# IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO



**KIMBERLY MONTANO,**

**Plaintiff-Appellee,**

**vs.** **No. 32,403**

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

**Defendant-Appellants.**

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

## ELDO FREZZA, M.D.'S BRIEF IN CHIEF

## ORAL ARGUMENT IS REQUESTED

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## I. SUMMARY OF PROCEEDINGS

This case arises out of medical care and treatment that Dr. Frezza, an employee of the State of Texas, provided to Kimberly Montano in Lubbock, Texas. On February 3, 2004, Plaintiff traveled to Texas Tech University Health Sciences Center ("Texas Tech") in Lubbock to undergo bariatric surgery with Dr. Frezza, a surgeon employed by Texas Tech. (RP 5, 54-55). Texas Tech is a governmental unit of the State of Texas. *See Texas Tech Univ. Health Sciences Center v. Ward*, 280 S.W.3d 345, 347-348 (Tex. App. 2008). Dr. Frezza performed a laparoscopic gastric bypass surgery on Ms. Montano and upon discharge, Plaintiff returned to her home in New Mexico. (RP 5).

After the surgery, Plaintiff traveled to Texas Tech on multiple occasions for follow up care with Dr. Frezza. (RP 5). Plaintiff allegedly suffered complications from the procedure and discovered her injury when Dr. David Syn, a physician in Lubbock, performed an esophagogastroduodenoscopy ("EGD") study on February 13, 2010. (RP 5, 67-68). Dr. Syn subsequently performed revision surgery in Lubbock. (RP 5, 67-58).

On October 26, 2011, Plaintiff filed her Complaint against Dr. Frezza in the Second Judicial District of the State of New Mexico asserting claims of medical negligence, lack of informed consent, and violation of the New Mexico Unfair Practices Act. (RP 1-11). Plaintiff alleges that Dr. Frezza breached the standard of

care in his performance of the bariatric surgery and that his negligence caused harm to her. (RP 7-8). Both Plaintiff's informed consent claim and her unfair practices claim allege that Dr. Frezza failed to accurately disclose the risks of the procedure. (RP 10-11). Plaintiff further claims that Dr. Frezza concealed his negligence when providing follow up care to her in Texas. (RP 8). Although Plaintiff's Complaint asserts a breach of contract claim against Lovelace, it does not assert any such claim against Dr. Frezza. (RP 7). All of Plaintiff's claims against Dr. Frezza are predicated on medical care she sought in Texas. (RP 1-11).

On January 13, 2012, Dr. Frezza moved to dismiss Plaintiff's Complaint because the Texas Tort Claims Act requires the dismissal of claims against an individual governmental employee when the claims are predicated on acts within the employee's scope of employment. (RP 1-11); *see* Tex. Civ. Prac. & Rem. Code 101.106(f); *Franka v. Velasquez*, 332 S.W.3d 367, 388 (Tex. 2011). Dr. Frezza's motion demonstrated that Texas law applies to this case under the doctrine of comity and because Texas was the "place of the wrong." (RP 43-63).

The district court held a hearing on Dr. Frezza's motion on July 12, 2012 and determined that Dr. Frezza was not entitled to the immunity from suit afforded by the Texas Tort Claims Act because New Mexico law applies to this case. (RP 195-196). Although all of the acts of which Plaintiff complains occurred in Texas, the court concluded that Texas law is inapplicable because New Mexico was the

"place of the wrong" and principles of comity do not require the application of Texas law. *Id.* Dr. Frezza timely filed his Petition for Writ of Error seeking review of the district court's decision in accordance with Rule 12-503 NMRA 2012 and the Petition was granted on November 1, 2012.

