IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NELLIE GONZALES, Plaintiff/Appellant, vs. ELDO FREZZA, M.D., Defendant/Appellee, and PRESBYTERIAN HEALTH PLAN, INC., a New Mexico Domestic For-profit Corporation, Defendants.	)	COA No. 32,606 Santa Fe County CV-2010-03827

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

PLAINTIFF-APPELLANT'S BRIEF IN CHIEF
(Redacted)

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INTRODUCTION

Nelly Gonzales, Plaintiff/Appellant, was employed and insured through the State of New Mexico which contracted with Presbyterian Health Plan (Presbyterian), to administer the health insurance provided to Plaintiff/Appellant and other state employees. Plaintiff/Appellant was told by her medical providers that she needed to have bariatric surgery and further that Dr. Eldo Frezza, Defendant/Appellee, was the only in-network provider available to her. Defendant/Appellee negligently performed the bariatric surgery on Plaintiff/Appellant and concealed his negligence for years by assuring Plaintiff/Appellant that the symptoms and complications she was feeling was normal and manageable. It was not until Plaintiff/Appellant was seen in Santa Fe, New Mexico that she discovered the extent of Defendant/Appellee's negligence.

SUMMARY OF PROCEEDINGS

On November 5, 2010, Plaintiff/Appellant filed a Complaint seeking recovery against Eldo Frezza, M.D. and Presbyterian Health Plan, Inc. for personal injuries arising from medical malpractice. (RP 000001 - 000009). A First Amended Complaint for Personal Injuries Arising from Medical Malpractice was filed on July 5, 2011. (RP 000026 - 000062). Plaintiff/Appellant again amended the complaint on November 4, 2011. (RP 000071 - 000084). Instead of filing an Answer, Defendant/Appellee filed a Motion to Dismiss for Lack of Personal

Jurisdiction on January 13, 2012 (RP 000103 - 000112) as well as a Motion to Dismiss for Failure to State A Claim Upon Which Relief Can be Granted (RP 000113 - 000128). Plaintiff/Appellant filed a Response to both Motions. (RP 000129 - 000142 and 000143 – 000180). Replies were filed March 8, 2012 by Defendant/Appellee. (RP 000186 - 000217).

After briefing on the Motion to Dismiss for Lack of Personal Jurisdiction had been completed, Defendant/Appellee filed Supplemental Exhibits in Support of Dr. Frezza's Motion to Dismiss For Lack of Personal Jurisdiction (RP 00303 – 305) and concurrently filed a Motion to File Documents Under Seal (PR 000306 - 000308) for those same supplements. The District Court held a hearing on Defendant/Appellee's motions to dismiss on October 1, 2012 and entered its Order granting Defendant Frezza's Motion to Dismiss for Lack of Personal Jurisdiction on November 2, 2012. (RP 000329 - 000331). Appellant filed a Motion to Reconsider Order Granting Defendant Dr. Frezza's Motion to Dismiss for Lack of Personal Jurisdiction with the District Court on November 13, 2012. (RP 000332 - 000335). The court heard oral arguments regarding the Motion to File Documents Under Seal on December 10, 2012. (RP unnumbered) and issued an Order on that motion on February 27, 2013 (RP SP-000008 - 000011).

Pursuant to Rule 12-201(A) NMRA 2012, Appellant timely filed his Notice of Appeal on December 3, 2012. (RP 000344 - 000348) No decision has been made by the district court on the Motion for Reconsideration.

STATEMENT OF FACTS

The Complaint filed on November 5, 2010 arose from a bariatric surgery that was negligently performed by Defendant/Appellee Eldo Frezza. (RP 000001 – 000009, RP 000026 – 000062, and RP 000071 - 000084) At the time of the surgery, Plaintiff/Appellant was employed by the State of New Mexico and received her health insurance through her employment. The State of New Mexico contracted with Presbyterian Health Plan to administer the health insurance provided to Plaintiff/Appellant and other state employees. (RP 000038 – 000062). Defendant/Appellee is a surgeon licensed to practice medicine in New Mexico (RP 000111 - 000112 and RP 000163) and a provider with certain New Mexico insurers, including Lovelace and Defendant Presbyterian (RP 000111). At the time of the surgery, Defendant/Appellee was employed by, associated with, or otherwise represented by Texas Tech Physicians Associates (TTPA) in Lubbock, Texas. Defendant Presbyterian did not have any in-network bariatric surgeons in New Mexico at that time and required Plaintiff/Appellant to see Defendant/ Appellee in Texas for his medically necessary surgery. (TR 9:59:27 – 10:00:00)

The Complaint alleges that the arrangement between Defendant/Appellee and Defendant Presbyterian enabled Defendant/Appellee to secure a stream of New Mexico patients in his Texas operating room, and to have their surgeries ultimately paid for by the State of New Mexico. (RP 000001 – 000009, RP 000026 – 000062, and RP 000071 - 000084) Defendant Presbyterian specifically required Plaintiff/Appellant to see Defendant/Appellee in Texas for her medically necessary bariatric surgery. (RP 000001 – 000009, RP 000026 – 000062, and RP 000071 - 000084) The Complaint further alleges that although Defendant/Appellee acted negligently in performing bariatric surgeries and injured numerous other New Mexico patients through this scheme and successfully concealed the effects of his negligence from Plaintiff/Appellant and the other victims for years by assuring them that their symptoms or complications were normal and manageable, on some occasions traveling to New Mexico to consult with other patients. (RP 000001 – 000009, RP 000026 – 000062, and RP 000071 - 000084) Thus having relied on a New Mexico agreement with a New Mexico insurer to secure New Mexico patients and payment directly from the State of New Mexico. Defendant/Appellee had intentional commercial contacts with and committed tortious acts in New Mexico and is subject to jurisdiction in here. (RP 000001 – 000009, RP 000026 – 000062, and RP 000071 - 000084)

