTIFF-APPELLEE'S ANSWER BRIEF

Submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

New Mexico Statutes

Texas Cases

Texas Statutes

Publications

I. STATEMENT OF THE CASE AND SUMMARY OF PROCEEDINGS

The core of Ms. Kimberly Montaño's allegations in this case, and the ultimate source of her significant injuries, is a contractual arrangement between Lovelace Insurance Company ("Lovelace"), a New Mexico corporation; Texas Tech Physicians Associates ("TTPA"), a physicians' practice group in Lubbock, Texas; and Dr. Eldo Frezza, a member of TTPA. Sadly, it must also be noted that this is only one of several similar cases: the undersigned represent four individuals who suffered severe and permanent harm on Dr. Frezza's operating table under similar circumstances, and are aware of dozens of other victims of Dr. Frezza's negligence. Under the contractual arrangement between Lovelace and TTPA (and a similar agreement between TTPA and Presbyterian Insurance Company), Ms. Montaño and others were informed that if they needed bariatric surgery, they had two choices: see Dr. Frezza in Lubbock, or pay for the surgery themselves.

Dr. Eldo Frezza is an Italian surgeon who has written a book and numerous articles advising physicians on how to increase their revenue. He was also a member of the TTPA, the private practice group that worked for the benefit of its physician members; Dr. Frezza worked at the Texas Tech University Health Sciences Center ("Texas Tech") in Lubbock. In Dr.

Frezza's book, THE BUSINESS OF SURGERY, he advised physicians on how to increase their own profits by developing practice groups for "strength in numbers, noting that such groups have " . . . leverage to negotiate a contract and to obtain exclusive payer contracts." THE BUSINESS OF SURGERY, 84, Cine-Med, 2007. It was through precisely this sort of agreement that Lovelace and Presbyterian began requiring their New Mexico insureds in need of bariatric surgery to see Dr. Frezza in Lubbock or to pay for the surgery themselves.

This case is thus not about New Mexicans who simply elected to go to Texas for medical treatment; it is about a Texas physician who used contractual relationships with New Mexico insurers in a concerted and successful effort to secure patients and a revenue stream from New Mexico. Based on these facts and because Ms. Montaño's injuries first expressed themselves in New Mexico, Judge Bacon correctly determined that New Mexico was the place of the wrong and that application of Texas law here would violate New Mexico's public policy. Further analysis of pertinent law unequivocally establishes that Judge Bacon was correct regarding the application of the "place of the wrong" principle and that under the facts of this case, principles of comity do not permit application of Texas law.

II. SUMMARY OF THE ARGUMENT

Although the writ of error is the proper means for invoking the "collateral order doctrine." Carillo v. Rostro, 114 N.M. 607, 845 P. 2d 130 (1992), the collateral order doctrine is not appropriate in this case. The issue here relates to choice of law; Dr. Frezza inaccurately seeks to cast it as a question of sovereign immunity. Ms. Montaño's allegations and the facts of the case developed thus far show that the core issues relate to an agreement made between a private group (TTPA); a member and beneficiary of that group (Dr. Frezza); and a New Mexico corporation (Lovelace). Based on this and the facts of this case, the district court correctly concluded that the law of New Mexico should apply. Dr. Frezza, however, seeks to put the cart before the horse, arguing that Texas law should be applied to determine how New Mexico should approach the question. Under Texas law, he argues, he is immune not only from liability but immune from suit, a position he asserts bars any inquiry into the facts of this matter. This position is wrong.

First, the pertinent facts of the matter demonstrate that the core of Ms. Montaño's allegations all relate to New Mexico. Ms. Montaño is a New Mexico citizen insured by a New Mexico insurer. TTPA's contract with that New Mexico insurer prompted Lovelace to send Ms. Montaño to Lubbock, giving her no choice unless she chose to pay for her own surgery. And New

Mexico is where Ms. Montaño developed the symptoms of the severe injury done to her by Dr. Frezza. In this circumstance, only the incidental location of Dr. Frezza's operating table brings Texas into the discussion at all: Ms. Montaño's injuries occurred out of a deliberate and calculated scheme to bring New Mexico citizens to Texas for surgery. That the scheme was successful does not render New Mexico law inapplicable. Dr. Frezza's Petition for Writ of Error should be denied.

