

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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COURT OF APPEALS OF NEW MEXICO
FILED

FERNANDO GALLEGOS,

JUL 18 2013

Plaintiff/Appellant,

Wendy F Jones

vs.

No. 32,605

ELDO FREZZA, M.D., and
PRESBYTERIAN HEALTH
PLAN, INC., a New Mexico Domestic
For-profit Corporation,

Defendants/Appellants.

Appeal from the First Judicial District,
Honorable Sarah M. Singleton

ELDO FREZZA, M.D.'S ANSWER BRIEF

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I. SUMMARY OF PROCEEDINGS

In his “Summary of Proceedings,” Plaintiff/Appellant devotes considerable discussion to his allegations of medical negligence and the allegations asserted in the First Amended Complaint. Plaintiff’s allegations are not supported by any evidence of record and are irrelevant to the issues presented on appeal. This appeal asks the Court to determine whether New Mexico courts can exercise personal jurisdiction over an out-of-state physician who provided medical care and treatment to a New Mexico resident in Texas. The only facts relevant to the Court’s review are those facts bearing upon Dr. Frezza’s contacts with the State of New Mexico.

This case arises from medical care and treatment that Dr. Frezza provided to Fernando Gallegos in Lubbock, Texas. On July 11, 2005, 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 76). Texas Tech is a governmental unit of the State of Texas and Dr. Frezza was an employee 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 gastric bypass procedure for Mr. Gallegos, and upon discharge, Plaintiff returned to New Mexico. (RP 76). After surgery, Plaintiff returned to Lubbock on multiple occasions for follow-up care with Dr. Frezza. (RP 76-77).

On November 4, 2011, Plaintiff filed his First Amended Complaint against Dr. Frezza in the First 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 71-84). Plaintiff alleged that his claims against Dr. Frezza arose from Dr. Frezza's transaction of business in New Mexico. (RP 72-73). Plaintiff did not allege that Dr. Frezza committed a tortious act in New Mexico or that he was subject to personal jurisdiction on such a basis. (RP 71-84).

On January 13, 2012, Dr. Frezza moved to dismiss Plaintiff's Complaint on the basis that he was not subject to personal jurisdiction in New Mexico. (RP 110-119). Dr. Frezza's motion established that he did not have sufficient minimum contacts with New Mexico so as to warrant exercising personal jurisdiction over him. (RP 110-119). The motion was supported by an affidavit from Dr. Frezza. (RP 118-119).

In response, Plaintiff contended that Dr. Frezza was subject to both general and specific personal jurisdiction in New Mexico. (RP 152-188). Plaintiff identified six contacts between Dr. Frezza and New Mexico for purposes of personal jurisdiction: an alleged relationship with Mr. Gallegos's New Mexico insurer, a website, a New Mexico medical license, real property that Dr. Frezza and his wife acquired in New Mexico subsequent to the date when he performed surgery on Plaintiff, a book, and "travels" to New Mexico. (RP 152-188).

Dr. Frezza's reply demonstrated that these alleged "contacts" were overstated and were insufficient for New Mexico courts to exercise personal jurisdiction over him. (RP 209-224). Dr. Frezza supplied another affidavit in support of his motion, as well as information from the New Mexico Medical Board regarding the status of his licensure in New Mexico. (RP 222-223). Dr. Frezza also submitted a copy of TTPA's "Specialty Services Agreement" with Presbyterian and an affidavit from TTPA's Managing Director of Provider-Payor Relations, Lorri Velten. (RP 306-308, SP 5-70). The contract demonstrated that Dr. Frezza was not a party to the agreement and that Plaintiff had misstated the nature of the relationship between Dr. Frezza and Presbyterian Health Plan. (SP 13-60).

The District Court, Honorable Sarah Singleton, heard argument regarding Dr. Frezza's motion to dismiss on October 1, 2012. The District Court concluded that Dr. Frezza's contacts with New Mexico were insufficient for New Mexico courts to exercise general or specific jurisdiction over him. (RP 334-336). The District Court further ruled that subjecting Dr. Frezza to personal jurisdiction in New Mexico would violate traditional notions of fair play and substantial justice. (RP 351-353). After the Court granted Dr. Frezza's motion, Plaintiff requested leave to conduct jurisdictional discovery. (CD, 10-1-12, 10:22:30). The district court denied Plaintiff's request as untimely. *Id.*

II. STANDARD OF REVIEW

Whether a party is subject to personal jurisdiction is a question of law that is reviewed *de novo*. *Cronin v. Sierra Medical Center*, 2000-NMCA-082, ¶ 10, 129 N.M. 521, 10 P.3d 845. The complainant must make a prima facie showing that personal jurisdiction exists. *Id.* When the party contesting jurisdiction accompanies its motion to dismiss with affidavits or other competent evidence, the party asserting jurisdiction cannot rest on the pleadings and “must come forward with affidavits or other proper evidence detailing specific facts that the Court has jurisdiction over the defendant.” *Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996-NMCA-057, 121 N.M. 738, 742, 918 P.2d 17, 21.¹

With regard to Plaintiff’s request for jurisdictional discovery, the trial court’s decision is reviewed for an abuse of discretion. *Roberts v. Piper Aircraft Corp.*, 100 N.M. 363, 368-69, 670 P.2d 974, 979-80 (Ct. App. 1983).

Plaintiff’s reliance upon *Sproul v. Rob & Charlies, Inc.*, 2013-NMCA-072, ___ N.M. ___, ___ P.3d. ___ (filed 2012), and *Madrid v. Chama*, 2012-NMCA-071, ___ N.M. ___, 283 P.3d 871, is misplaced because neither case has bearing on the applicable standard of review. *Sproul* confirms that a state cannot exercise personal jurisdiction over a foreign defendant when doing so would

¹ The paragraphs in this decision are not numbered for purposes of pinpoint citation.

offend the Due Process Clause of the United States Constitution. *Sproul*, 2013-NMCA-072, ¶¶ 7-8. In that regard, personal jurisdiction hinges on federal law. *Id.* *Madrid* addresses the standard of review to be applied when considering a motion to dismiss pursuant to Rule 1-012(B)(6). *Madrid*, 2012-NMCA- 071, ¶ 18. Because *Madrid* does not address the complainant’s burden under Rule 1-012(B)(2), the case has no bearing on the issues presented here.