On January 13, 2012, Defendant/Appellee filed a Motion to Dismiss for Lack of Personal Jurisdiction arguing that he never had any contact with the State of New Mexico and therefore cannot be sued in New Mexico because there is no basis for specific personal jurisdiction or general personal jurisdiction over him. (RP 00103 - 000112) At the October 1, 2012 hearing on the Motion to Dismiss[1], Defendant/Appellee relied on a confidential agreement between his physician's group TTPA and Defendant Presbyterian, which was filed under seal. (RP 000306 – 000308; TR 9:25:40 – TR 9:26:24; TR 9:31:12 – TR 9:31:57) He argued that he was not a party to the agreement, could not control whether his patients came from New Mexico, and therefore did not have contacts sufficient to support personal jurisdiction in New Mexico. (TR TR 9:25:40 – TR 9:26:24; TR 9:31:12 – TR 9:31:57). Defendant/Appellee also filed a Motion to Dismiss for Failure to State a Claim but the Court declined to hear that Motion because it granted the Motion to Dismiss based on lack of personal jurisdiction. (RP 000113 – 000128)

Plaintiff/Appellant responded to the Motion to Dismiss for Lack of Personal Jurisdiction by outlining the many contacts they knew Defendant/Appellee had with the State of New Mexico. Plaintiff/Appellant argued that the confidential agreement was an agreement between Defendant/Appellee and Defendant Presbyterian because under the terms of the Agreement, Defendant/Appellee

[1] The October 1, 2012 hearing on Defendant's Motion to Dismiss was combined with a similar Motion to Dismiss filed by Defendant Frezza in a related case also on appeal. COA No. 32,605. See RP 000218 in this matter and RP 000227 in COA No. 32,605.

himself was bound by the terms of the agreement with Presbyterian. (RP SP 000005 – SP 000007, specifically, SP 000006, ¶ 5, last sentence; SP 000012 – SP 000059, specifically pg. 6 of 48, ¶ 2.2) Plaintiff/Appellant also relied upon Defendant/Appellee's New Mexico medical license (RP 000111 - 000112 and RP 000163); his consultation of with other New Mexico patients in New Mexico, his website which was targeted to potential New Mexico patients as it listed Defendant Frezza had an active NM license (RP 000163 – 000166), a book he published that is widely available in New Mexico (excerpts at RP 000157 – 000162); and property ownership records (RP 000167 – 000180). Plaintiff/Appellant alleges that these facts demonstrate a marketing plan designed to attract New Mexico patients making it amply clear that Defendant/Appellee had sufficient contacts with New Mexico to satisfy due process concerns and establish personal jurisdiction in New Mexico. (RP 000143 – 000180; TR 9:38:03 – TR 9:39:15; TR 9:43:18 – 9:57:00)

The district court granted the Motion to Dismiss finding there was no basis for personal jurisdiction over Defendant/Appellee. (RP 000329 – 000331; TR 10:17:55 – 10:19:12) In addition, the district court found that exercising personal jurisdiction over Appellee in New Mexico would violate traditional notions of fair play and substantial justice because many of the important witnesses reside in Texas. (RP 000329 – 000331; TR 10:21:00 – TR 10:22:18) The district court ruling was based in large part upon a determination that Defendant/Appellee was

not a party to the agreement between Texas Tech Physician's Associates and Defendant Presbyterian. (RP 000329 – 000331, ¶2).

Aside from this matter, there are two other related appeals, and four cases total currently pending in New Mexico Courts relating to surgeries performed by Defendant/Appellee on New Mexico residents. On appeal regarding the exact same issues is Fernando Gallegos v. Eldo Frezza, M.D. and Prebyterian, COA No. 32,605. On appeal regarding other jurisdictional issues is Kimberly Montano v. Eldo Frezza, M.D. and Lovelace, COA No. 32,403. Pending before the Second Judicial District court under a stay pending the outcome of the appeal in Montano v. Frezza is Susan Method v. Eldo Frezza, M.D. and Presbyterian, D-202-CV-2012-02915. Undersigned counsel represents the plaintiffs in all these matters.

STANDARD OF REVIEW

The standard of review for a dismissal based on lack of personal jurisdiction is well settled: it is a question of law, which is reviewed de novo by the Court of Appeals. Cronin v. Sierra Medical Center, 2000-NMCA-082, ¶ 10, 129 N.M. 521, 524, 10 P.3d 845, 848. (citations omitted). Because the Defendant/Appellee's jurisdictional challenge is brought under Rule 1-012(B), Plaintiff/Appellee is required to make only a prima facie showing that personal jurisdiction exists. Cronin, 2000-NMCA at ¶10, 129 N.M. at 524, 10 P. 3d at 848. As the district court did not conduct an evidentiary hearing regarding jurisdiction, the standard of

review mirrors that of a summary judgment hearing and the pleadings, affidavits and submissions are viewed in a light most favorable supporting the existence of jurisdiction. Doe v. Roman Catholic Diocese of Boise, Inc., 1996-NMCA-057, 121 N.M. 738, 742, 918 P. 2d 17, 21 (Ct. App. 1996) (paragraphs not numbered).

The Court of Appeals' most recent decision concerning long-arm jurisdiction states that the question of personal jurisdiction hinges on federal law. Sproul v. Rob & Charlies, Inc., 2012 NMCA ---, ¶8, --- P.3d ---. This seems to be in direct conflict with another recent Court of Appeals' decision regarding summary judgment in which the Court expressly denied the application of a heightened pleading standard in New Mexico. Madrid v. Chama, 2012 NMCA 017, ¶ 16, 283 P.3d 871, 875. Plaintiff/Appellant submits that this Court should apply a standard that tests the legal sufficiency of the complaint, not the factual allegation of the pleadings as those are to be accepted as true for the purposes of the determination to be made herein. Id. at ¶18, 283 P.3d at 876.

