IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED

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Wendy F Jones

KIMBERLY MONTANO,

Plaintiff-Respondent,

vs.

No. 32,403
Bernalillo County
D-202-CV-2011-10851

ELDO FREZZA, M.D.,

Defendant-Petitioner,

and

LOVELACE INSURANCE COMPANY,
a Domestic For-Profit Corporation,

Defendant.

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

ELDO FREZZA, M.D.'S REPLY BRIEF

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(F) NMRA, I hereby certify that this Reply Brief complies with the applicable type-volume limitation in that the body of the brief contains 3,968 words as indicated by the word-count total of the word processing system used to prepare the same, which is Microsoft Office Word 2007.

Dana S. Hardy

INTRODUCTION

The issue presented by this appeal is whether Dr. Frezza, an employee of the State of Texas who provided medical care to Plaintiff exclusively in Texas, is entitled to the immunity from suit afforded by the Texas Tort Claims Act. Because Plaintiff's medical malpractice claims against Dr. Frezza are predicated entirely on care Dr. Frezza provided in Texas and Plaintiff's alleged injuries were discovered and treated in Texas, Texas law applies under the "place of the wrong" rule and under the doctrine of comity. The district court's decision holding that New Mexico law applies is incorrect and should be reversed. Under the Texas Tort Claims Act, Dr. Frezza is immune from suit and Plaintiff's claims against him must be dismissed.

Plaintiff's Answer Brief incorrectly argues that the district court's order denying immunity falls outside the scope of the collateral order doctrine because the decision to apply New Mexico law is somehow separate from Dr. Frezza's immunity from suit under Texas law. (AB 3-6). These issues are in fact one and the same because if Texas law applies, Dr. Frezza is immune from suit. The district court's decision to apply New Mexico law, and thereby deprive Dr. Frezza immunity from suit under the Texas Tort Claims Act, is unreviewable on appeal from a final judgment because the immunity will be lost if the case is erroneously permitted to go to trial. Because the district court's decision to apply New Mexico

law conclusively determined whether Dr. Frezza is immune from suit, the ruling resolved a disputed issue that is completely separate from the merits of Plaintiff's clams and the order fits squarely within the parameters of the collateral order doctrine.

ARGUMENT

I. PLAINTIFF'S UNSUPPORTED FACTUAL ARGUMENTS SHOULD BE DISREGARDED.

Plaintiff's Answer Brief focuses on the agreement between Lovelace and non-defendant Texas Tech Physician Associates ("TTPA"), the relationship between TTPA and Dr. Frezza, Dr. Frezza's alleged business practices, and Dr. Frezza's allegedly negligent medical treatment of Plaintiff and other patients. (AB 1-4, 6-9, 14, 17-19). Likely because Plaintiff's claims are unsubstantiated, Plaintiff fails to cite any evidence to support her contentions. Indeed, Plaintiff's Answer Brief contains a total of one citation to the record proper. (AB 10). Plaintiff's failure to cite the record proper in support of her factual assertions and argument violates Rule 12-213(A)(3)-(4) NMRA. *See* Rule 12-213(A)(3)-(4); *see also Murphy v. Strata Production Co.*, 2006-NMCA-008, ¶5, 138 N.M. 809, 126 P.3d 1173 (sprinkling of citation to portion of record does not comply with Rule 12-213(A)(3)). The Court has no duty to search the record to find evidence to support a party's claims and may disregard unsupported arguments. *See, e.g.,*

Murken v. Solv-Ex Corp., 2005-NMCA-137, ¶ 2, 138 N.M. 653, 124 P.3d 1192 (failure to cite record limited scope of review); *Delta Automatic Systems, Inc. v. Bingham*, 1999-NMCA-029, ¶ 31, 126 N.M. 717, 974 P.2d 1174 ("This Court has no duty to search the record or research the law to 'defend' in a civil case a party that fails to defend itself on an issue"); *Estate of Heeter*, 1992-NMCA-032, ¶ 15, 113 N.M. 691, 831 P.2d 990 ("This court will not search the record to find evidence to support an appellant's claims."). Plaintiff's unsupported factual arguments lack merit and should not be considered by the Court.

II. THE DISTRICT COURT'S ORDER REJECTING DR. FREZZA'S IMMUNITY UNDER THE TEXAS TORT CLAIMS ACT IS A COLLATERAL ORDER SUBJECT TO IMMEDIATE REVIEW.