III. ARGUMENT

a. The Collateral Order Doctrine is Inappropriate and Inapplicable Here

The disputed question here is whether Dr. Frezza is entitled to the sovereign immunity he claims when the contract through which he benefited and through which Ms. Montaño was harmed was made between Dr. Frezza's private physicians' group and a New Mexico insurer, not involving the State of Texas in any way.

" . . . [A] petitioner for writ of error must demonstrate, beyond error in the district court, that the impugned order conclusively determines a disputed issue that is entirely separate from the merits of the action and that would be effectively unreviewable from a final judgment." Handmaker v. Henney, 1999-NMSC-043, ¶10, 128 N.M. 328, 992 P.2d 879 (1999). The disputed issue here—Dr. Frezza's liability in light of the contractual

arrangement between his practice group and Lovelace—has not been determined by the order in this matter, and is inextricably tied to the merits of Ms. Montaño's action. As a threshold matter, therefore, Dr. Frezza has failed to meet the basic requirement of the writ of error.

Further analysis into the requirements of the writ of error confirms this. For the collateral order doctrine to apply, there are three conjunctive requirements that must be met: "(1) the order must finally determine the disputed question; (2) it must concern an issue that is entirely separate from the merits of the claim; *and* (3) there must be no effective remedy by appeal." Handmaker v. Henney, 1999-NMSC-043, ¶9, 128 N.M. 328, 992 P.2d 879 (1999) (emphasis added). None of these requirements are met.

At the outset in considering the following factors, it is important to consider the "place of the wrong" rule, which is addressed more fully below. This rule, under which Judge Bacon correctly determined that, because Ms. Montaño's injuries developed in New Mexico, even though they were caused by Dr. Frezza in New Mexico, New Mexico law applies, provides the context for the collateral error discussion. See Santa Fe Technologies, Inc., v. Argus Networks, Inc., 2002-NMCA-030, ¶15, 131 N.M. 772, 42 P. 3d 1221 (noting that the New Mexico long-arm statute permits New Mexico courts to exercise jurisdiction when the tortious act occurs outside the state,

but the injury occurs in New Mexico). In this context, New Mexico law applies and the New Mexico Tort Claims Act ("NMTCA") is instructive. Under the NMTCA, a surgeon employed by the State of New Mexico would not be immune from suit, but might be entitled to some limitation of liability and would be entitled to a defense by the State. NMSA 1978, § 41-4-4(B) (2001). Thus Dr. Frezza's argument, that the real issue at hand is immunity from suit, presupposes incorrectly that Texas law applies and that as a result the Texas Tort Claims Act ("TTCA"), which provides immunity from suit, applies.

i. The Order Here Does Not Finally Determine the Disputed Question.

The disputed question here is whether Dr. Frezza is entitled to sovereign immunity when the nexus of facts related to the injury Ms. Montaño suffered is tied to a contract between his private physicians' practice group and a New Mexico corporation—which contract provided Dr. Frezza with significant pecuniary benefit. Judge Bacon's order does not finally determine the disputed question. Judge Bacon's Order determined that because New Mexico was the place of the wrong, New Mexico law should apply; and that application of Texas law in this case would violate the public policy of New Mexico, barring a comity-based application of the Texas Tort Claims Act. These rulings do not determine what the effect of

the private contract between non-governmental actors through which Dr. Frezza secured New Mexican patients is on Dr. Frezza's liability; they effectively only conclude that New Mexico law should apply. This is a choice of law question, which is subject to a direct appeal but is not properly subject to the collateral order doctrine. See Flemma v. Halliburton Energy Services, Inc., -- P. 3d, --, 2013 WL 2353832 (only Westlaw citation currently available) (choice of law question decided on direct appeal); See also Sam v. Sam, 2006-NMSC-022, 139 N.M. 474, 134 P. 3d 761 (comity question decided on direct appeal).

ii. The Issues Addressed in Judge Bacon's Order are Directly Tied to the Merits of Ms. Montaño's Case, and the Writ of Error is Therefore Inappropriate.