ARGUMENT

Plaintiff/Appellant appealed five legal issues all of which are tied directly to jurisdiction. The first three issues discuss the standard for and applicability of personal jurisdiction to Defendant/Appellee. Issue No. 4 discusses the district court's finding that Defendant/Appellee was not a party to an agreement with Defendant Presbyterian. Finally Issue No. 5 discusses the district court's denial of

Plaintiff/Appellant's request for jurisdictional discovery. On all issues herein, Plaintiff/Appellant requests that the decision of the district court be overturned and the Court hold that the district court has personal jurisdiction over Defendant/Appellant. In the alternative, Plaintiff/Appellee requests that this Court remand the case for jurisdictional discovery.

I. New Mexico has personal jurisdiction over Defendant/Appellee and exercise by the Court of such jurisdiction is proper.

The State of New Mexico can assert both specific and general jurisdiction over Defendant/Appellee because he has more than minimum contacts with the State of New Mexico and plaintiff's cause of action arises from those contacts. The district court granted Defendant Frezza's Motion to Dismiss for Lack of Personal Jurisdiction, finding there was no basis for either specific personal jurisdiction because all medical care and treatment was provided in Texas or general jurisdiction by finding that Appellee did not maintain continuous and systematic contacts with New Mexico. (RP 000329 – 000331; TR 10:17:55 – 10:19:12) This ruling was based in large part on a finding that Defendant/Appellee was not a party to the agreement between Texas Tech Physician's Associates and Defendant Presbyterian as Defendant/Appellee did not sign the agreement. (RP 000329 - 000331, ¶ 2; TR 10:21:00 – TR 10:22:18). The Court further found that the exercise of jurisdiction over Defendant/Appellee would violate traditional notions of fair play and substantial justice. (RP 000329 – 000331, ¶3) Plaintiff/Appellant

contends that this ruling was in error as it failed to grant all inferences in favor of Plaintiff/Appellant as required under the standard for motion to dismiss and did not fairly and fully consider the impact of Defendants/Appellee's substantive contacts with the State of New Mexico. Plaintiff/Appellant preserved these issues in their response to motion to dismiss, in their oral argument on said motion, and in their motion for reconsideration.

Personal jurisdiction over Defendant/Appellee, a non-resident, is available pursuant to NMSA 1978, § 38-1-16 (1971), commonly referred to as the long-arm statute. The long-arm statute allows state courts to assert jurisdiction over nonresident defendants who engage in enumerated acts, including transaction of business or in the commission of a tort in New Mexico. Id. New Mexico courts have determined that a technical determination of acts which satisfy these categories is no longer necessary, requiring instead a determination that sufficient minimum contacts exist with New Mexico to satisfy due process. Zavala v. El Paso County Hospital District, 2007-NMCA-149, ¶ 10, 143 N.M. 36, 41, 172 P. 3d 173, 178. The focus in analyzing personal jurisdiction in New Mexico is on whether the defendant has the requisite minimum contacts with New Mexico to satisfy due process. Id. Due process in turn is determined in two distinct manners: specific jurisdiction and general jurisdiction. Zavala, 2007 NMCA at ¶12, 143 N.M. at ¶ 42, 172 P. 3d at ¶ 179. As discussed in greater detail below, specific

jurisdiction exists when defendant has purposely established contact in New Mexico and the cause or action arises from those contacts. Id. General jurisdiction exists when a defendant has such continuous and systematic contacts with New Mexico that he can reasonably foresee being brought to court in New Mexico for any matter. Id. Under both theories of jurisdiction, the court must also determine whether the exercise of jurisdiction over the nonresident defendant would offend traditional notions of fair play and substantial justice. Id.

Issue No. 1: Because the facts of the present suit arise directly out of Defendant/Appellee's specific contacts with New Mexico, he is subject to specific personal jurisdiction in New Mexico.

The district court ruled that because all medical care and treatment Plaintiff/Appellant received was provided in Texas by Defendant/Appellee, there was no basis for specific personal jurisdiction in New Mexico. (RP 000329, ¶ 1). The district court's ruling failed to take into account the allegations of specific contacts before Plaintiff/Appellee was able to discover Defendant/Appellee's continued negligent acts which include more than the surgery in Lubbock and failed to acknowledge that New Mexico is the place of the wrong.

Specific personal jurisdiction over a defendant exists when a defendant purposely establishes contact with New Mexico and plaintiff is harmed as a result of that contact. Zavala, 2007 NMCA at ¶ 12, 143 N.M. at 42, 172 P.3d at 179 (citations omitted). Although a finding of specific personal jurisdiction used to be

contingent on a technical determination of specific factors under the New Mexico long arm statute, Section 38-1-16, this requirement has been compressed, and now a strictly constitutional analysis is required. Santa Fe Technologies, Inc. v. Argus Neworks, Inc., 2002 NMCA 030, ¶ 13, 131 N.M. 772, 779, 42 P.3d 1221, 1228. Under this new standard, even one single transaction of business, the commission of a tort within this state, or one single physical in-state contact can be sufficient to subject a non-resident defendant to specific personal jurisdiction in this state, provided that the cause of action involved in the suit arises from the transaction of that particular contact. Visarraga v. Gates Rubber Co., 104 N.M. 143, 146, 717 P. 2d 596, 599 (1986); Santa Fe Technologies, 2002 NMCA at ¶ 29, 131 N.M. at 783, 42 P.3d at 1232. Conversely, lack of physical contact with the forum state will not defeat personal jurisdiction when the defendant's efforts are purposefully directed toward residents of New Mexico. Santa Fe Technologies, 2002 NMCA at ¶17 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174 (1985)). The key to a finding of specific personal jurisdiction is whether the defendant could reasonably anticipate that he would be brought into court in New Mexico. Santa Fe Technologies, 2002 NMCA at ¶ 16, 131 N.M. at 781, 42 P.S3d at 1231.