III. ARGUMENT

A. THE DISTRICT COURT CORRECTLY CONCLUDED THAT DR. FREZZA IS NOT SUBJECT TO PERSONAL JURISDICTION IN NEW MEXICO.

New Mexico courts may exercise personal jurisdiction over non-residents through application of New Mexico’s long-arm statute. *See* NMSA 1978, § 38-1-16. The statute provides, “[a]ny person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state...” *Id.* The transaction of business in New Mexico is one of the enumerated acts identified in New Mexico’s long-arm statute. NMSA 1978, § 38-1-16(A)(1).

The formalities of New Mexico’s long-arm statute have been modified by common law. *See Tercero v. Roman Catholic Diocese of Norwich, Conn.*, 2002-NMSC-018, ¶ 7, 132 N.M. 312, 48 P.3d 50; *see also Santa Fe Techs. v. Argus*

Networks, Inc., 2002-NMCA-030, ¶ 13, 131 N.M. 772, 42 P.3d 1221; *Alto Eldorado P'ship v. Amrep Corp.*, 2005-NMCA-131, ¶ 30, 138 N.M. 607, 124 P.3d 585. To exercise personal jurisdiction over a non-resident defendant, "New Mexico requires satisfaction of a three part test: (1) the defendant's acts must be one of the five enumerated in the long-arm statute; (2) the plaintiff's cause of action must arise from the act; and (3) minimum contacts sufficient to satisfy due process must be established by the defendant's act." *Santa Fe Techs.*, 2002-NMCA-030, ¶ 13. The first and third factors of the test have been replaced with the due process standard of "minimum contacts," and thus, "the necessity of a technical determination of whether the non-resident committed an act enumerated by the long-arm statute has evaporated." *Id.*; *see also Tercero*, 2002-NMSC-018, ¶ 8 (stating that analysis of whether defendant committed an act enumerated in the long-arm statute merges with the inquiry regarding whether such activities constitute minimum contacts sufficient to satisfy due process). The long-arm statute "extends the jurisdictional reach of New Mexico courts as far as constitutionally possible." *Tercero*, 2002-NMSC-018, ¶ 6.

The constitutional limits on personal jurisdiction require that the defendant have sufficient minimum contacts with the forum state so that permitting the action will not violate traditional concepts of fair play and substantial justice. *Tercero*, 2002-NMSC-018, ¶ 7 (*citing Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320

(1945)). “A defendant will be found to have sufficient minimum contacts, satisfying due process, where the defendant has a connection with the forum state and has acted in the state in such a manner that they ‘should reasonably anticipate being haled into court there.’” *Id.*; *citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Restated, the plaintiff must demonstrate that the defendant engaged in some act by which the defendant purposely availed himself or herself of the privilege of conducting activities within New Mexico, thus invoking the benefits and protections of its laws. *Zavala v. El Paso County Hospital District*, 2007-NMCA-149, ¶ 11, 143 N.M. 36, 172 P.3d 173. Random, fortuitous, or attenuated contacts are insufficient to fulfill the due process requirements for personal jurisdiction. *Id.* Personal jurisdiction may be either “general” or specific.” *Zavala*, 2007-NMCA-149, ¶ 12.

New Mexico courts have previously considered whether New Mexico could exercise personal jurisdiction over Texas health care providers. *See Cronin v. Sierra Medical Center*, 2002-NMCA-082, 129 N.M. 521, 10 P.3d 845; *see also Zavala v. El Paso County Hospital District*, 2007-NMCA-149, 143 N.M. 36, 172 P.3d 173. In *Cronin*, the Court of Appeals determined that New Mexico could assert general personal jurisdiction over a Texas hospital based on its advertising efforts in New Mexico. *Cronin*, 2002-NMCA-082, ¶ 4. The Court determined that jurisdiction over the hospital was appropriate based upon its extensive

advertising activities in New Mexico and the influence of those activities on the plaintiff's decision to undergo surgery at that particular hospital. *Id.* ¶¶ 14-16.

The Court also held in *Cronin* that New Mexico could not exercise personal jurisdiction over five non-hospital defendants, including individual physicians, because they lacked the requisite minimum contacts with New Mexico. *Id.* ¶ 23. The Court noted that the non-hospital defendants, “acted in New Mexico only after Patient had unilaterally initiated a doctor-patient relationship in Texas.” *Id.* ¶ 25.

In *Zavala*, the Court of Appeals held that a different Texas hospital was not subject to personal jurisdiction in New Mexico. *Zavala*, 2007-NMCA-149, ¶ 16. The plaintiffs contended that personal jurisdiction was proper based on several factors, including a transfer agreement between the New Mexico hospital and the Texas hospital, the number of New Mexico patients treated at the Texas hospital, the Texas hospital's website, the Texas hospital's registration as a New Mexico Medicaid Provider, accreditation as a regional trauma center, and proximity to a border region. *Id.* ¶ 15. The Court of Appeals discussed each of the contacts and concluded that “[e]ven if we were to conclude that these contacts taken together would be sufficient to support general jurisdiction, we nonetheless conclude that principles of fundamental fairness do not permit the exercise of personal jurisdiction over Hospital.” *Id.* ¶ 16.

The Court also held that New Mexico could not exercise personal jurisdiction over out-of-state physicians named in the lawsuit. *Id.* ¶ 39. The plaintiffs contended that the physicians were subject to jurisdiction in New Mexico because they were registered as New Mexico Medicaid providers. *Id.* ¶ 36. The Court stated that Medicaid registration was a factor for it to consider, but that registration alone was insufficient to warrant the exercise of general personal jurisdiction. *Id.* ¶ 21. The Court also rejected the plaintiff's arguments regarding the physicians vis-à-vis the hospital and stated "[t]he acts of a defendant determine whether New Mexico has personal jurisdiction, not the acts of other defendants or third parties." *Id.* ¶ 37.