Here, the merits of Ms. Montaño's claim are tied, not to Dr. Frezza's alleged status as an employee of the Texas Tech Hospital, but to the contract between Lovelace and TTPA from which Dr. Frezza benefited by securing patients like Ms. Montaño. Regardless of who Dr. Frezza worked for, the source of Ms. Montaño's harm was unrelated to Dr. Frezza's employer, being tied instead to the contractual arrangement between his private practice group, TTPA, and Lovelace, a New Mexico corporation. Because Dr. Frezza's Petition for Writ of Error does not therefore concern an issue

entirely separate from the merits of the claim, the collateral order doctrine does not apply and Dr. Frezza's Petition is improper.

The pertinent facts here are that Dr. Frezza wrote a book advising physicians on how to negotiate and profit from precisely the type of agreement TTPA made with Lovelace; that Dr. Frezza secured many New Mexican patients as a direct result of that agreement; and that Ms. Montaño was informed by Lovelace, as a result of this agreement, that if she wanted to enjoy the benefit of her insurance, she would have to go to Lubbock for treatment by Dr. Frezza. Ms. Montaño's only other option was to pay for the surgery herself. These issues are tied directly to the allegations in Ms. Montaño's Complaint:

> Because of Dr. Frezza's special relationship with Lovelace, when New Mexico patients covered through a Lovelace-administered plan were referred for or sought bariatric surgery, Lovelace had a routine practice of telling those patients that Dr. Frezza was the only "in network" bariatric surgeon and that in order to have their surgery covered by Lovelace's insurance plan they would be obliged to travel to Lubbock, Texas and be treated by Dr. Frezza.

Complaint, ¶21. With regard to applicability of the writ of error, this Court has stated that "Our immediate review of immunity claims by writ of error is usually reserved for discrete legal issues that do not depend on extensive factual analysis for their resolution." Campos de Sueños, Ltd. v. County of Bernalillo, 2001-NMCA-043, ¶17, 130 N.M. 563, 569, 28 P. 3d

1104, 1110. Dr. Frezza seeks to ignore this assertion, citing Campos de Suenos for the proposition that the writ of error is available for immune entities seeking immediate review to protect the right not to stand trial. The Campos de Sueños court went on to note that " . . . as Handmaker makes clear, not every challenge to a denial of immunity is appropriate for immediate, collateral review because some assertions of immunity are inseparable from the merits of the case." Whether Dr. Frezza is entitled to assert governmental immunity in the face of the "special relationship" alleged by Ms. Montaño is one such case: directly tied to the merits of Ms. Montaño's claims, Dr. Frezza's assertion of immunity cannot be separated from the merits, and application of the collateral order doctrine is inappropriate in this case.

iii. Dr. Frezza Has an Effective Remedy to Any Wrong through Direct Appeal of Any Judgment Entered in this Action, and application of the Collateral Order Doctrine is Therefore Not Proper Here.

Finally, Dr. Frezza's assertion that there is no effective remedy on appeal is wrong, as is his approach to the question. The basis of the trial court's decision, which Dr. Frezza appeals, is that New Mexico law applies. Under New Mexico law, Dr. Frezza is not entitled to immunity: the New Mexico Tort Claims Act provides immunity from liability, not immunity

from suit. Handmaker, ¶12. In New Mexico, therefore, and under New Mexico law which is correctly applied here, a direct appeal is adequate.