In Cronin, the court applied these factors to find jurisdiction was proper over a Texas hospital that provided medical services to a New Mexico patient. Cronin,

2000 NMCA at ¶ 15, 129 N.M. at ¶ 525, 10 P.3d at ¶ 849. The Court determined that the Texas hospital had sufficient contacts with New Mexico: they had previously served other New Mexico residents, and the hospital advertised in New Mexico on television and in yellow book advertisements. Cronin, 2000 NMCA at ¶ 14, 129 N.M. at ¶ 525, 10 P.3d at ¶ 849. As a result, the court reasoned that the hospital had intentionally initiated commercial contact with New Mexico for the purpose of pecuniary gain. Cronin, 2000 NMCA at ¶ 15, 129 N.M. at 525, 10 P.3d at 849. The Cronin court refused to exercise jurisdiction over the individual defendant doctors however, on the basis that they did not have sufficient minimum contacts with New Mexico. Id. at ¶ 23, 129 N.M at 527, 10 P.3d at 851. The court reasoned that the doctors themselves did not purposely initiate any contact with New Mexico and the follow-up care they provided did not constitute purposeful availment such that due process would be satisfied. Id. at ¶ 26, 129 N.M. 528, 10 P.3d at 852. The Cronin court relied in large part upon a New Jersey federal court decision that described the provision of medical services as not directed to any location, but to the person only and it would be unfair to have jurisdiction follow the person wherever he or she may go. Id. at ¶ 25, 129 N.M. at 528, 10 P.3d at 852, (citing Gelineau v. New York Univ. Hosp. 375 F. Supp. 661 (D.N.J. 1974)). Gelineau's language originated from Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972) which is the Ninth Circuit's leading case on subjecting nonresident medical

doctors to jurisdiction. Cubbage v. Merchant, 744 F.2d 665, 669 (1984). This same court declined to extend the language quoted in Cronin to circumstances similar to those found in this case. Cubbage, 744 F.2d at 669. Cubbage concerned a medical malpractice case in the Arizona/California border community of Parker, Arizona, and a hospital and physicians located on the Arizona side of the border, but patients residing in California. Id. at 667. The Cubbage court reasoned that the California court had jurisdiction over the hospital, as well as the defendant doctors who provided medical care to a California patient in Arizona because the doctors had applied for and received authority from the state of California to receive reimbursements for services provided to California residents, over 25% of the hospital's patients were California residents and the hospital advertised in the general area, which included circulation in California. Id. at 668. As such, the defendants had invoked the privileges of California law. Id. The court distinguishes the unilateral action described in Wright, Gelineau and Cronin holding that patients in those cases took unilateral action to seek the medical care whereas in Cubbage the hospital had continuing efforts to provide services to California residents in the area. Id. at 669.

Similar to Cubbage, in this case, Defendant/Appellee's actions leave no doubt that he should reasonably have expected to be brought to court in New Mexico. He entered into an agreement with Presbyterian which provided a steady

stream of New Mexico patients to him for pecuniary gain. [redacted]

[redacted]

Plaintiff/Appellant was required by her insurer to see Defendant/Appellee for surgery in Texas then returned to her home in New Mexico, where she developed substantial discomfort, pain and suffering. (RP 000076, ¶31). After additional procedures in Texas which Defendant/Appellee indicated were normal, Plaintiff/Appellant returned to her home in New Mexico where she continued to suffer numerous additional complications. (RP 000076, ¶32) Defendant/Appellee would continuously reassure Plaintiff/Appellant that her discomfort was normal. (RP 000076, ¶32). However, the pain became so unbearable it eventually resulted in her hospitalization in New Mexico and the discovery of a tangled network of sutures in her gastric pouch and down the jejunal limb which were left by Defendant/Appellee. (RP 000076, ¶33 and 35). In addition, after securing New Mexico patients pursuant to Presbyterian's agreement, Defendant/Appellee traveled to New Mexico and while here consulted at least one other victim of his scheme regarding their recovery from bariatric surgery. Either of these actions individually is adequate to establish specific personal jurisdiction here, but combined they leave no doubt that specific personal jurisdiction is proper.

In many ways, the agreement between Defendant/Appellee and Defendant Presbyterian is similar to the stream of commerce argument often used to support minimum contacts for large manufacturers. See generally Sproul v. Rob & Charlies, Inc., 2012 NMCA ---, ¶8, --- P.3d ---. The stream of commerce argument generally supports jurisdiction when a manufacture or producer places their goods into a stream of commerce with the intent that such goods will be purchased and used in the forum state. Id. at ¶17. In Sproul, the Court held that the Chinese manufacturer of a part on a bicycle sold in New Mexico was subject to jurisdiction in New Mexico because the manufacturer engaged in efforts to serve the market in New Mexico. Id. at ¶ 13. In the same way, Defendant/Appellee engaged in direct efforts to serve the patients of New Mexico. He entered into an agreement that provided a stream of New Mexico patients, his website promoted his New Mexico license and contained testimonials of New Mexico patients. He maintained long-term contacts with New Mexico patients, including Plaintiff/Appellee. Indeed, he placed himself in the perfect position to serve a stream of patients, much like a manufacturer seeks to serve a market, all for pecuniary gain. Defendant/ Appellee's own website indicates that as many as fifty percent (50%) of his patients came from New Mexico. (RP 0001163 – 000166) Having served the New Mexico market and received pecuniary gain, Defendant/Appellee should not be allowed to shirk the jurisdiction of our courts. There should be no doubt that

Defendant/Appellee knew he could be haled into court in New Mexico for care provided to Plaintiff/Appellant.

a. Employment by or association with Texas Tech Physician Associates does not shield Defendant/Appellee from jurisdiction in New Mexico.