## II. STANDARD OF REVIEW

The validity of a claim of sovereign immunity is reviewed *de novo*. *See Zuni Public School Dist. v. Public Educ. Dept.*, 2012-NMCA-048, ¶ 8, 277 P.3d 1252, 1255. The review of an order granting or denying a motion to dismiss is a question of law that is reviewed *de novo*. *See id.*

With respect to comity, the district court's decision to apply a comity analysis is reviewed *de novo* and the district court's comity analysis is reviewed for an abuse of discretion. *See Sam v. Sam*, 2006-NMSC-022, ¶ 12, 139 N.M. 474, 478, 134 P.3d 761, 765.

## III. SUMMARY OF THE ARGUMENT

The district court's decision denying Dr. Frezza immunity from suit under the Texas Tort Claims Act is a collateral order because it conclusively determines a disputed question that is completely separate from the merits of the action and the ruling would be effectively unreviewable on appeal from a final judgment. *See* Rule 12-503 NMRA 2013; *Handmaker v. Henney*, 1999-NMSC-043, ¶ 10, 128 N.M. 328, 332, 992 P.2d 879, 883; *Carrillo v. Rostro*, 114 N.M. 607, 613, 845

P.2d 130, 136 (1992). Whether Dr. Frezza is entitled to the benefits of the Texas Tort Claims Act, and is therefore immune from suit, is unrelated to the merits of Plaintiff's claims. *See Handmaker*, 2012-NMCA-048, ¶ 11, 128 N.M. at 332, 992 P.2d at 883. Because the Texas Tort Claims Act provides immunity from suit, rather than immunity from liability, the district court's decision subjecting Dr. Frezza to suit would be effectively unreviewable on appeal. *See Campos de Suenos, Ltd. v. County of Bernalillo*, 2001-NMCA-043, ¶ 9, 130 N.M. 563, 567, 28 P.3d 1104, 1108 (writ of error is available for immune entities seeking immediate review to protect the right not to stand trial). As a result, this case falls well within the parameters of the collateral order doctrine.

The district court's decision to deny Dr. Frezza the immunity from suit afforded by the Texas Tort Claims Act was erroneous and should be reversed. Plaintiff asserts claims against a Texas governmental employee in relation to medical care that she sought in Texas, and her injuries were allegedly discovered and treated in Texas. In addition to the fact that Texas is the "place of the wrong," principles of comity require the application of Texas law. Under the Texas Tort Claims Act, Dr. Frezza is immune from suit and Plaintiff's claims against him must be dismissed.

## IV. ARGUMENT

### A. The District Court's order denying Dr. Frezza the immunity from suit afforded by the Texas Tort Claims Act conclusively determines a disputed question that is completely separate from the merits of this case and would be effectively unreviewable on appeal from a final judgment.

The collateral order doctrine applies when a district court's order conclusively determines a disputed question that is completely separate from the merits of the action and the ruling would be "effectively unreviewable on appeal from a final judgment because the remedy by way of appeal would be inadequate." *See* Rule 12-503 NMRA 2013; *Carrillo v. Rostro*, 114 N.M. 607, 613, 845 P.2d 130, 136 (1992); *Handmaker v. Henney*, 1999-NMSC-043, ¶ 10, 128 N.M. 328, 992 P.2d 879. The order at issue must "finally determine a claim which is 'separable from,' 'collateral to' or 'independent of' the cause itself." *Carrillo*, 114 N.M. at 613, 845 P.2d at 136. When such an order is not "inextricably bound up with the merits of the...claim," it would be "essentially unreviewable upon review of the final judgment in the case." *Id.*

District court decisions regarding governmental immunity from suit meet the criteria set out in Rule 12-503 and are reviewable under the collateral order doctrine. *See, e.g., Zuni*, 2012-NMCA-048, ¶ 8, 277 P.3d at 1252; *Handmaker,* 1999-NMSC-043, ¶ 11, 128 N.M. at 332, 992 P.2d at 883; *King v. Allstate Ins. Co.*, 2004-NMCA-031, ¶ 16, 135 N.M. 206, 209, 86 P.3d 631, 634. The right to