In this case, the district court's decision that Dr. Frezza's contacts with New Mexico are insufficient to warrant the exercise of personal jurisdiction over him is correct and should be affirmed. Dr. Frezza did not maintain continuous systematic contacts with New Mexico such that New Mexico courts can exercise general personal jurisdiction over him. Because Plaintiff's cause of action arose from medical care and treatment that was provided in the State of Texas, there is no basis for New Mexico courts to exercise specific personal jurisdiction over Dr. Frezza. In addition, exercising personal jurisdiction over Dr. Frezza would violate traditional notions of fair play and substantial justice given his limited contacts with New Mexico.

1. New Mexico courts cannot exercise general personal jurisdiction over Dr. Frezza because his contacts with New Mexico are not “continuous and systematic.”

“A state exercises general jurisdiction over a nonresident defendant when its ‘affiliations with the [s]tate are so continuous and systematic as to render [it] essentially at home in the forum state.’” *Sproul*, 2013-NMCA-072, ¶ 12 (*citing Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. _____, 131 S.Ct. 2847 (2011)). In accord with United States Supreme Court precedent, New Mexico appellate courts have stated that “general jurisdiction exists when a defendant has ‘continuous and systematic contacts with [New Mexico] such that the defendant could reasonably foresee being haled into court in that state for any matter.’” *Id.* (*citing Zavala*, 2007-NMCA-149, ¶ 12).

Plaintiff contends that Dr. Frezza is subject to general personal jurisdiction in New Mexico on the basis of six contacts: (1) the contract between TTPA and Presbyterian, (2) Dr. Frezza’s travels to New Mexico, (3) medical licensure in New Mexico, (4) operation of a website, (5) publication of a book, and (6) ownership of land. (BIC 14-15, 19-20). These contacts are not supported by the evidence in the record and are insufficient to warrant exercising general personal jurisdiction over Dr. Frezza.

Dr. Frezza was an employee of Texas Tech University Health Sciences Center (“Texas Tech”), a governmental entity of the State of Texas, at all times

material to Plaintiff's claims. (RP 118-119). Texas Tech established Texas Tech Physicians Associates ("TTPA") as a Texas 5.01(a) corporation for purposes of managed care contracting. (SP 5-7). On December 17, 2003, TTPA executed a Specialty Services Agreement (SP 13-60) with Presbyterian Network, Inc. to provide medical services to Presbyterian insureds. (SP 5-7). As an employee of Texas Tech, Dr. Frezza did not have any authority to decide what insurance he would accept. (SP 5-7). Dr. Frezza did not execute the Specialty Services Agreement and contrary to Plaintiff's assertion, Dr. Frezza was not a party to the Agreement (SP 5-7, 13-60).

A named defendant's activities within the forum state must provide the basis for personal jurisdiction, "not the acts of other defendants or third parties." *Visarraga v. Gates Rubber Co.*, 104 N.M. 143, 147, 717 P.2d 596, 600 (Ct. App. 1986); *see also Zavala*, 2007-NMCA-149, ¶ 37. "The unilateral activity of those who claim a relationship with a nonresident defendant does not alone satisfy the requirement of contact with the forum state." *Id.* (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980)). Under *Visarraga* and *Zavala*, TTPA's actions and contract with Presbyterian cannot be imputed to Dr. Frezza for purposes of personal jurisdiction. As a result, the contract does not provide a basis for New Mexico courts to exercise jurisdiction over Dr. Frezza.

Plaintiff's argument that Dr. Frezza's relationship to TTPA supports exercising personal jurisdiction over him lacks merit and should be rejected. (BIC 17-18). First, Dr. Frezza is not an employee of TTPA. (RP 118-119). Second, whether TTPA is subject to jurisdiction in New Mexico is not before the Court. Third, Dr. Frezza has not argued that he is immune from personal jurisdiction by virtue of any relationship with TTPA. Thus, Plaintiff's reliance on *Calder v. Jones*, 465 U.S. 783 (1984), is misplaced. (BIC 16-17).

In *Calder*, the Supreme Court considered whether California could exercise personal jurisdiction over a Florida reporter and a Florida editor in connection with a libelous publication sold in California. *Id.* at 785-787. The Supreme Court concluded that California could exercise personal jurisdiction over these defendants on the basis of their intentional acts directed at a California resident. *Id.* at 789-90. In reaching its conclusion, the Supreme Court noted that the defendants' contacts could not be judged on the basis of their employer's activities in the forum state and "[e]ach defendant's contacts with the forum State must be assessed individually." *Id.* at 790. The Supreme Court concluded that jurisdiction was appropriate based upon *the defendants' intentional actions directed at the forum state.* *Id.* at 789-90.

Unlike *Calder*, Plaintiff has failed to demonstrate that Dr. Frezza engaged in any conduct targeted at New Mexico residents. Dr. Frezza did not engage in any

advertising activities directed at New Mexico residents, nor did Dr. Frezza procure TTPA's relationship with Presbyterian. (RP 118-119, SP 5-7). Furthermore, Dr. Frezza has never practiced medicine in New Mexico and his New Mexico medical license was not in effect at the time of Plaintiff's surgery. (RP 118-119). Dr. Frezza only saw New Mexico patients as a result of Presbyterian's relationship with TTPA and his status as an employee of Texas Tech. *Id.* While Dr. Frezza's treatment of patients with Presbyterian insurance may be a contact for purposes of personal jurisdiction, it is insufficient to justify the exercise of personal jurisdiction. *See Zavala*, 2007-NMCA-149, ¶ 21 (holding that registration as New Mexico Medicaid provider is a contact for purposes of general jurisdiction, but is insufficient to warrant the exercise of personal jurisdiction).