Defendant/Appellee cannot rely upon his position with his physician's group TTPA to shield himself from jurisdiction and thereby evade responsibility for his tortious actions. Calder v. Jones, 465 U.S. 783, 790, 104 S.Ct. 1482, 1487 (1983). In Calder, employees sought to avoid jurisdiction of a California court over an article they wrote about a California resident because, although they were employed by a magazine with national circulation, they lived and worked in Florida. Calder, 465 U.S. 783, 104 S.Ct. 1482. The Supreme Court held that jurisdiction over the employees was proper, finding that their status as employees did not insulate them from jurisdiction as they were the primary participants in the alleged tortious action, which was expressly directed at a California resident. In the same way, Defendant/Appellee asserts that his only connection to Defendant Presbyterian and therefore New Mexico was through his apparent physician's group practice, TTPA. TTPA is subject to the jurisdiction of the State of New Mexico because it signed the agreement with Defendant Presbyterian. Although Defendant/Appellee was employed, associated with or otherwise represented by TTPA at the time he injured Plaintiff/Appellee, it was his negligence that actually caused Plaintiff/Appellant's injuries, and Defendant/ Appellee who was the

primary participant in the wrongdoing at issue. His association with TTPA changes nothing because an employee of a corporation that is subject to personal jurisdiction will himself not be shielded from jurisdiction when he is the primary participant in the wrongdoing intentionally directed at New Mexico. Calder, 465 U.S. at 790, 104 S. Ct. at 1487; Santa Fe Technologies, 2002-NMCA-030, ¶49. Finally, as discussed above and in greater detail below in Issue No. 4, Defendant/Appellee himself was a direct party to the agreement for personal jurisdiction purposes, as he was expressly bound by all the terms of the contract. As such, his status does not change his direct contact with New Mexico or this court's ability to assert specific personal jurisdiction over him.

b. The place of the wrong rule also supports the exercise of specific personal jurisdiction over Defendant/Appellee.

Where minimum contacts exist as they do here, the "place of the wrong" rule recognizes medical negligence occurring in other states as a tortious act occurring within New Mexico. See e.g. Cronin v. Sierra Medical Center, 129 N.M. 521, 10 P. 3d 845, ¶¶17-18 (2000) (injury occurred in New Mexico where health problems developed here following negligent treatment in Texas); Santa Fe Technologies, 2002 NMCA at ¶ 15 ("a tortious act can occur in New Mexico when the harmful act originates outside the state, but the injury occurs inside New Mexico); Beh v. Ostergard, 657 F. Supp. 173, 175-76 (D.N.M. 1987) (where complications developed in New Mexico following medical negligence in

California, tortious action had occurred in New Mexico for purposes of long-arm statute). Not only did Plaintiff/Appellant experience continuing pain and discomfort upon her return to New Mexico, but for years following the initial surgery, Defendant/Appellee continued to communicate with Plaintiff/Appellant regarding her medical condition, assuring her that the symptoms and additional required procedures were all normal thereby hiding his own negligence and preventing Plaintiff/Appellant from discovering it. Plaintiff/Appellant has had substantial economic loss in New Mexico as a result of the injuries sustained. See Santa Fe Technologies, 2002 NMCA at ¶ 15 (the economic loss is the injury which completes the tort in New Mexico). All this occurring in New Mexico, the place of the wrong is New Mexico and this court should assert jurisdiction over Defendant/Appellee.

Issue No. 2: Defendant/Appellee's systematic and continuous contacts with the State of New Mexico render him subject to general personal jurisdiction.

The District found that Defendant/Appellee did not maintain continuous and systemic contacts with New Mexico sufficient to render him subject to general personal jurisdiction in New Mexico. (RP 000329, ¶2). In addition to all the contacts that support specific personal jurisdiction, there are additional contacts that support general personal jurisdiction. Defendant/Appellee holds a medical license from the state of New Mexico. (RP 000111, ¶2). He had a website that was

designed to attract patients from New Mexico by listing Defendant/Appellee as a doctor licensed in New Mexico and contained New Mexico patient testimonials. (RP 000163 - 000166) Of the ten patient testimonials on his website, five, or fifty percent (50%), were from New Mexico patients. (RP 000163 – 000166) Defendant/Appellee also published a book, called "The Business of Surgery" which is available in New Mexico (excerpts at RP 000157 – 000162) and he owns property in the State of New Mexico. (RP 000167 – 000180)

New Mexico courts have previously held these types of contacts sufficient to establish general personal jurisdiction. In Cronin v. Sierra Medical Center, the court found that it had jurisdiction over an entire Texas hospital because the hospital had intentionally initiated commercial activities in New Mexico for the purpose of realizing pecuniary gain by advertising in New Mexico. 2000-NMCA-082, at ¶22. The Zavala court, at 2007-NMCA-149, ¶22, cited Presbyterian University Hosp. v. Wilson, 337 Md. 541, 550, 654 A. 2d 1324, 1329 (1995), in which Maryland found jurisdiction over a Pennsylvania hospital. One of the defining factors in Wilson was that the Pennsylvania hospital had successfully sought to have the State of Maryland designate it as an approved liver-transplant center for Maryland patients; thus, a Maryland patient seeking the benefit of a liver transplant was obliged to go to Pennsylvania. Id., 337 Md. At 555, 654 A. 2d at 1331.

Defendant/Appellee's arrangement with Presbyterian went far beyond simple advertising, securing for him a virtual guarantee of New Mexico patient referrals. If simple advertising justified a finding of personal jurisdiction in Cronin, Defendant/Appellee's arrangement, which *required* New Mexico residents seeking necessary treatment to see him if they wanted their insurance to cover their medical costs, certainly justifies the exercise of personal jurisdiction here. See Id. at ¶16 (law favors a finding of personal jurisdiction when patient would not have sought out-of-state medical care but for solicitation of New Mexico patients) (citing Kathrein v. Parkview Meadows, Inc., 102 N.M. 75, 77, 691 P. 2d 462, 464 (1984)).

The present case is more closely analogous to Wilson and Cubbage: in all three cases, a background deal with the defendant obliged the eventual plaintiff to leave his own home state for medically necessary treatment. In Wilson, the deal justified exercise of personal jurisdiction over the Pennsylvania defendant in Maryland; here, it justifies personal jurisdiction over Defendant/Appellee. Id. at 337 Md. at 561, 654 A.2d at 1335. Defendant/Appellee attempts to counter this clear precedent by asserting that he did not advertise in New Mexico or "solicit" patients here. (RP 000118, ¶6). The pleaded facts demonstrate otherwise because the agreement itself is a form of direct solicitation. See Wilson, 337 Md. At 557, 654 A.2d at 1132-1333.