immediate review is "based on the fact that the immunity in question is an immunity from suit and the burdens imposed by participation in a lawsuit." *King,* 2004-NMCA-031, at ¶ 16, 135 N.M. at 209, 86 P.3d at 634; *see also Campos de Suenos, Ltd*, 2001-NMCA-043, ¶ 9, 130 N.M. at 567, 28 P.3d at 1108; *Carrillo,* 114 N.M. at 615, 845 P.2d at 138 (the right not to stand trial cannot effectively be vindicated after the trial has occurred). Allowing such summary denials to be immediately appealed protects the "overarching policy for the legislative grant of immunity...to protect the public purse" as well as "reliev[ing] the governmental entity from the burdens of a trial on the merits." *Campos de Suenos,* 2001-NMCA-043, ¶ 14, 130 N.M. at 568, 845 P.2d at 1109.

New Mexico's appellate courts have reviewed legal decisions that control whether a party is immune from suit under the collateral order doctrine. In *Zuni*, the court issued a writ of error to evaluate whether the plaintiff's claims arose under state or federal law and, as a result, whether the defendant was immune from suit. *Zuni,* 2012-NMCA-048, ¶¶ 1-2, 277 P.3d at 1253. The defendant claimed that it was immune from suit under either the Eleventh Amendment of the United States Constitution or under New Mexico's common law sovereign immunity. The plaintiff argued that the defendant was not immune from suit because its claims arose under the New Mexico Public School Finance Act rather than federal statutes. The court evaluated New Mexico and federal case law to determine

whether the plaintiff was asserting a federal statutory claim precluded by the Eleventh Amendment or a state law claim, and concluded that the claim was predicated on state law. *Id.*, 2012-NMCA-048, at ¶¶ 9-17, 277 P.3d at 1255-1256. The court then determined that the defendant was not immune from suit because the legislature had not asserted sovereign immunity in relation to the type of damages action asserted by the plaintiff. *Id.,* 2012-NMCA-048, at ¶¶ 18-20, 277 P.3d at 1257-1258. In accordance with *Zuni,* the collateral order doctrine applies to a district court decision determining which law governs a plaintiff's claims when the decision controls whether a party is immune from suit.

In this case, the collateral order doctrine applies because whether Dr. Frezza is immune from suit is solely a legal issue that has no bearing on the merits of this case. Texas Tech University Health Sciences Center is a governmental unit for purposes of the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code § 101.001(3); *see also Texas Tech Univ. Health Sciences Center v. Ward*, 280 S.W.3d 345 (Tex. App. 2008) (holding that Texas Tech University Health Sciences Center is a governmental unit under the Texas Tort Claims Act). Physicians employed by governmental units are governmental employees for purposes of the Texas Tort Claims Act. *See Murk v. Scheele*, 120 S.W.3d 865, 866 (Tex. 2003).

Under the Texas Tort Claims Act, an employee of a governmental unit is entitled to dismissal of claims asserted against him or her in an official capacity if

the claims could have been brought against the governmental unit. *See* Tex. Civ. Prac. & Rem. Code 101.106(f); *see also Franka v. Velasquez*, 332 S.W.3d 367, 369-372 (Tex. 2011). Section 101.106(f) of the Texas Tort Claims Act provides:

> If a suit is filed against an employee of a governmental unit based upon conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee **shall be dismissed** unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as a defendant on or before the 30th day after the date the motion is filed. (Emphasis added).

The Texas Supreme Court interpreted and applied section 101.106(f) of the Texas Tort Claims Act in *Franka v. Velasquez*, 332 S.W.3d at 369-370. In *Franka*, the plaintiffs initiated a lawsuit against a physician employed by Texas University Health Systems. *Id.*, 332 S.W.3d at 370. The plaintiffs did not sue the governmental entities that employed the defendant physician. *Id.* The defendant physician moved for summary judgment based on section 101.106(f) and argued that because plaintiff's claims could have been brought against his governmental employer, he was entitled to dismissal of the claims against him in his individual capacity. *Id.* at 371. Although the trial court denied the defendant's motion, the Supreme Court reversed and dismissed the plaintiff's claims.