Because Dr. Frezza has not established any of the three elements required for application of the collateral order doctrine in this case, his Petition for Writ of Error should be denied.

b. The "Place of the Wrong" Rule, Properly Construed, Requires That New Mexico Have Jurisdiction Over Dr. Frezza

New Mexico applies its own rules in characterizing an issue for a conflict of laws analysis, Terrazas v. Garland & Loman, Inc., 2006-NMCA-111, ¶11, 140 N.M. 293, 142 P. 3d 374. Judge Bacon correctly characterized the issue as one requiring a "place of the wrong" analysis and a comity analysis. Based on that analysis, Judge Bacon correctly determined that, because Ms. Montaño's injuries manifested themselves in New Mexico, and because the manifestation of the injury was the "last act necessary" to complete the injury, New Mexico is the place of the wrong. Order, ¶ 1-2 (RP0195). Recognizing that this decision presented an issue that could only be appropriate for an interlocutory order, Dr. Frezza requested an interlocutory appeal. With that request denied, Dr. Frezza manufactured the present argument for application of the collateral order doctrine.

Given the clear rule that New Mexico shall apply its own rule in characterizing an issue for a conflict of laws analysis, Dr. Frezza's attempt to get around the denial of his request for an interlocutory order is inappropriate. Further, his position ignores the clear admonition of the Supreme Court in defining the narrowness of the collateral order doctrine. Carillo v. Rostro, 114 N.M. 607, 845 P. 2d 130 (1992). In that case, Justice Baca wrote a special concurrence, stating that,

> While I agree with much of what the majority espouses today and join the Court's opinion, I write separately to emphasize the extremely limited reach of the collateral order doctrine. I do so in the hope of stemming the tide of appeals that I anticipate will flood this court in the wake of today's opinion from those parties who either misread the opinion or ignore our admonitions as to the narrowness of the collateral order doctrine.

Carillo v. Rostro, 114 N.M. at 625, 845 P. 2d at 149. Dr. Frezza is one of those parties who has either misread the opinion or ignored the Supreme Court's admonition. In Carillo, the court considered the underlying facts of the case in making its determination that the defendants were not entitled to immunity from suit; noting, however, that this left pending the question of immunity from liability. 114 N.M. at 614, 845 P. 2d at 137. Here, the district court properly recognized that the nexus of facts pled by Ms. Montaño raised a question of choice of law and comity, and made its decision. That decision is subject to appeal, but it is not subject to

interlocutory appeal and is not subject to improper application of the collateral order doctrine. New Mexico law applies; under New Mexico law, Dr. Frezza is not immune from suit. Dr. Frezza's Petition for Writ of Error should be denied.

c. The Doctrine of Comity Requires that the Present Suit be Heard in New Mexico

The question of comity was important to Judge Bacon's analysis of Dr. Frezza's Motion to Dismiss. Judge Bacon properly considered four factors described in Sam v. Sam, 2006-NMSC-022, ¶22, 139 N.M. 474, 134 P. 3d 761. Based on this analysis, Judge Bacon correctly and unequivocally concluded that application of the Texas Tort Claims Act in the present situation would violate New Mexico public policy, as Texas bars all suits against physicians employed by the State of Texas. New Mexico, in contrast, does limit suits against the government, but does not have the absolute prohibition on suing any doctor employed by the state, regardless of the degree of negligence, that Texas does.

Although the four factors described in Sam are important to the comity analysis, they cannot be considered in isolation. Both New Mexico and Texas specifically recognize that comity should not apply where its application would result in violation of that state's public policy. In State of New Mexico v. Caudle, 108 S.W. 3d 319, 320 (Tex. App. 2002), which