Plaintiff also contends that Dr. Frezza had contact with New Mexico by consulting with him while traveling through the state. (BIC 15). Dr. Frezza refuted this allegation with an affidavit detailing a luncheon he had with Mr. Gallegos. (RP 213-214). Because Dr. Frezza came forward with evidence to refute Plaintiff's allegation, Plaintiff had a burden to produce some competent evidence to support his assertion that personal jurisdiction was proper. *See Doe*, 1996-NMCA-057, 121 N.M. at 742, 918 P.2d at 21. During the eight months Dr. Frezza's motion was pending, Plaintiff did not submit an affidavit or other

competent evidence to refute Dr. Frezza's affidavit.² Dr. Frezza's affidavit establishes that he did not provide medical care or medical consultation to Mr. Gallegos in New Mexico and that he merely had lunch with him. (RP 213-214).

Having lunch with a former patient is insufficient to support the exercise of personal jurisdiction over Dr. Frezza. *See Valley Wide Health Services, Inc. v. Graham*, 106 N.M. 71, 738 P.2d 1316 (1987) (holding that out-of-state physician was not subject to personal jurisdiction on basis of phone call to New Mexico resident where doctor-patient relationship was established out-of-state). Dr. Frezza's affidavit demonstrates that he did not purposely initiate activity relating to his patients in New Mexico. (RP 213-214). Additionally, Plaintiff has made no showing that Dr. Frezza sought to invoke the benefits and protections of New Mexico's laws by having lunch with him in New Mexico. Plaintiff's allegation regarding contact with another former patient "lacks the purposefulness of defendant's contact which is demanded by due process." *Valley Wide*, 106 N.M. at 73, 738 P.2d at 1318.

Next, Plaintiff argues that Dr. Frezza is subject to personal jurisdiction based upon his website that "demonstrates his continuous contacts and focused targeting

² Plaintiff belatedly offered to submit an affidavit to support this contention at the hearing on Dr. Frezza's motion to dismiss. (CD, 10-1-12, 9:57:53).

of New Mexico patients.” (BIC 21-22). Plaintiff’s argument regarding “targeting” is overstated and lacks support in the record.³

To determine whether personal jurisdiction in New Mexico is appropriate based upon operation of a website, the Court must consider the interactivity of the website. *Sublett v. Wallin*, 2004-NMCA-089, ¶ 29, 136 N.M. 102, 94 P.3d 845. This analysis emphasizes “the degree to which the website operator intentionally initiates the contacts.” *Id.* “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.” *Zavala*, 2007-NMCA-149, ¶ 20; *see also Sublett* 2004-NMCA-089, ¶ 33 (a passive website that provides information and offers no opportunity for interaction will ordinarily not be sufficient to support personal jurisdiction).

Dr. Frezza’s website provides information about himself and the procedures he performs as a bariatric surgeon. (RP 171-174). Any potential patient who

³ For example, Plaintiff states that “Defendant/Appellee’s own website indicates that as many as fifty percent (50%) of his patients come from New Mexico. (BIC 16). Plaintiff’s statement is conjecture based upon the patient testimonials posted on Dr. Frezza’s website. (RP 163-166). Plaintiff has not cited to any evidence in the record regarding the number of New Mexico residents who sought treatment from Dr. Frezza. It is the duty of the appellant to provide a record adequate to review the issues on appeal. *See Williams v. Bd. of County Comm’rs of San Juan County*, 1998-NMCA-090, ¶ 10, 125 N.M. 445, 963 P.2d 522. “Upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the trial court’s decision, and the appellate court will indulge in reasonable presumptions in support of the order entered.” *Reeves v. Wimberly*, 107 N.M. 231, 236, 755 P.2d 75, 80 (Ct. App. 1988).

accessed Dr. Frezza's website would learn that Dr. Frezza practiced in Lubbock, Texas, at the Texas Tech University Health Sciences Center. *Id.* The website does not solicit patients and there is no opportunity for patients to receive referrals through the website. *Id.* Indeed, Dr. Frezza's website does not indicate that his practice accepts patients with New Mexico insurance. *Id.* The only interactive feature of the website is the ability of patients to submit testimonials *regarding services already provided by Dr. Frezza.* *Id.* Moreover, the website does not specifically ask New Mexico residents to submit testimonials. *Id.* Dr. Frezza's website confirms that the exercise of personal jurisdiction is improper in this case.

In addition, Dr. Frezza's passive website is nothing like the defamatory website at issue in *Silver v. Brown*, 382 Fed. Appx. 723 (10th Cir. 2010), relied upon by Plaintiff. In *Silver*, the Tenth Circuit found that personal jurisdiction was appropriate over foreign publishers who posted a defamatory weblog ("blog") about a New Mexico resident. *Id.* at 732. The defendants created, posted, and managed a blog expressly targeting the plaintiff and his business for the purpose of disrupting and interfering with his business. *Id.* at 731. The domain name of the blog included the plaintiff's name. *Id.* at 725. The appellate court held that the defendant's actions in operating the blog were sufficiently targeted at New Mexico so as to justify the exercise of specific personal jurisdiction. *Id.* at 728, 731.

Plaintiff asserts that Dr. Frezza's "website is targeted to a New Mexico audience as it contains reference to [Dr. Frezza's] medical license and includes 10 testimonials of patients, 5 of which are New Mexico residents." (BIC 23). The only references to New Mexico come from persons who voluntarily sent testimonials for publication and identified themselves as New Mexico residents and Dr. Frezza's status as a licensed physician in New Mexico. *Id.* Dr. Frezza's website is a general one that does not target New Mexico. In accordance with *Zavala*, *Sublett*, and *Silver*, Dr. Frezza's website does not provide a basis to exercise jurisdiction over him.

Similar to Plaintiff's argument regarding Dr. Frezza's website, Plaintiff contends that jurisdiction is warranted because Dr. Frezza published a book that is available in New Mexico. (BIC 24). Plaintiff asserts that Dr. Frezza "undoubtedly...expects the State of New Mexico to protect his copyright with regard to his publication and has a plan for the commercial success of his book and its distribution in New Mexico." *Id.* The record contains no support for Plaintiff's supposition. In addition, Plaintiff's allegations are identical to those that the federal district court found "clearly insufficient" in *Beh v. Ostergard*, 657 F.Supp. 173 (D.N.M. 1987). *Id.* at 177-178.