Defendant/Appellee's website also demonstrates his continuous contacts and focused targeting of New Mexico patients. In Silver v. Brown, 383 Fed. Appx. 723, 730, (10th Cir. 2010), the Tenth circuit considered this "targeting" question and found the website adequate contact to support a finding of specific personal jurisdiction. Id. Although the lower court had considered significant that the site was available to any internet user and that only a small percentage of all internet users were in New Mexico, the Tenth Circuit overturned that decision, noting that the analysis disregarded "the ubiquitous nature of search engines." Id. Through such search engines, the court reasoned, the individuals for whom the website's content was most significant were the same individuals who were most likely to find it, and therefore found the website adequate contact to support a finding of specific personal jurisdiction. Id.

Defendant/Appellee attempts to discredit the website as a contact by relying on Zavala v. El Paso County Hospital District, which noted that establishment of a passive website was not sufficient to support general personal jurisdiction absent some showing that the website targeted New Mexico. 2007-NMCA-149, ¶20, 143 N.M. 36, 172 P. 3d (2007). Plaintiff/Appellant is also aware that in Sublett v. Wallin, this Court held that in order to determine personal jurisdiction based on a website, that website needs to be interactive. 2004 NMCA 089, ¶ 33, 136 N.M. 102, 110, 94 P.3d 845, 853. However, the circumstances in this case are

distinguishable. In Sublett, the plaintiff found a local franchise of a national chain through a feature on the national chain's website that allowed you to locate a local franchise. Sublett, 2004 NMCA at ¶ 30, 136 N.M. at 110, 94 P.3d at 853. Further, this was the only potential contact that the national chain had with the State of New Mexico and there was no indication that the national chain had any pecuniary gain from plaintiff's use of their website to find a local franchise dealer. Sublett, 2004 NMCA at ¶32, 136 N.M. at 110, 94 P.3d at 853. In this case, the website is not the website of a national chain, but the direct website for Defendant/Appellee. The website is targeted to a New Mexico audience as it contains reference to Defendant/Appellee's New Mexico license (RP 000163) and includes 10 testimonials of patients, 5 of which are New Mexico residents. (RP 000163 – 000166). In addition, the website encourages viewers to submit their own testimony (RP 000166) or to view additional testimonials "posted by Dr. Frezza's patients on ObesityHelp.com". (RP 000166). This is strikingly different than the website in Sublett that simply provided a name, address and telephone number of the local franchise dealer. Sublett, 2004 NMCA at ¶ 30, 136 N.M. at 110, 94 P.3d at 853. Zavala's reference to passive websites without any showing that they targeted New Mexico actually supports Plaintiff/Appellant, because under Silver v. Brown, Defendant/Appellee's website does in fact target New Mexico. Thus, even under the standard Defendant/Appellee argues, his website supports personal

jurisdiction in New Mexico. Although Defendant/Appellee's website is in fact accessible to anyone with an internet connection, this is simply the nature of the internet. It is not who *could* access the site, but who is most likely to—here, patients considering surgery by Defendant/Appellee. In addition, Plaintiff/ Appellant here uses the website not as the sole contact with the state, but as one of many contacts which combined subject Defendant/Appellee to general jurisdiction in this state.

Finally, Defendant/Appellee has had systematic and continuous contacts in two other important ways. First, he and his wife own several pieces of real property in New Mexico, and thus he purposefully availed himself of the protections and benefits of New Mexico law by purchasing land here and making some use of that land. (RP 0000167 - 000180). Only because Plaintiff/Appellant's cause of action is not directly related to this land is there even a question about jurisdiction. See Rogers v. 5-Star Management, Inc., 946 F. Supp. 907, 911 (D.N.M. 1996) (disagreeing with the contention that possession of real property within the state "invariably" conferred personal jurisdiction). However, Defendant/Appellee's purchase and possession of land is one more factor supporting a finding of systematic and continuous contacts. In addition, Defendant/Appellee published a book that is available for purchase in New Mexico. (Excepts at RP 000157 – 000162). Undoubtedly, Defendant/Appellee

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. Such a plan is sufficient for general jurisdiction to attach to Defendant/Appellant. See Beh v. Ostergard, 657 F.Supp 173, 178 (D.N.M. 1987) (stating in dicta that if the defendant had a plan to distribute his publication within New Mexico, that would be sufficient for jurisdiction).

Defendant/Appellee relied upon dicta in Tercero v. Roman Catholic Diocese of Norwich, for the proposition that these contacts should not be considered by the court to establish jurisdiction to the extent they occurred after the surgery that injured Plaintiff/Appellant. 2002 NMSC 018, ¶9, 132 N.M. 312, 317, 48 P.3d 50, 55 (citing Doe v. Roman Catholic Diocese of Boise, Inc., 121 N.M. 738, 743, 918 P.2d 17, 22 (Ct.App. 1996) (citing Steel v. United States, 813 F.2d 1545, 1549 (9th Cir. 1987))). Ultimately, Steel v. United States discussed the timeliness of the contacts only in the context of specific jurisdiction and therefore, all contacts listed herein, whether occurring before and after the surgery are properly considered for the purpose of general jurisdiction over Defendant/Appellee. Steel, 813 F.2d 1545, 1549 (9th Cir.App. 1987).

Importantly, all of these factors—the commercial arrangement with Presbyterian, licensure in New Mexico, the website, the ownership of land, his book and the journeys to New Mexico—must be considered together. Although

the court will assess each in turn, the combination of a number of individually insufficient contacts can support a finding of personal jurisdiction. Zavala, 2007-NMCA-149, ¶16. Here, each of these individual facts are adequate to establish personal jurisdiction over Defendant/Appellee. Considered together, however, they leave no doubt: Defendant/Appellee is subject to personal jurisdiction in New Mexico.