related to a retirement plan offered by the State of New Mexico, the court specifically noted that there are two reasons Texas should refuse to apply comity: if "(1) the foreign state declines to extend comity to Texas or sister states under the same or similar circumstances, or (2) the foreign statute produces a result in violation of Texas' own legitimate public policy." State of New Mexico v. Caudle, 108 S.W. 3d 319, 321 (Tex. App. 2002). In the present case, both of these exceptions to the application of comity are met: because New Mexico has a similar prohibition on application of comity where it would violate New Mexico public policy, New Mexico would not apply comity in the same or similar circumstances. Even Dr. Frezza's Brief in Chief recognizes that "The New Mexico Tort Claims Act expresses a clear public policy that tort claims against governmental entities should be allowed," citing Sam, 2006-NMSC-022, ¶23, 139 N.M. at 480, 134 P. 3d at 767. Dr. Frezza makes references to various similar aspects of the New Mexico and Texas Tort Claims Acts—for example, a limited waiver of sovereign immunity. These references appear to be calculated to gloss over the enormous differences: for example, that in New Mexico an injured party may sue a negligent surgeon employed by a state hospital, while in Texas an injured party may not. The public policy expressed through the two different tort claims acts is stark. Because New Mexico will not apply

comity where doing so would violate its own public policy, application of comity is inappropriate here. This is the context and background of the analysis of the four comity factors considered below, which further demonstrate that comity cannot apply here.

The factors to be considered in a comity analysis according to Sam are these: (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. Sam v. Sam, 2006-NMSC-022, ¶23.

With regard to the first factor, the question is whether the forum state would enjoy similar immunity in similar circumstances: circumstances are key. The circumstances here are not simply that Dr. Frezza may have received a paycheck from and used an operating room at Texas Tech, but that he was a member of a private physicians' group, TTPA, and that that group had a contract with a New Mexico insurer—which contract resulted in Ms. Montaño's presence on Dr. Frezza's operating table. A similar circumstance, therefore, would be a physician employed by a New Mexico state hospital who, through a non-governmental contract with a Texas insurer, began systematically performing negligent surgery on Texas

citizens: would Texas provide a defense to such a doctor? The TTCA unequivocally bars suits against doctors, and bars claims against state hospitals except in the peculiar circumstance where the injury was "caused by a condition or use of tangible personal or real property." Tex. Civ. Prac. & Rem. Code Ann. §101.021(2) (1985). The Texas law also has a strict six-month statute of repose. Tex. Civ. Prac. & Rem. Code, §101.101(a) (1985). These statutory manifestations of the public policy of Texas stand in stark contrast to New Mexico's policy, which permits suits against doctors. NMSA 1978, § 41-4-4(B) (2001). Although, as Dr. Frezza notes in his brief, there is no case law regarding such a circumstance, it appears unlikely at best that Texas would in fact permit the suit to go forward and provide a defense to the surgeon given the public policy of that state. Since Dr. Frezza wants New Mexico to apply the TTCA to him, the question is whether Texas would apply the NMTCA to a New Mexico surgeon in Texas, not only permitting him to be sued but providing him a defense. Because Texas certainly would not, comity does not apply here.

With regard to the second factor, whether Texas has or is likely to extend similar immunity to other states, there is no case similar to this one in which Texas has offered comity to New Mexico. In addition, as noted above, Texas has an explicit exception to application of comity where such

application would violate Texas public policy, which the NMTCA clearly does. State of New Mexico v. Caudle, 108 S.W. 3d at 321. Dr. Frezza cites only this case, which concerned dramatically different circumstances than those present here, in support of his argument for application of comity here. In Caudle, the Texas Court of Appeals did in fact extend comity to New Mexico, noting that because New Mexico courts applied the principle of comity, it would "treat New Mexico as a cooperative jurisdiction for purposes of applying comity." Id. There, however, there was no issue regarding a conflict between the public policies of the states as there is here. Rather than a negligent surgeon benefiting from a contract between a private physician's group and a New Mexico insurer, that case involved the State of New Mexico itself: the district court had denied New Mexico's request for a special appearance, and New Mexico appealed. Nothing in Caudle indicates that Texas intended to apply comity so broadly to New Mexico that it would except its own exception, applying comity regardless of any violation of its own public policy. Accordingly, regardless of whether Texas will ordinarily apply comity to New Mexico, Texas would not likely apply comity here.