In *Beh*, the plaintiff alleged that the defendant published articles relating to the cause of action that were circulated in New Mexico. *Id.* at 177-78. The

plaintiff further alleged that the defendant received monetary benefit by having his articles circulated throughout New Mexico. *Id.* The federal district court determined that the publication of information that fortuitously finds its way into New Mexico is not an act of purposeful availment of the laws of this state. *Id.* at 178. The Court stated,

[u]nless the plaintiff alleges that the Defendant had a regular distribution plan for his publications into New Mexico for which he derived commercial benefit, or that the Defendant intentionally harmed or defamed the Plaintiff in New Mexico by publishing the article, this Court cannot assert *in personam* jurisdiction consistent with the due process clause.

Id. The federal district court found that Plaintiff's allegations did not support a finding of sufficient minimum contacts. *Id.*

In this case, Plaintiff never alleged that Dr. Frezza had a plan for distribution of his book in New Mexico and Plaintiff did not present any such argument to the district court. (RP 71-84). Arguments not presented to or ruled upon by the district court cannot be asserted for the first time on appeal. Rule 12-216 NMRA 2013. Regardless, Plaintiff does not cite to any evidence in the record to support his allegations regarding Dr. Frezza's book. Plaintiff has not alleged or established that Dr. Frezza received monetary benefit through the sale of his book in New Mexico or that Dr. Frezza has sold even one copy of his book in New Mexico. Plaintiff's argument regarding Dr. Frezza's book is unsupported by the record and lacks merit. There is no evidence before the Court that would support a finding of

“minimum contacts” based upon Dr. Frezza’s publication of a book that may or may not have fortuitously found its way into New Mexico.

Plaintiff also argues that Dr. Frezza owns land in New Mexico and that he should therefore anticipate being sued in New Mexico. (BIC 24). Dr. Frezza and his wife do indeed own land in New Mexico. (RP 175-188). However, land ownership in the forum state does not automatically confer general personal jurisdiction over a party. *See Shaffer v. Heitner*, 443 U.S. 186, 212 (1977). All assertions of state-court jurisdiction, including property based jurisdiction, “must be evaluated according to the standards set forth in *International Shoe* and its progeny.” *Id.*; *see also Rush v. Savchuk*, 444 U.S. 320 (1980); *Rogers v. 5-Star Mgmt., Inc.*, 946 F. Supp. 907 (D.N.M. 1996). Land ownership is merely a contact between the defendant and the forum. *Rush* at 328.

Dr. Frezza’s acquisition of land in New Mexico is not the type of “continuous and systematic” contact such that he would anticipate being sued in New Mexico for a medical malpractice claim related to care he provided in Texas in 2005. Indeed, Dr. Frezza’s New Mexico property was not acquired until after Dr. Frezza treated Plaintiff. (RP 175-188). Dr. Frezza’s acquisition of land in New Mexico after he treated Plaintiff in Texas does not fulfill the requirements of *International Shoe*.

Lastly, Plaintiff identifies Dr. Frezza's expired medical license as a contact with New Mexico. (BIC 19). Dr. Frezza obtained a New Mexico medical license after he performed surgery on Plaintiff in Texas. (RP 76, 224). Dr. Frezza held a New Mexico license from January 26, 2006 to July 1, 2009, at which time his license expired. (RP 224). Dr. Frezza's license expired before Plaintiff filed his original complaint. (RP 1, 224). Although Dr. Frezza at one time had a New Mexico medical license, he has never practiced medicine in New Mexico. (RP 118-119). Dr. Frezza's medical license was not a "continuous and systematic" contact with New Mexico and does not establish general personal jurisdiction over him.

Dr. Frezza has not maintained continuous and systematic contacts with New Mexico such that he could reasonably foresee being sued for medical negligence in New Mexico. As in *Zavala* and *Cronin*, the Court should decline exercising personal jurisdiction over Dr. Frezza and the district court's ruling regarding general personal jurisdiction should be affirmed.

2. Plaintiff's cause of action does not arise from Dr. Frezza's contacts with New Mexico and thus, Dr. Frezza is not subject to specific personal jurisdiction in New Mexico.

If the defendant's contacts are insufficient to support general personal jurisdiction, New Mexico may still exercise personal jurisdiction if the Plaintiff's cause of action arises from the defendant's contacts with the forum. *Sproul*, 2013-

NMCA-072, ¶ 16 (*citing F.D.I.C. v. Hiatt*, 117 N.M. 461, 463, 872 P.2d 879, 881 (1994)). However, specific jurisdiction is limited to the adjudication of issues connected to the same controversy that establishes jurisdiction. *Sproul*, 2013-NMCA-072, ¶ 17 (*quoting Goodyear*, 131 S.Ct. at 2851). Restated, the plaintiff's cause of action must stem from or be related to the defendant's contacts with the forum. *Zavala*, 2007-NMCA-149, ¶ 28. New Mexico will not exercise personal jurisdiction over non-resident physicians "without any evidence that [they] reached into the forum state in order to attract the patient's business." *Id.* ¶ 29. (*citing Cronin*, 2000-NMCA-082, ¶ 26); *accord Cabbage v. Merchant*, 744 F.2d 665 (9th Cir. 1984) (holding that non-resident physicians were subject to personal jurisdiction based upon "continuing efforts to provide services in [forum]").

Of the contacts discussed above, Plaintiff has pointed to only one contact that relates to his cause of action: Dr. Frezza's treatment of Presbyterian insureds. Plaintiff's argument regarding specific personal jurisdiction focuses on the relationship between the plaintiff, his insurer, the forum, and the litigation. *See Rush* 444 U.S. at 332. "Such an approach is forbidden by *International Shoe* and its progeny." *Id.*

Plaintiff's characterization of the relationship between Dr. Frezza and Presbyterian is based upon three separate relationships: (1) Plaintiff's relationship with Presbyterian; (2) Presbyterian's relationship with TTPA; and (3) TTPA's

relationship with Dr. Frezza. Plaintiff cannot combine these relationships to establish personal jurisdiction over Dr. Frezza.