Issue No. 3: The district court erred by concluding that exercising personal jurisdiction over Defendant/Appellee Frezza in New Mexico would violate traditional notions of fair play and substantial justice.

The district court found that exercising personal jurisdiction over Appellee in New Mexico would violate traditional notions of fair play and substantial justice because many of the important witnesses reside in Texas. (RP 000329 – 000331).

When, as here, minimum contacts are adequate to establish personal jurisdiction, a determination must be made whether the exercise of such jurisdiction would offend "traditional notions of fair play and substantial justice." Zavala v. El Paso County Hospital District, 2007-NMCA-149, ¶12, 143 N.M. 36, 172 P. 3d 173 (2007). "This determination is made by balancing 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. In Sproul, the court reviewed each of these five factors and held that a Chinese manufacturer was subject to jurisdiction in New Mexico courts as the burden on

the defendant in defending a case in a foreign jurisdiction was slight in comparison to the New Mexico plaintiff's and the State's interest in obtaining relief. Sproul, 2012 NMCA at ¶37. The Plaintiff in Sproul argued that this state has a clear interest in resolving claims arising from injuries occurring within New Mexico. Id. In this case, each of these five factors weighs in favor of personal jurisdiction.

First, comparing the Plaintiff/Appellant's interest with the burden on the Defendant/Appellee weighs in favor of a finding of personal jurisdiction over Defendant/Appellee. The burden imposed on Defendant/Appellee in defending a lawsuit in New Mexico is no greater than the burden on Plaintiff/Appellant if she were forced to prosecute this action in Texas or elsewhere. Burger King, 471 U.S. at 474, 105 S.Ct. at 2183; Silver v. Brown, 283 Fed. Appx. 723, 732 (10th Cir. 2010). Defendant/Appellee owns property in New Mexico and has voluntarily traveled here many times. However, if Plaintiff/Appellant were forced to litigate elsewhere against Defendant/Appellee, she would have to prosecute two lawsuits, because her suit against Presbyterian, Defendant/Appellee's business partner in the venture that led to this suit would have to remain in New Mexico. These factors support personal jurisdiction of Defendant/Appellee.

New Mexico's interest and public policy considerations may also be analyzed together. In Cubbage, the court determined that the State of California had a manifest interest in protecting its citizens against the tortious injury of health

care providers who solicit and derive a substantial number of patients and revenue from the state. 744 F.2d at 671. Here, Defendant/Appellee injured New Mexico citizens pursuant to an arrangement with a New Mexico insurance provider that required Plaintiff/Appellant leave the state for necessary medical treatment. As a matter of public policy, New Mexico has a very active interest where New Mexico residents are being required to go to Texas for medical treatment pursuant to the State's contract with Presbyterian. Where that surgeon has caused significant injury to numerous New Mexico citizens, including the state's own employees, but relies on the protection of Texas law to hide from liability, the public policy of New Mexico is directly implicated and supports a finding of personal jurisdiction here, permitting the New Mexico citizen who was directly injured to seek redress in the courts of his own state.

Finally, the interest in an efficient judicial system will also be best served through assertion of jurisdiction over Defendant/Appellee thus retaining one action in New Mexico rather than one here and one in Texas or elsewhere. See Zavala v. El Paso County Hospital District, 2007-NMCA-149, ¶ 33, 143 N.M. 36, 47, 172 P.3d 173, 184 (2007) (stating in dicta that it was more efficient for defendants to be sued in a single lawsuit). There is the obvious burden of having two suits. The district court was concerned over the location of the witnesses including the healthcare provider who subsequently treated Plaintiff/Appellant. (RP 000330,

¶3). The district court failed to acknowledge that the subsequent healthcare provider is the expert witness for the Plaintiff/Appellant and his testimony at trial in New Mexico has already been confirmed. In addition, in the remaining suit against Defendant Presbyterian, Defendant Presbyterian will require virtually the same witnesses as any against Defendant/Appellee. The burden on Defendant/Appellee is significantly less than the district court understood.

Together, evaluation of these factors demonstrates that fair play and substantial justice will best be served by the exercise of personal jurisdiction over Defendant/Appellee in New Mexico. Defendant/Appellee voluntarily made an arrangement with Presbyterian, through which he effectively compelled New Mexico citizens to go to Texas for treatment. Now, having injured those patients and collected his fees, he claims that Plaintiff/Appellant's suit against him in New Mexico is not fair—because after all, he made the Plaintiff/Appellant come to Texas for the surgery. Permitting Defendant/Appellee to slip away without consequence for the scheme he set up would violate both public policy and justice, and could not be called "fair play" or "substantial justice." Denying jurisdiction over Defendant/Appellee would, as a matter of policy, establish that foreign surgeons or hospitals are free to establish agreements whereby New Mexico citizens are required to leave their home state for necessary medical treatment, but

are barred from recourse for injury—because they had left their home state. Such a result would be unjust:

> "Where individuals purposely derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for the consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." Burger King, 471, U.S. at 474, 105 S.Ct. at 2183.

Issue No. 4: The trial court erred by allowing Appellee to rely upon the Specialty Services Agreement between Texas Tech Physicians Associates and Presbyterian and concluding that because Appellee was not a party to that Agreement, it cannot be considered as a basis to assert jurisdiction over Appellee in New Mexico.

There should be no doubt that Defendant/Appellant had an arrangement with Defendant Presbyterian under which Defendant Presbyterian agreed to send New Mexico patients to Defendant/Appellee. When the terms of the agreement are unambiguous, the court may only apply the provisions of the contract as written and their meaning is a question of law. Carlsberg Mgt. Co., v. State of NM, 116 N.M. 247, 251, 861 P.2d 288, 291 (Ct.App. 1993) (citations omitted). An individual can be bound be the terms of the contract even if he is not a party to that contract where the terms of the contract benefit the individual. Chandler-McPhail v. Duffey, 194 P. 3d 434, (Colo. App. 2008) (doctor held bound by the terms of an agreement between his practice group and an insurer even when not a signatory

because doctor benefitted from the agreement in the form of additional clients provided through the agreement).