The third Sam factor relates to New Mexico's crucial interest in litigating the case. First, the matter does of course concern numerous New Mexico citizens who were harmed by Dr. Frezza. As importantly, the matter

concerns New Mexico insurers who contracted with the State of New Mexico to insure employees of the State of New Mexico like Ms. Montaño. Those New Mexico insurers, including Lovelace, then contracted with TTPA, making an arrangement under which those employees of the State of New Mexico were told that in order to get the benefit of the insurance *paid for by the State of New Mexico*, they would have to go to Texas for treatment. And once they were in Texas, they were harmed by a negligent surgeon—the *only one* that the New Mexico insurers would permit them to see. These New Mexico citizens and employees of the State of New Mexico were then sent back to New Mexico, where they all developed severe pain lasting in some cases for years before they discovered the source of the problem.

Dr. Frezza, of course, insists that the only fact in this constellation that matters is that his own operating table was located in Texas; and asserts falsely that " . . . the sole nexus between New Mexico and the cause of action is that Plaintiff is a New Mexico resident." In fact, the only nexus between Texas and the cause of action is the location of the operating table: everything else that matters here is of direct concern to New Mexico. Dr. Frezza further misstates the facts when he asserts at 21 of his Brief that "Because Plaintiff chose to travel repeatedly to Texas to obtain medical care.

. .". In fact, Ms. Montaño and Dr. Frezza's other victims would never have chosen to travel to Texas had their insurers not had an arrangement, secret to them, with Dr. Frezza's practice group. New Mexico has a crucial interest in litigating this matter, not least to unravel the arrangement that resulted in insurance for New Mexico state employees being paid by the state of New Mexico to New Mexico insurance companies paying for a negligent Texan surgeon.

The final Sam factor considers whether extending immunity would prevent forum shopping. As a matter of fact, the only forum shopping going on in this case was Dr. Frezza, who may have had an inkling of his own incompetence, shopping for the forum that would afford him the best protection from liability for his negligence. Unable to secure enough patients in Lubbock, however, his practice group entered into precisely the kind of arrangement Dr. Frezza advocated for in his book, THE BUSINESS OF SURGERY, and began securing new patients from New Mexico. The issue is not, as Dr. Frezza says at 21 of his Brief, that "Plaintiff should not be permitted to evade the Texas Tort Claims Act in this way," but that Dr. Frezza should not be permitted to escape all responsibility for his predatory, avaricious, and incompetent surgery and business practices which were visited upon New Mexicans. That Texas chooses to afford absolute

immunity from suit to even grossly negligent surgeons does not make Ms. Montaño's suit in New Mexico forum shopping; it is not only the forum in which she resides but the forum in which she was insured, the forum in which she was informed that she had to go to Texas or forego the benefit of her insurance, the forum in which she began to suffer the effects of Dr. Frezza's incompetence. It is the forum in which her suit should be brought.

IV. CONCLUSION

Dr. Frezza advocated use of special arrangements with insurance companies to increase numbers of patients and revenue. It is not by coincidence that his practice group, TTPA, made such an arrangement with at least two New Mexico insurers, thus putting numerous New Mexico citizens on Dr. Frezza's operating table. These facts are crucial to determination of Dr. Frezza's liability; to proper application of choice of law principles; and ultimately the merits of this matter. Because the collateral order doctrine is applicable only where the order in question "conclusively determines a disputed issue that is entirely separate from the merits of the action," the doctrine is inapplicable here. Further, because application of Texas law to the present case would entirely exempt a grossly negligent surgeon from liability in direct violation of New Mexico's public policy, comity should not be applied even if all the factors were met, which they are

not. For these reasons and those stated above, Dr. Frezza's Petition for Writ of Error should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on the 5th day of June, 2013, a copy of Kimberly Montaño's Answer to Eldo Freeza, M.D.'s Brief in Chief on his Petition for Writ of Error was served by first-class mail, postage prepaid to:

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