As discussed above, Dr. Frezza did not have a direct relationship with Presbyterian. Dr. Frezza was employed by Texas Tech, which established TTPA for purposes of managed care contracting. (SP 5-7). He was not employed by TTPA. (RP 118-119). TTPA, not Dr. Frezza, contracted with Presbyterian to provide medical care and services to Presbyterian's insureds. *Id.* Plaintiff had Presbyterian insurance and it was through his insurer that he was referred to Dr. Frezza. (RP 74-75). Dr. Frezza did not have any direct relationship with Presbyterian and had no involvement in TTPA's decision to contract with Presbyterian. (SP 5-7, 13-60). Additionally, Dr. Frezza did not conduct any advertising activities in New Mexico. Plaintiff has not identified any evidence that Dr. Frezza solicited New Mexico residents as patients and has not alleged that he relied on any such solicitations in deciding to travel to Texas to obtain treatment from Dr. Frezza. (RP 118-119).

Plaintiff voluntarily traveled to Texas Tech University Health Sciences Center in Lubbock, Texas, to undergo bariatric surgery with Dr. Frezza. (RP 71-84). Dr. Frezza performed a Roux-En-Y gastric bypass for Plaintiff and upon discharge, Plaintiff returned home to New Mexico. *Id.* Plaintiff's lawsuit for medical negligence arises from this surgery with Dr. Frezza in Texas. When a

person travels to a foreign jurisdiction seeking out services of a personal nature, he or she “must realize that the services are not directed to impact on any particular place, but are directed to the needy person himself.” *Cronin*, 2000-NMCA-082, ¶ 25 (citing *Gelineau v. New York Univ. Hosp.*, 375 F.Supp. 661, 667 (D.N.J. 1974)).

In *Cronin*, the Court of Appeals held that New Mexico could not exercise personal jurisdiction over non-resident physicians because they lacked sufficient minimum contacts with New Mexico. The Court noted that the non-hospital defendants, “acted in New Mexico only after Patient had unilaterally initiated a doctor-patient relationship in Texas.” *Id.* ¶ 25. The Court went on to discuss the nature of personal services rendered by physicians and cited approvingly *Gelineau*.

The Court quoted from *Gelineau*:

When one seeks out services which are personal in nature, such as those rendered by attorneys, physicians, dentists, hospitals, or accountants, and travels to the locality where he knows the services will actually be rendered, he must realize that the services are not directed to impact on any particular place, but are directed to the needy person himself. While it is true that the nature of such services is that if they are negligently done, their consequences will thereafter be felt wherever the client or patient may go, it would be fundamentally unfair to permit a suit in whatever distant jurisdiction the patient may carry the consequences of his treatment, or the client the consequences of the advice received.

Unlike a case involving interstate or international economic activity, which is directed at the forum state’s markets, 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.

Cronin, 2000-NMCA-082, ¶ 25 (*citing Gelineau* at 667).

Plaintiff's relationship with Presbyterian and his status as a New Mexico resident are insufficient to establish specific personal jurisdiction over Dr. Frezza. *See Cronin*, 2000-NMCA-082, ¶ 25 ("...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..." (*quoting Gelineau* at 667)). The district court correctly concluded that New Mexico cannot exercise specific personal jurisdiction over Dr. Frezza and its ruling should be affirmed.

Plaintiff's contention that Dr. Frezza is subject to specific personal jurisdiction in New Mexico because he traveled to New Mexico and allegedly consulted him lacks merit. (BIC 15). As discussed above, Dr. Frezza's affidavit directly rebutted this allegation and Plaintiff did not come forward with any evidence to refute Dr. Frezza's affidavit. *See Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996-NMCA-057, 121 N.M. 738, 742, 918 P.2d 17, 21 (holding that when party contesting jurisdiction submits affidavits or other competent evidence, complainant cannot rest on pleadings to establish jurisdiction). Regardless, having lunch with a former patient in New Mexico does not constitute purposeful availment of the benefits and protections of New Mexico's laws and is insufficient

to warrant exercising personal jurisdiction over Dr. Frezza. *Zavala*, 2007-NMCA-149, ¶ 11.

Plaintiff also asserts that the Court should exercise specific personal jurisdiction over Dr. Frezza through application of the “place of the wrong rule.” (BIC 18-19). Plaintiff did not plead “the commission of a tortious act” as a basis for personal jurisdiction in his Complaint. (RP 71-84). Plaintiff’s sole allegation of personal jurisdiction over Dr. Frezza relates to Dr. Frezza’s alleged transaction of business in New Mexico. *Id.* Plaintiff cannot sustain his burden of establishing jurisdiction on basis of a jurisdictional hook that was not plead. *See Beh*, 657 F.Supp. at 177. Furthermore, Plaintiff did not fairly invoke a ruling from the district court on this issue. *See* Rule 12-216 NMRA 2013.

Although the “place of the wrong rule” may be utilized to determine whether a tort has occurred in New Mexico, it does not dictate whether personal jurisdiction is appropriate. *See Santa Fe Techs.*, 2002-NMCA-030, ¶ 15. The Court must still determine whether the minimum contacts requirement has been satisfied. *Id.* ¶¶16-18. Insofar as Plaintiff’s argument is considered by the Court, Plaintiff has still failed to satisfy his burden with regard to specific personal jurisdiction because Plaintiff cannot demonstrate the requisite minimum contacts necessary to fulfill Due Process.

Plaintiff has asserted claims against Dr. Frezza for medical negligence, lack of informed consent, and violation of the New Mexico Unfair Practices Act. (RP 71-84). Plaintiff alleges that Dr. Frezza negligently performed surgery on his 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. *Id.* All of Plaintiff's claims against Dr. Frezza are predicated on medical care he sought in Texas. *Id.* Additionally, Plaintiff underwent revision surgery in Texas. *Id.*

There is no question that any alleged tort committed by Dr. Frezza was committed in Texas or that Plaintiff claims his injuries were discovered and treated in Texas. The fact that Plaintiff resides in New Mexico, and returned here following his medical treatment, is insufficient to establish that Dr. Frezza committed a tort in New Mexico. *See, e.g., Cronin*, 2000-NMCA-082, ¶ 25 (“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.” (quoting *Gelineau* at 667)); *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.” Regardless, as discussed above, the “place of the wrong” does not govern whether jurisdiction exists. In this case, Dr. Frezza’s contacts with New Mexico are insufficient to warrant the exercise of personal jurisdiction.