The collateral order doctrine provides for immediate review of orders "implicating rights that will be irretrievably lost...regardless of the outcome of an appeal from the final judgment." *Handmaker v. Henney*, 1999-NMSC-043, ¶ 9, 128 N.M. 328, 992 P.2d 879. To invoke the collateral order doctrine, three requirements must be met: (1) the order must finally determine the disputed question; (2) the order must concern an issue that is entirely separate from the merits of the claim; and (3) there must be no effective remedy on appeal. *Id.* The district court's order denying Dr. Frezza immunity from suit meets each of these requirements and is therefore a collateral order subject to immediate review.

A. The District Court's order conclusively determines whether Dr. Frezza is immune from suit.

The issue raised by Dr. Frezza's motion to dismiss is whether he is immune from suit in New Mexico based upon application of the Texas Tort Claims Act. (RP 43-60). District court decisions regarding governmental immunity from suit meet the criteria set out in Rule 12-503 NMRA and are reviewable under the collateral order doctrine. *See, e.g., Zuni Public School Dist. v. Public Educ. Dept.*, 2012-NMCA-048, ¶ 8, 277 P.3d 1252; *Handmaker,* 1999-NMSC-043, ¶ 11; *King v. Allstate Ins. Co.*, 2004-NMCA-031, ¶ 16, 135 N.M. 206, 86 P.3d 631. The necessity of immediate appellate 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, ¶ 16; *see also Campos de Suenos, Ltd. v. County of Bernalillo*, 2001-NMCA-043, ¶ 9, 130 N.M. 563, 28 P.3d 1104; *Carrillo v. Rostro*, 1992-NMSC-054, ¶ 19, 114 N.M. 607, 845 P.2d 130 (the right not to stand trial cannot effectively be vindicated after the trial has occurred).

Plaintiff's argument that the collateral order doctrine does not apply because the district court's decision involved choice-of-law rather than sovereign immunity is inaccurate. (AB 7). This Court specifically addressed the intersection between sovereign immunity, choice-of-law, and the collateral order doctrine in *Zuni Public School District v. Public Education Department*, 2012-NMCA-048, 277 P.3d 1252. In *Zuni*, the Court issued a writ of error to review the district court's

decision regarding choice-of-law when that determination controlled whether the defendant was entitled to sovereign immunity. The State of New Mexico asserted a sovereign immunity defense under federal law, and the plaintiff contended that its claims arose out of state law, which did not provide the defendant with a sovereign immunity defense. *Id.* ¶ 9. The Court of Appeals noted that resolution of the parties' respective characterizations of the claim was "key to resolving whether the State is shielded from this action by sovereign immunity." *Id.* In this context, the Court stated, "[w]e issue writs of error to review immunity from suit cases because we consider them collateral order[s] affecting interests that would be irretrievably lost if the case proceeded to trial." *Id.* ¶ 8. *Zuni* demonstrates that the collateral order doctrine applies when a choice-of-law question controls whether a defendant is entitled to sovereign immunity. Plaintiff's argument to the contrary, which fails to mention *Zuni* and relies on a case that did not involve sovereign immunity,[1] is incorrect.

As in *Zuni*, Dr. Frezza's claim of sovereign immunity hinges on the Court's determination regarding choice-of-law. By declining to apply the Texas Tort Claims Act, the district court conclusively determined that Dr. Frezza is not entitled to sovereign immunity in this case. Because the district court's order

[1] *See* AB at 7 (citing *Flemma v. Halliburton Energy Services, Inc.*, 2013-NMSC-22, 303 P.3d 813).

conclusively determined the sovereign immunity issue, the first element of the collateral order doctrine has been satisfied.

B. Dr. Frezza's claim of sovereign immunity is completely separate from the merits of Plaintiff's claims.

Under the Texas Tort Claims Act, a governmental employee 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). Plaintiff does not dispute the pertinent facts establishing Dr. Frezza's immunity: (1) Dr. Frezza was employed by Texas Tech Health Sciences Center ("Texas Tech") at the time he treated Plaintiff (RP 41-42); (2) she is suing Dr. Frezza for acts that occurred within the scope of his employment with Texas Tech (RP 1-11); and (3) Texas Tech is a governmental entity of the State of Texas. *See Texas Tech Univ. Health Sciences Center v. Ward*, 280 S.W.3d 345 (Tex. App. 2008). Indeed, Plaintiff admits that Dr. Frezza is immune from suit under the Texas Tort Claims Act. (AB 12).