In reaching its decision, the Supreme Court held that all tort claims against a governmental unit, whether sued alone or in conjunction with its employees, are

subject to the Texas Tort Claims Act for purposes of section 101.106(f), even if the Act does not waive immunity. *Id.* at 375. Consequently, a governmental employee need not establish a waiver of immunity as to a governmental employer under the Texas Tort Claims Act to be entitled to dismissal under section 101.106(f). *Id.* at 379-380, 385. A governmental employee must only establish that he or she was acting within the course and scope of employment and that suit could have been brought under the Texas Tort Claims Act, regardless of whether the Act waives immunity. *Id.* at 381. The court noted that these conditions are met in almost every negligence suit against a government employee. *Id.* As a result, individual employees cannot be sued under the Texas Tort Claims Act for acts within the scope of their employment and any such claims "shall be dismissed" on motion of the employee. *See* Tex. Civ. Prac. & Rem. Code 101.106(f).

In this case, the district court's determination that the Texas Tort Claims Act does not apply conclusively determines a legal issue that is separate from the merits of Plaintiff's claims. it is undisputed that: Dr. Frezza was employed by Texas Tech University Health Sciences Center at all material times; he provided medical treatment to Plaintiff only in that capacity; and all of Plaintiff's claims against Dr. Frezza are predicated on that treatment. (RP 1-11, 54-55). Because Plaintiff is suing Dr. Frezza for acts that occurred within the scope of his employment with a governmental entity, under Texas law Plaintiff is suing Dr.

Frezza in his official capacity and this is a case that could have been brought against Texas Tech under the Texas Tort Claims Act. *See Franka,* 332 S.W.3d at 375. Pursuant to section 101.106(f) of the Texas Tort Claims Act and *Franka*, Dr. Frezza is immune from suit and is entitled to dismissal of the claims against him regardless of the merits of the case.

The district court's decision is precisely the type of ruling that New Mexico courts have determined is separate from the merits and reviewable as a collateral order. In *Carrillo*, *Zuni,* and *Handmaker,* the courts evaluated various legal issues to determine whether the defendants were immune from suit. *See generally Carrillo v. Rostro*, 114 N.M. 607, 845 P.2d 130, (1992); *Handmaker v. Henney*, 1999-NMSC-043, 128 N.M. 328, 992 P.2d 879; *Zuni Public School District v. Public Education Department*, 2012-NMCA-048, 277 P.3d 1252. In *Handmaker*, the court recognized that determinations regarding governmental immunity are generally reviewable under the collateral order doctrine because they are separate from the merits and conclusively determine the issue. *See Handmaker*, 2012-NMCA-048, ¶ 11, 128 N.M. at 332, 992 P.2d at 883.

In contrast, in *Williams v. Rio Rancho Public Schools*, the court held that an order denying a motion to dissolve an injunction was not reviewable under the collateral order doctrine because it required an evaluation of the merits. *See Williams v. Rio Rancho Public Schools*, 2008-NMCA-150, ¶ 13, 145 N.M. 214,

218, 195 P.3d 879, 883. The court stated, "we fail to see how the court's rulings granting, extending, and declining to dissolve the injunction against the School was based on anything but a consideration of the merits." *Id.*, 2008-NMCA-150, ¶ 12, 145 N.M. at 218, 195 P.3d at 883. Accordingly, the collateral order doctrine did not apply. Unlike *Handmaker*, *Carrillo*, *Zuni*, and this case, *Williams* did not present issues relating to sovereign immunity.

The district court's decision that Dr. Frezza is not entitled to the immunity afforded by the Texas Tort Claims Act is analogous to the orders addressed in *Handmaker*, *Carrillo,* and *Zuni* because it conclusively determined whether Dr. Frezza was immune from suit. Under New Mexico law, decisions regarding whether parties are immune from suit are unrelated to the merits of the claim and subject to review under the collateral order doctrine.