3. Subjecting Dr. Frezza to personal jurisdiction in New Mexico would offend traditional notions of fair play and substantial justice.

“Both general and specific jurisdiction require a showing that exercise of jurisdiction would not ‘offend traditional notions of fair play and substantial justice.’” *Zavala*, 2007-NMCA-149, ¶ 12. Traditional notions of fair play and substantial justice are evaluated on the basis of five factors: the burden on the defendant, New Mexico’s interest, the plaintiff’s interest, the interest in an efficient judicial system, and the interest in promoting public policy. *Id.* The weaker the plaintiff’s showing on purposeful availment, the less a defendant need show in terms of unreasonableness to defeat jurisdiction. *Zavala*, 2007-NMCA-149, ¶ 30 (internal citation omitted).

New Mexico has an interest in providing its residents a forum in which to resolve conflicts. *Zavala*, 2007-NMCA-149, ¶ 31. However, New Mexico’s interest in providing a forum is not limitless and must be balanced against competing factors. *Id.* In this case, New Mexico’s interest is significantly

outweighed by the burden on Dr. Frezza, interests in efficiency, and other public interests.

Requiring Dr. Frezza to defend against this lawsuit in New Mexico would place a significant burden on Dr. Frezza. As discussed in Dr. Frezza's Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted (RP 120-130), Dr. Frezza is a governmental actor entitled to the immunities and protections of the Texas Tort Claims Act. Under the Texas Tort Claims Act, Dr. Frezza cannot be sued in his individual capacity. Tex. Civ. Prac. & Rem. Code 101.106(f); *Franka v. Velasquez*, 332 S.W.3d 367, 388 (Tex. 2011). Dr. Frezza has a considerable interest in seeing that claims against him in his capacity as a governmental employee are litigated in the state that bestows upon him the cloak of governmental immunity.

Although New Mexico may be a more convenient forum for Plaintiff, the convenience afforded to Plaintiff is outweighed by the burden placed on Dr. Frezza in defending this case in New Mexico. As the district court noted, "many of the important fact witnesses in this case reside in Texas" and "Dr. Frezza will be unable to compel fact witnesses in Texas, including the healthcare providers who subsequently treated Plaintiff and allegedly diagnosed his complications, to testify at trial in New Mexico." (RP 334-336). Plaintiff asserts the district court failed to acknowledge that Plaintiff's subsequent surgeon has agreed to serve as an expert

for Plaintiff (BIC 28). However, Plaintiff did not make any such proffer to the district court and there is no evidence in the record to support this claim. Arguments not presented to or ruled upon by the district court cannot be asserted for the first time on appeal. Rule 12-216 NMRA 2013.

Even though one lawsuit is generally more efficient than two, Plaintiff's contract and referral claims against Presbyterian are factually distinct from his claims against Dr. Frezza. (RP 71-84). Plaintiff will not be unfairly burdened by prosecuting his breach of contract and negligent referral claims in New Mexico, while simultaneously prosecuting his medical negligence claims in Texas. Even if Plaintiff were to pursue all of his claims in one action, Plaintiff's negligent referral claims are derivative of his medical negligence claims and may be bifurcated at trial due to unfair prejudice to Dr. Frezza. *See* Rule 1-042 NMRA 2013. Additionally, Plaintiff's lawsuit raises significant issues related to Texas law and application of the Texas Tort Claims Act. Presumably, Texas district courts are better situated to deal with the issues inherent in applying Texas's Tort Claims Act.

Lastly, considerations of public policy demonstrate the impropriety of exercising personal jurisdiction in this case. Dr. Frezza never treated Plaintiff in New Mexico or had any contact with his in New Mexico. (RP 118-119). Subjecting out of state physicians to jurisdiction in New Mexico could discourage them from treating New Mexico patients. In light of the shortage of health care

providers in New Mexico, this result would be concerning. Barry Massey, *Report: State's shortage of medical care will grow*, Santa Fe New Mexican, May 15, 2013, http://www.santafenewmexican.com/news/local_news/article_650014af-95bf-55a3-849d-b98aa70c72ed.html.

Moreover, because of Dr. Frezza's status under the Texas Tort Claims Act, Texas has significant public policy interests in litigating this case. "[A] court should normally refrain from exercising jurisdiction when another state has expressed a substantially stronger sovereignty interest and that state's courts will take jurisdiction." *Zavala*, 2007-NMCA-149, ¶ 34 (citing *Cabbage*, 744 F.2d at 671). Dr. Frezza not only resides in Texas, but at all times material to Plaintiff's lawsuit, was a governmental employee of the State of Texas. "It is therefore clear that Texas has a substantially stronger sovereignty interest." *Id.*

Dr. Frezza's contacts with New Mexico are not of such a nature that New Mexico courts may exercise personal jurisdiction over him without offending traditional notions of fair play and substantial justice. In this case, New Mexico's interest in providing a forum to Plaintiff is significantly outweighed by the burden on Dr. Frezza, interests in efficiency, and other public interests. Accordingly, New Mexico cannot exercise personal jurisdiction over Dr. Frezza and the district court's decision should be affirmed.

B. THE DISTRICT COURT CORRECTLY CONCLUDED THAT DR. FREZZA IS NOT A PARTY TO THE AGREEMENT BETWEEN PRESBYTERIAN AND TTPA AND THAT THE AGREEMENT CANNOT BE CONSIDERED AS A BASIS TO ASSERT JURISDICTION OVER HIM.

Plaintiff contends that the district court erred when it held that Dr. Frezza was not a party to the Agreement between Presbyterian and TTPA. (BIC 30-33). Plaintiff further argues that the district court should have considered the agreement between TTPA and Presbyterian as a basis to assert jurisdiction over Dr. Frezza. *Id.* Plaintiff does not cite any authority in support of the proposition that a foreign defendant may be subjected to personal jurisdiction as a third party beneficiary of a contract between other parties. Nor does Plaintiff cite any authority to support his position that a person bound by an agreement is therefore a party to that agreement. (BIC 30-31). Plaintiff's arguments lack support and should be rejected.