Despite these undisputed facts, Plaintiff contends that the collateral order doctrine is inapplicable because the merits of her claims cannot be severed from Dr. Frezza's claim of immunity. Although Plaintiff's argument is unclear, she appears to contend that her claim against Dr. Frezza is based on the contract

between Lovelace and TTPA rather than on medical care provided by Dr. Frezza. (AB 7). This argument is problematic in numerous respects.

First, Plaintiff's claims against Dr. Frezza are based on medical care provided in Texas rather than breach of contract. (RP 1-11). Second, Dr. Frezza is not a party to the Agreement between Lovelace and TTPA, was not employed by Texas Tech at the time the Agreement was entered, and did not have authority to select the insurance accepted by Texas Tech.[2] Third, Plaintiff has not alleged that the Agreement waives sovereign immunity on behalf of Texas Tech's employees and indeed, it does not do so. Fourth, Plaintiff fails to cite any evidence in support of her contentions regarding the Agreement and mischaracterizes Dr. Frezza's relationship with TTPA. For example, although Plaintiff repeatedly states that TTPA was Dr. Frezza's "physician practice group," that statement is false. As stated in Ms. Velten's affidavit, TTPA is a corporation established by Texas Tech for purposes of managed care contracting[3] – not a "physician practice group." Plaintiff's inaccurate arguments regarding the Agreement have no bearing on whether Dr. Frezza is immune from suit in this case.

Under the Texas Tort Claims Act, Dr. Frezza is immune from suit and is entitled to dismissal of the claims against him apart from the merits of the case. ***See*** Tex. Civ. Prac. & Rem. Code 101.106(f); *see also Franka v. Velasquez*, 332

[2] *See* RP 41-42; L. Velten Affidavit at ¶¶ 3, 5 and 6 (filed February 19, 2014).
[3] *Id.* at ¶ 3.

S.W.3d 367, 369-372 (Tex. 2011). The collateral order doctrine applies here because whether Dr. Frezza is immune from suit is solely a legal issue that has no bearing on the merits of Plaintiff's claims.

C. The district court's decision is unreviewable on appeal from a final judgment.

In determining whether an order is effectively unreviewable on appeal, there is a difference between an immunity from suit and a defense to liability. *See Handmaker*, 2012-NMCA-048, ¶ 12. 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.* Because the Texas Tort Claims Act affords Dr. Frezza immunity from suit rather than a defense to liability, the district court's ruling is effectively unreviewable on appeal from a final judgment because Dr. Frezza will have been deprived of his right not to stand trial. ***See*** Tex. Civ. Prac. & Rem. Code 101.106(f); *see also Franka v. Velasquez*, 332 S.W.3d 367, 369-372 (Tex. 2011). Plaintiff's argument that Dr. Frezza has an adequate remedy on direct appeal because the New Mexico Tort Claims Act provides a defense to liability rather than immunity from suit misses the point. (AB 9). The issue here is whether the district court's ruling deprived Dr. Frezza of the right not to stand trial under Texas law, and there is no doubt that it did.

III. THE "PLACE OF THE WRONG RULE" AND PUBLIC POLICY CONCERNS REQUIRE THAT TEXAS LAW APPLY TO PLAINTIFF'S CLAIMS AGAINST DR. FREZZA.

In this case, Plaintiff claims that: she repeatedly traveled to Texas to obtain medical care from Dr. Frezza at Texas Tech University; Dr. Frezza failed to obtain informed consent during pre-operative visits that occurred in Texas; Dr. Frezza negligently performed surgery on her in Texas; Dr. Frezza concealed the alleged injury during post-operative visits in Texas; the injury allegedly resulting from the surgery was discovered in Texas; and subsequent surgery relating to the alleged injury was performed in Texas. (RP 1-11). "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 v. Garland & Loman, Inc.*, 2006-NMCA-111, ¶ 12, 140 N.M. 293, 142 P.3d 374. "The 'place of the wrong' under this rule is 'the location of the last act necessary to complete the injury.'" *Torres v. State*, 1995-NMSC-025, ¶ 13, 119 N.M. 609, 894 P.2d 386. However, application of the "place of the wrong" rule is tempered by policy concerns. *Estate of Gilmore v. Gilmore*, 1997-NMCA-103, ¶¶ 18-19, 124 N.M. 119, 946 P.2d 1130.

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. 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, does not 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, 10 P.3d 845 ("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*, 1980-NMCA-110, ¶ 13, 94 N.M. 727, 616 P.2d 440 ("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.") (internal citation omitted). 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.