The district court's ruling denying Dr. Frezza immunity is also subject to review as a collateral order because it is effectively unreviewable on appeal from a final judgment. As discussed in *Handmaker*, courts have drawn a distinction between immunity from suit and a defense to liability in determining whether an order is effectively unreviewable on appeal. *See Handmaker*, 2012-NMCA-048, ¶ 12, 128 N.M. at 332, 992 P.2d at 883. This distinction is based on the fact that an immunity from suit "is effectively lost if a case is erroneously permitted to go to trial." *Id.*

The Texas Tort Claims Act affords Dr. Frezza an immunity from suit rather than a defense to liability. As discussed above, Section 101.106(f) of the Act provides, "[o]n the employee's motion, the suit against the employee **shall be dismissed** unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as a defendant on or before the 30th day after the date the motion is filed. *See* Tex. Civ. Prac. & Rem. Code 101.106(f) (emphasis added). Because this provision precludes litigation against an individual employee from proceeding to trial, it establishes an immunity from suit, rather than a defense to liability, that would be irretrievably lost should the district court's decision be permitted to stand.

The district court's order denying Dr. Frezza's Motion to Dismiss is reviewable as a collateral order under Rule 12-503 NMRA 2013. The court's decision is completely separate from the merits of the action and conclusively determines whether Dr. Frezza is immune from suit under the Texas Tort Claims Act. An immediate review of the order is appropriate because Dr. Frezza's right to immunity from suit will effectively be lost should he be required to defend against Plaintiff's claims and appeal from a final judgment. The district court's order is incorrect and should be reversed.

**B. The "place of the wrong" rule and public policy concerns require that Texas law apply to Plaintiff's claims against Dr. Frezza.**

The initial step in conflicts analysis is to characterize the claim being asserted, or more precisely, determine the area of substantive law applied by the forum state to a particular claim or issue. *See Terrazas v. Garland & Loman, Inc.*, 2006-NMCA-111, ¶ 11, 140 N.M. 293, 296, 142 P.3d 374, 377. New Mexico, as the forum state, applies its own rules in characterizing an issue for conflicts analysis. *Id.* Plaintiff's claims against Dr. Frezza are predicated on medical negligence, a common law tort. *See Schrib v. Seidenberg*, 80 N.M. 573, 574, 458 P.2d 825, 826 (Ct. App. 1969); *see also Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973); *rev'd on other grounds Demers v. Gerety*, 86 N.M. 141, 520 P.2d 869 (1974). "In determining which jurisdiction's law should apply to a tort action, New Mexico courts follow the doctrine of *lex loci delicti commissi*, that is, the substantive rights of the parties are governed by the law of the place where the wrong occurred." *Terrazas,* 2006-NMCA-111, ¶ 12, 140 N.M. at 296, 142 P.3d at 377. "The 'place of the wrong' under this rule is 'the location of the last act necessary to complete the injury.'" *Torres v. State*, 119 N.M. 609, 613, 894 P.2d 386, 390 (1995).

New Mexico courts have not rigidly applied the "place of the wrong" rule. *See Estate of Gilmore v. Gilmore*, 1997-NMCA-103, ¶ 17, 124 N.M. 119, 124, 946 P.2d 1130, 1135. In *Torres*, the court applied New Mexico law to a case in which

the alleged negligence of the Albuquerque Police Department resulted in a death in California. *See Torres,* 119 N.M. at 613, 894 P.2d at 390. The court reasoned that the alleged negligence occurred in New Mexico and that "public policy dictates that New Mexico law determine the existence of duties and immunities on the part of New Mexico officials." *Id.*

In *Gilmore*, the court determined that Texas law governed the distribution of proceeds from a wrongful death claim when the decedent was injured in Texas and died in Texas but his spouse resided in New Mexico. The court discussed *Torres* and drew the following conclusion:

> New Mexico courts will apply the law of the state where the wrong occurred. This makes sound policy sense, because the state where the wrong occurred ordinarily is the state with the greatest interest in having its law apply. This is particularly true when both the wrongful conduct and the injury occur in one state. In certain circumstances, however, another state may have a more significant interest in having its law apply. For example, when the misconduct and the injury are in separate states, there may be reasons for the law of the state of the misconduct to govern the question of the actor's liability.