The terms of the agreement here are clear and unambiguous and clarify that Defendant was a party and bound by all the terms therein. By his own admission. Defendant/Appellee was a "participating provider" pursuant to the terms of an agreement with Defendant Presbyterian (RP 000111, ¶ 4), he submitted an application to qualify for this status (RP 000111, ¶ 5), and he secured New Mexico patients through the arrangement (RP 000111, ¶ 6). The term "participating provider" as used by Defendant/Appellee [redacted]. (RP SP 000012 – 000059, ¶ 1.12).[2] Under the agreement [redacted] are subject to and bound by all the terms of the Agreement. In this regard, the agreement states:

> [redacted] . . . ." (RP SP 000012 – SP 000059, pg. 3, ¶ 1.12 and pg. 6, ¶ 2.2) (emphasis added).

Even the Managing Director of Provider-Payor Relations for TTPA submitted an affidavit that specifically states that Defendant/Appellee was subject

[2] For all other categories of providers, the contract specifically states [redacted]. (RP SP 00012 – 000059, ¶ 1.22 (defining Plan Physician as [redacted]); ¶ 1.24 (defining a Plan Primary Care Provider [redacted]); ¶ 1.26 (defining a Plan Provider as [redacted]).

to the agreement. (RP SP 000006, ¶5, last sentence). The unambiguous terms of the agreement demonstrate that Defendant/Appellee is bound by, and therefore a party to, the agreement with Defendant Presbyterian.

The agreement further clarifies that Defendant/Appellee should reasonably have anticipated being haled into New Mexico courts. It defines the service area as "[redacted]" (RP SP 000012 – 000059, pg. 5, ¶ 1.37) and refers to [redacted]. For example:

"7.2 … [redacted] …" (RP SP 000012 – 000059, pg. 15, ¶ 7.2)

9.4 "… [redacted] …". (RP SP 000012 – 000059, pg. 17, ¶9.4)

9.7 [redacted]." (RP SP 000012 – 000059, pg. 18, ¶ 9.7).

9.12 " [redacted]." (RP SP 000012 – 000059, pg. 19, ¶9.12)

10.5 "[redacted]... ." (RP Sp 000012 – 000059, pg. 18, ¶10.5).

As a party bound to all the terms of the agreement, Defendant/Appellee should reasonably have anticipated being brought to New Mexico courts for any number of reasons [redacted]. See Alto Eldorado Partnership v. AMREP, 2005 NMCA 131, ¶35, 138 N.M. 607, 619, 124 P.3d 585, 597 (stating that they could not fathom how the defendant could subject itself to the jurisdiction of a state agency and not reasonably anticipate being haled into court in New Mexico); see also Cubbage, 744 F.2d at 668 (holding that defendants subjected themselves to the jurisdiction by placing themselves within the statutory safeguards provided health care providers seeking to settle grievances under a state sponsored plan). That he contracted with Defendant Presbyterian through his group practice rather than individually does not defeat personal jurisdiction. The contract itself clearly supports jurisdiction.

Issue No. 5: Did the trial court err by not allowing Appellant to conduct jurisdictional discovery?

The district court denied Plaintiff/Appellant's request for jurisdictional discovery based on the timing of the request. Courts should decide matters on a full record. Although Plaintiff/Appellant recognizes the well-settled law that requires any request for jurisdictional discovery to be brought before the court

before a ruling on a motion to dismiss on jurisdictional grounds, this case presents extenuating and unusual circumstances that necessitate a deviation. Sun Country Savings Bank of NM, FSB, v. McDowell, 108 N.M. 528, 775 P.2d 730 (1989). Prior to the Defendant/Appellee's submission of the agreement under seal, Plaintiff/Appellant had already defeated a similar motion to dismiss for lack of personal jurisdiction in the related case of Kimberly Montano v. Eldo Frezza, M.D. and Lovelace, COA No. 32,403. There, the contract was never lodged but the district court determined that there were sufficient minimum contacts for personal jurisdiction over Defendant/Appellee. Plaintiff/Appellant had no reason to believe that this district court would view the contacts any differently than the previous court or would rule any differently. Finally, there continues to be another case against Defendant/Appellee and Defendant Presbyterian, Susan Method v. Eldo Frezza, M.D. and Presbyterian, D-202-CV-2012-0291 in which Plaintiff/Appellant will be able to obtain jurisdictional discovery from Defendant/Appellee. For these reasons, Plaintiff/Appellant requests that in the alternative to ruling on the merits, this matter be remanded for jurisdictional discovery.

CONCLUSION AND RELIEF REQUESTED

Plaintiff/Appellant's cause of action arises from both the transaction of business in New Mexico and the commission of a tortious act in New Mexico,

therefore, New Mexico's long arm statute is satisfied, and this Court has personal jurisdiction over Defendant/Appellee Frezza. Under the standard appropriate for analysis of the question at this stage, Plaintiff/Appellant has met his burden of establishing a prima facie case that Defendant/Appellee has minimum contacts with the state of New Mexico and that the constitutional requirements of due process are met. This court should overturn the decision of the district court and hold that Defendant/Appellee is subject to specific personal jurisdiction in the state of New Mexico.

In the alternative, this Court should remand this case for the conduct of jurisdictional discovery. The unique posture of this case justifies an exception to the general rule that a request for jurisdictional discovery should precede the district court's ruling. Because of the other cases pending, this Court will ultimately decide the question of personal jurisdiction with the benefit of jurisdictional discovery about Defendant/Appellee and Texas Tech Physicians Associates. It should have the benefit of such discovery here as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on the 2nd day of July, 2013, a true copy of the foregoing Plaintiff-Appellant's Brief in Chief was served by first-class mail, postage prepaid on:

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