Additionally, 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. (RP 41-42). As an employee of the State of Texas, Dr. Frezza is immune from suit under Texas law. ***See*** Tex. Civ. Prac. & Rem. Code 101.106(f); *see also Franka v. Velasquez*, 332 S.W.3d 367, 369-372 (Tex. 2011). Public policy concerns support application of Texas's laws to determine the duties and immunities of Texas's employees. *Cf. Torres*, 1995-NMSC-025, ¶ 13 (public policy concerns required

application of New Mexico law to determine duties and immunity of New Mexico state employees despite fact that injury occurred in California).

Plaintiff's argument regarding the "place of the wrong" does not cite a single case in support of the district court's decision or address any of the authorities cited by Dr. Frezza. (AB 10-12). Instead, Plaintiff conclusively states that the district court correctly decided that New Mexico was the "place of the wrong" and contends that Dr. Frezza has misinterpreted the breadth of the collateral order doctrine. (AB 11-12). In addition to the fact that Plaintiff's argument regarding the collateral order doctrine is incorrect, as discussed above, the breadth of the collateral order doctrine is not relevant to the Court's determination regarding the "place of the wrong." (AB 11-12). Plaintiff's failure to cite any authority in support of her position and address the authorities cited by Dr. Frezza violates Rule 12-213(A)(4) NMRA and demonstrates the weakness of her argument. *See id.* ("Applicable New Mexico decisions shall be cited").

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.

IV. NEW MEXICO SHOULD HONOR THE SOVEREIGN IMMUNITY OF TEXAS AND ITS GOVERNMENTAL ACTORS UNDER PRINCIPLES OF COMITY.

"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, 134 P.3d 761. Comity should be extended to a sister state unless doing so would undermine New Mexico's own public policy. *Id.* ¶ 21. In this case, New Mexico should extend comity to the State of Texas and the district court's decision to the contrary should be reversed.

Plaintiff contends that application of the Texas Tort Claims Act to Plaintiff's claims against a Texas state employee would violate New Mexico's public policy because the Texas Tort Claims Act differs from the New Mexico Tort Claims Act. (AB 12-13). Plaintiff's arguments regarding the differences between the acts are overstated. Application of the Texas Tort Claims Act is not offensive to the public policy of New Mexico such that the sovereign immunity of Texas and its governmental actors should be ignored.

New Mexico has recognized and extended principles of comity even when the laws of a sister sovereign are irreconcilable with the express policies of New Mexico. *See Leszinke v. Pool*, 1990-NMCA-088, 110 N.M. 663, 798 P.2d 1049. *Leszninke* involved a custody dispute between divorced parents of minor children. *Id.* ¶ 1. The father challenged the district court's decision awarding the mother

primary physical custody on the basis that the mother's remarriage to her uncle was repugnant to New Mexico's public policy. *Id.* The father argued that district court should not have considered the marriage in its custody determination because New Mexico prohibited and criminalized marriage between uncles and nieces. *Id.* ¶¶ 6, 15-19; *see also* NMSA 1978, § 40-1-7 (all marriages between...uncles and nieces...are hereby declared incestuous and void); NMSA 1978, § 30-10-3 (making sexual intercourse between uncles and nieces a third degree felony).

The Court of Appeals affirmed the decision of the district court awarding custody to the mother despite her incestuous marriage. *Leszinke*, ¶ 34. In reaching its decision, the Court of Appeals balanced the State's prohibition of incestuous marriages with the general principle that "a marriage valid when and where celebrated is valid anywhere." *Id.* ¶ 20-21 (*citing* NMSA 1978 § 40-1-4). The Court noted that "[a]n interest in comity underlies Section 40-1-4 and the rule it codifies." *Id.* Despite the criminal statutes evidencing a strong public policy against incestuous marriage, the Court held that the mother's marriage did not preclude the district court from awarding her primary custody. *Id.* ¶ 34.

The *Leszinke* case demonstrates that New Mexico may extend comity even when the laws of a sister sovereign are directly contrary to New Mexico law. In this case, there is no such conflict and in fact, there is substantial similarity between Texas's and New Mexico's tort claims acts. Both New Mexico and

Texas, through their respective tort claims acts, place restrictions on the right to recover in actions against the state. *Compare* NMSA 1978, § 41-4-1 *et seq.* (requiring notice to state (§ 41-4-16), imposing strict two-year statute of limitations (§41-4-15), limiting recovery (§41-4-19)); *with* Tex. Civ. Prac. & Rem. Code. § 101.001 *et seq.* (limiting recovery (§101.023), imposing occurrence-based notice requirement (§101.101)).