*Gilmore*, 1997-NMCA-103, ¶ 19, 124 N.M. at 124, 946 P.2d at 1135. Accordingly, the court held that the place of wrong rule generally determines which state's law applies but that the application of the rule is tempered by policy concerns. *Id.*, 1997-NMCA-103, ¶ 21, 124 N.M. at 126, 946 P.2d at 1137.

In this case, both the "place of the wrong" rule and policy concerns require that Texas law apply to Plaintiff's claims against Dr. Frezza. Plaintiff claims that

Dr. Frezza negligently performed surgery on her in Texas; made misrepresentations in Texas regarding the risks of the surgery; provided negligent follow up care in Texas; and concealed his negligence during care provided in Texas. (RP 5- 8). Plaintiff further claims that she discovered her injuries in Texas when they were diagnosed by Dr. Syn, a Texas physician, and that she underwent revision surgery in Texas. (RP 5). There is no question that any alleged tort committed by Dr. Frezza was committed in Texas or that Plaintiff claims her injuries were discovered and treated in Texas. The fact that Plaintiff resides in New Mexico, and returned here following her medical treatment, is insufficient to establish that Dr. Frezza committed a tort in New Mexico. *See, e.g., Cronin v. Sierra Med. Ctr.*, 2000-NMCA-082, ¶25, 129 N.M. 521, 528, 10 P.3d 845, 852 ("the residence of a recipient of personal services rendered elsewhere is irrelevant and totally incidental to the benefits provided by the defendant at his own location."); *Tarango v. Pastrana*, 94 N.M. 727, 729, 616 P.2d 440, 442 (Ct. App. 1980) ("the idea that tortious rendition of such services is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt is wholly inconsistent with the public interest in having services of this sort generally available."). Because all of Dr. Frezza's alleged tortious acts took place in Texas and were discovered in Texas, Texas is the "place of the wrong" and Texas law applies.

Policy concerns further warrant the application of Texas law. As the court noted in *Gilmore*, there may be reasons for the law of the state of the misconduct to govern the actor's liability even if the negligence and the injury did not occur in the same state.[1] *See Gilmore*, 1997-NMCA-103, ¶ 19, 124 N.M. at 124, 946 P.2d at 1135. In *Torres*, the court determined that public policy concerns require that a state determine the duties and immunities of its own officials. *See Torres,* 119 N.M. at 613, 894 P.2d at 390. As discussed above, Dr. Frezza was an employee of the State of Texas at all material times and he provided medical care to Plaintiff only in that capacity. As a result, under *Gilmore* and *Torres*, Texas law governs Plaintiff's claims against Dr. Frezza.

In accordance with the New Mexico case law discussed above, both the "place of the wrong" rule and policy concerns require that Texas law apply to Plaintiff's claims against Dr. Frezza. The district court's determination to the contrary was incorrect and should be reversed.

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[1] Although it is Dr. Frezza's position that both the alleged negligence and the injury occurred in Texas because Plaintiff claims that the surgery was improperly performed in Texas, misrepresentations were made in Texas, and discovery of the injury occurred in Texas, Plaintiff claims that the injury occurred in New Mexico. (RP 84-85).

### C. The doctrine of comity requires the application of Texas law in this case.

"Comity is a principle whereby a sovereign forum state recognizes and applies the laws of another state sued in the forum state's courts." *Sam v. Sam*, 2006-NMSC-022, ¶ 8, 139 N.M. 474, 477, 134 P.3d 761, 764. In forming the union that is the United States, "the states intended to adopt policies of broad comity toward one another." *Nevada v. Hall*, 440 U.S. 410, 422, 99 S.Ct. 1182, 1190 (1979). As a result, comity should be extended to a sister state unless doing so would undermine New Mexico's own public policy. *Sam,* 2006-NMSC-022, ¶ 21, 139 N.M. at 480, 134 P.3d at 767.