Plaintiff cites *Chandler-McPhail v. Duffey*, 194 P.3d 434 (Colo. App. 2008), for the proposition that a contract is binding upon any third party beneficiaries to the contract. (BIC 30-31). The reasoning of *Chandler-McPhail* is not applicable to this case and does not support Plaintiff's arguments. First, personal jurisdiction was not an issue before the court. Second, the Colorado Court of Appeals concluded that a participating provider-physician was bound by the terms of an agreement between the plaintiff's employer and an insurer. *Id.* at 439-440. In reaching its decision, the Court stated that the participating provider-physician was

undisputedly a nonparty to the agreement. Id. at 437. This language directly refutes Plaintiff's contention that a person bound by a contract's terms as a third party beneficiary is therefore a party to the contract. For these reasons, *Chandler-McPhail* is unpersuasive and inapplicable here.

Personal jurisdiction cannot be based upon the "unilateral activity of another party or third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Jurisdiction is only proper where the defendant's contacts with the forum state "proximately result from actions by the defendant himself that created a 'substantial connection' with the forum state." *Id.* In this case, the contract between TTPA and Presbyterian cannot be considered as Dr. Frezza's "contact" with New Mexico.

Dr. Frezza is not a party to the agreement and he did not execute the Agreement on behalf of TTPA. (SP 5-7, 13-60). Additionally, Dr. Frezza did not decide what insurance TTPA would accept, nor did he have authority to decide which insurance he would or would not accept. (SP 5-7). Indeed, there is no evidence before the Court that Dr. Frezza played any role in TTPA's decision to contract with Presbyterian. Consequently, the contract between TTPA and Presbyterian is not a "contact" with New Mexico that can be attributed to Dr. Frezza for purposes of establishing personal jurisdiction.

Plaintiff quotes at length from the Specialty Services Agreement to support his argument that Dr. Frezza should have reasonably anticipated being haled into New Mexico courts based upon “jurisdiction of New Mexico Courts on other occasions.” (BIC 31-32). A choice-of-law provision does not automatically confer personal jurisdiction over a foreign defendant. *Monks Own Ltd. v. Monastery of Christ in Desert*, 2006-NMCA-116, ¶10, 140 N.M. 367, 142 P.3d 955. Moreover, Plaintiff’s argument is misleading and erroneous. None of the provisions cited by Plaintiff relate to jurisdiction over TTPA by New Mexico courts. (SP 13-60; §§ 7.2, 9.4, 9.7, 9.12, 10.5). The contract does not contain a choice-of-venue provision or a choice-of-law provision. (SP 13-60). More importantly, the contract contains no waiver of sovereign immunity by TTPA for medical malpractice claims brought against it or Texas Tech employees. *Id.* It is unfathomable that TTPA or Texas Tech employees would stipulate to personal jurisdiction in New Mexico for medical malpractice claims that could not be brought in Texas. Tex. Civ. Prac. & Rem. Code 101.106(f); *Franka v. Velasquez*, 332 S.W.3d 367, 388 (Tex. 2011).

C. PLAINTIFF’S REQUEST FOR JURISDICTIONAL DISCOVERY WAS UNTIMELY AND THE DISTRICT COURT’S DENIAL OF PLAINTIFF’S REQUEST SHOULD BE AFFIRMED.

Dr. Frezza filed his Motion to Dismiss for Lack of Personal Jurisdiction on January 13, 2012. (RP 103). Plaintiff failed to seek jurisdictional discovery

during the eight months the motion was pending. Instead, Plaintiff waited until the district court had granted Dr. Frezza's motion and then requested jurisdictional discovery. (CD, 10-1-12, 10:22:30). When Plaintiff finally made his oral request to the district court, he did not provide any specific information regarding his need for discovery, nor did he explain how further discovery would aid the court in its resolution of Dr. Frezza's motion. *Id.*

“Plaintiffs cannot appear at a hearing, present their evidence, and then argue that they should have been permitted additional discovery simply because the district court ruled against them.” *Zavala*, 2007-NMCA-149, ¶ 9; *see also Ciup v. Chevron U.S.A.*, 1996-NMSC-062, ¶ 22, 122 N.M. 537, 928 P.2d 263 (holding that plaintiff waived right to appeal on discovery issues by not indicating to trial court that resolution of pending motion should be deferred until resolution of discovery issues).

Plaintiff claims that this case presents “extenuating and unusual circumstances that necessitate a deviation,” but does not specify what those circumstances are. (BIC 33). Although Plaintiff implies that he did not believe he required discovery to defeat Dr. Frezza's motion, his apparent belief does not constitute an extenuating or unusual circumstance under New Mexico law. Plaintiff made a calculated decision not to request jurisdictional discovery prior to the hearing on Dr. Frezza's motion to dismiss, or even prior to the court's ruling.

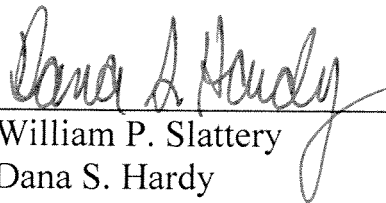
Plaintiff's request for jurisdictional discovery after the court's ruling on Dr. Frezza's motion was untimely and was properly denied. The trial court acted within its discretion in denying Plaintiff's request and the trial court's decision should be affirmed.

IV. CONCLUSION

For the foregoing reasons, Dr. Frezza respectfully requests that the Court affirm the district court's decision and hold that New Mexico cannot exercise personal jurisdiction over Dr. Frezza.

Respectfully submitted,

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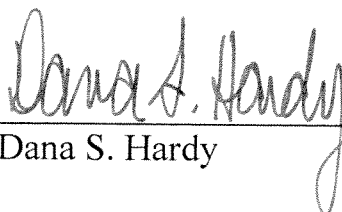
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Eldo Frezza, M.D.'s Answer Brief to be served, by first class mail, on the following counsel of record, on this **18th** day of July 2013:

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