Although Plaintiff focuses on the fact that the New Mexico Tort Claims Act allows suits against a state employee while the Texas Tort Claims Act does not, this difference is superficial. The Texas Tort Claims Act allows a plaintiff to substitute the state as a defendant for an employee that has been named in the caption. *See* Tex. Civ. Prac. & Rem. Code 101.106(f). The fact that Texas requires tort claims against employees to be brought against the "State" does not violate New Mexico public policy and New Mexico should extend comity to Texas in this case.

Furthermore, analysis of the comity factors set out in *Sam v. Sam* supports New Mexico's extension of comity to the State of Texas in this case. The factors to be considered include: (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. Each of these factors weighs in favor of extending comity.

It is undisputed that Texas has recognized the sovereign immunity of the State of New Mexico under principles of comity. *New Mexico v. Caudle*, 108 S.W.3d 319, 321 (Tex. App. 2002). Plaintiff's hypothesis that a New Mexico state employee would not receive immunity if sued in Texas is speculative. (AB 14-15). Plaintiff does not cite any authority in support of her argument and it is pure speculation as to how Texas would apply New Mexico's Tort Claims Act under inverse circumstances. Moreover, it is incongruous to assume that Texas would permit a claim against a New Mexico employee to proceed in its state courts without recognizing the applicability of the New Mexico Tort Claims Act.

Turning to the second factor, Plaintiff concedes that Texas has extended comity to New Mexico. *See Caudle*, 108 S.W.3d at 321. However, Plaintiff argues that *Caudle* did not involve a "conflict between the public policies of the states as there is here." (AB 16). Plaintiff cites no authority in support of this argument, nor does Plaintiff cite to any language in the *Caudle* opinion that supports this position. Contrary to Plaintiff's argument, 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. Thus, the second factor weighs in favor of honoring Texas's sovereign immunity.

In balancing which state has a greater interest in litigating this case, Texas's sovereignty interest outweighs New Mexico's interest in providing a forum to a plaintiff who traveled to Texas to obtain medical care. *See Sam*, 2006-NMSC-022, ¶ 25 (New Mexico's interest in providing forum is tempered by concept of comity). Plaintiff's argument regarding "New Mexico's crucial interest" is unsupported by any citation to the record proper and should be rejected. *See* Rule 12-213(A)(3)-(4) NMRA.

Moreover, New Mexico's "interest" in the relationship between Lovelace and TTPA has no bearing on Plaintiff's negligence claim against Dr. Frezza. As discussed previously, Dr. Frezza is not a party to the Agreement between TTPA and Lovelace and the Agreement was executed before Dr. Frezza was hired by Texas Tech. The only nexus between New Mexico and Plaintiff's claims against Dr. Frezza is that she 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*, 1995-NMSC-025, ¶ 13 (acknowledging the importance of a state's ability to evaluate the duties and immunities of its own employees).

The fourth factor, prevention of forum shopping, unquestionably supports the extension of comity in this case.[4] In fact, Plaintiff conceded this issue at the hearing on Dr. Frezza's motion. (Tr. at p. 61 lines 18-25). By filing her lawsuit in New Mexico, Plaintiff seeks to evade application of the Texas Tort Claims Act to her claims against Dr. Frezza. If Plaintiff's claim against a Texas state employee regarding medical care provided in Texas is permitted to proceed, New Mexico will become a forum for claims that do not exist elsewhere.

Based upon the foregoing analysis, extending comity to the State of Texas in this case 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.

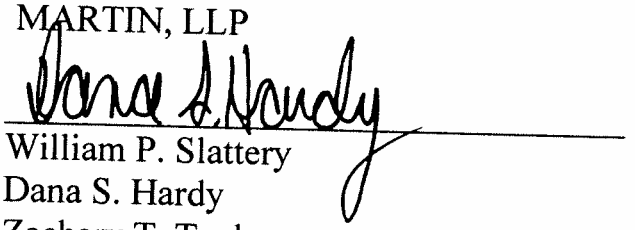
CONCLUSION

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.

[4] Plaintiff's argument that Dr. Frezza has somehow engaged in forum shopping (AB 18-19) lacks citation to the record proper and should be rejected. ***See*** Rule 12-213(A)(3)-(4) NMRA (argument shall be supported by citation to record proper).

Respectfully submitted,

HINKLE, HENSLEY, SHANOR & MARTIN, LLP



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Eldo Frezza, M.D.'s Reply Brief to be served, by first class mail, on the following counsel of record, on this 6th day of March, 2014:

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