New Mexico courts evaluate four factors in determining whether extending immunity through comity would violate the forum state's public policy: (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*, 2006-NMSC-022, ¶ 22, 139 N.M. at 480, 134 P.3d at 767. These factors support New Mexico's extension of comity to the State of Texas in this case.

With respect to the first factor, the district court incorrectly concluded that it is unlikely Texas would extend immunity to New Mexico under similar circumstances. (RP 196). There is no evidence in the record, and no case law, to

support a determination that Texas would not extend immunity to New Mexico under similar circumstances. In fact, as discussed below, Texas courts have extended comity to New Mexico. *New Mexico v. Caudle*, 108 S.W.3d 319, 321 (Tex. App. 2002).

In addition, it is undeniable that a similar action brought against a New Mexico entity or governmental employee would be subject to the New Mexico Tort Claims Act. *See* NMSA 1978, § 41-4-1 *et seq*. Like Texas, New Mexico has enacted a limited waiver of sovereign immunity for various tort claims against the State. *See Sam*, 2006-NMSC-022, ¶ 23, 139 N.M. at 480, 134 P.3d at 767. The New Mexico Tort Claims Act provides various benefits and protections to those entities and persons for whom immunity has been waived, including *inter alia*, a statutory limitation on recovery (§ 41-4-19), a notice requirement of ninety (90) days for any claim to be initiated against the State (§ 41-4-16), a strict two (2) year statute of limitations (§ 41-4-15), and the right to a defense provided by the State for claims initiated against governmental employees (§ 41-4-4). "The New Mexico Tort Claims Act expresses a clear public policy that tort claims against governmental entities should be allowed," but this public policy is not without its limitations. *Sam*, 2006-NMSC-022, ¶ 23, 139 N.M. at 480, 134 P.3d at 767.

The Texas Tort Claims Act was enacted with similar considerations in mind and also establishes limitations on governmental liability. *See Texas Tech Univ.*

*Health Sciences Center v. Ward*, 280 S.W.3d 345 (Tex. App. 2008). The Texas Tort Claims Act provides a limited waiver of sovereign immunity with regard to claims against the State and its employees. *See* Tex. Civ. Prac. & Rem. Code. § 101.001 *et seq*. The Act also extends various benefits and protections to those persons and entities for whom immunity has been waived, including *inter alia*, a limitation on recovery (§101.023), an occurrence-based notice requirement (§101.101), and a right of dismissal for governmental employees (§101.106(f)). In this case, the Court should recognize the sovereign immunity of the State of Texas and dismiss Plaintiff's claims for failure to comply with the Texas Tort Claims Act.

The second factor of the *Sam* test – whether Texas would extend immunity to New Mexico – also weighs in favor of comity because Texas's appellate courts have in fact extended comity to New Mexico. In *New Mexico v. Caudle*, the plaintiffs brought an action in Texas district court challenging the constitutionality of the State of New Mexico's alternative retirement plan. *New Mexico v. Caudle*, 108 S.W.3d 319, 320 (Tex. App. 2002). The district court denied New Mexico's request for special appearance and New Mexico appealed. *Id.* at 321. The appellate court dismissed the plaintiff's claims against the State of New Mexico based upon considerations of comity. In so doing, the court noted, "New Mexico courts recognize the principle of comity and applied it liberally...As a result, we

will treat New Mexico as a cooperative jurisdiction for purposes of applying comity." *Id.*

The district court considered *Caudle* but erroneously concluded that it did not apply because the opinion addressed a constitutional question. (RP 196). Although the facts at issue in *Caudle* involved a constitutional question, the court's opinion did not limit Texas's extension of comity to New Mexico to constitutional issues. Rather, the court broadly stated that it would treat New Mexico as a cooperating jurisdiction for purposes of applying comity. *Caudle*, 108 S.W.3d at 321. As a result, the second factor weighs in favor of honoring Texas's sovereign immunity and the district court's determination to the contrary was incorrect.

The third factor set out in *Sam* – whether New Mexico has a strong interest in litigating this case – also weighs in favor of extending comity to Texas. While New Mexico has an interest in litigating any action initiated by one of its residents, that interest is "tempered by the concept of comity..." *Sam*, 2006-NMSC-022, ¶ 25, 139 N.M. at 480, 134 P.3d at 767. In this case, New Mexico's interest is limited by virtue of the fact that all of the alleged negligent acts occurred in Texas. Indeed, the sole nexus between New Mexico and the cause of action is that Plaintiff is a New Mexico resident. Without more, New Mexico's interest in litigating this case is *de minimus* compared to Texas's interest in litigating a case against its own employee. *See Torres,* 119 N.M. at 613, 894 P.2d at 390

(acknowledging the importance of a state's ability to evaluate the duties and immunities of its own employees). Because Plaintiff chose to travel repeatedly to Texas to obtain medical care provided by a Texas governmental entity and has filed suit against an employee of the State of Texas who is immune from suit under Texas law, the district court incorrectly concluded that New Mexico has an "equal or greater interest" in litigating this case. (RP 196).

The fourth factor in the *Sam* analysis considers issues of forum shopping. The district court correctly determined that this factor weighs in favor of extending comity to Texas. (RP 196). By initiating her lawsuit against Dr. Frezza in New Mexico, Plaintiff is attempting to circumvent the Texas Tort Claims Act and the benefits and protections it provides, including the notice requirement, the limitation on recovery, and the dismissal of Dr. Frezza required by § 101.106(f). Plaintiff should not be permitted to evade the Texas Tort Claims Act in this manner. This case presents a clear example of why comity should be extended to a sister state to discourage the practice of forum shopping.

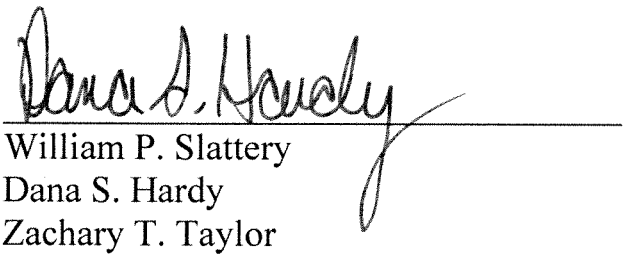
Based upon the foregoing analysis, extending comity to the State of Texas is appropriate and would not offend New Mexico's public policy. Accordingly, the Court should recognize Texas's sovereign immunity and the immunity afforded to Dr. Frezza by the Texas Tort Claims act. Plaintiff's claims against Dr. Frezza should be dismissed as required by section 101.106(f).

## V. CONCLUSION

For the foregoing reasons, Dr. Frezza respectfully requests that the Court reverse the district court's decision and hold that he is entitled to the immunity from suit afforded by the Texas Tort Claims Act.

Respectfully submitted,

HINKLE, HENSLEY, SHANOR & MARTIN, LLP



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## REQUEST FOR ORAL ARGUMENT

Oral argument is requested and would be helpful due to the complex legal issues and unique circumstances presented by this appeal.

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Eldo Frezza, M.D.'s Brief in Chief to be served, by first class mail, on the following counsel of record, on this 22nd day of March, 2012:

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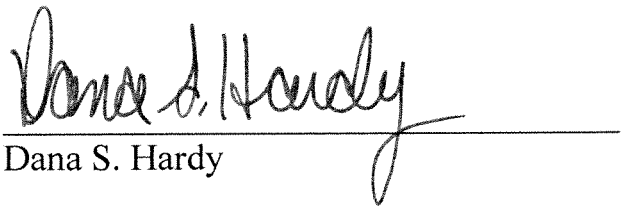

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