



DATE: January 30, 2016
TO: Physician Colleagues
FROM: James Martinez MD, NMMS President 2014-2016

Many of you have heard and read about Montaño v. Frezza, the liability case being heard by the Supreme Court in New Mexico (www.montanovfrezza.brief.info). To recap briefly:

Texas physician Eldo Frezza MD is being required to defend a medical professional liability lawsuit filed in New Mexico. Frezza v. Montaño has reached the New Mexico Supreme Court after lower courts ruled New Mexico law should apply to the case.

In 2004 Kimberly Montaño, a New Mexico resident, traveled to Lubbock to undergo bariatric surgery, performed by Dr. Frezza, an employee of Texas Tech University Health Sciences Center. During the ensuing six years, Dr. Frezza performed follow-up care for complications related to Ms. Montaño's surgery. All of the care rendered by Dr. Frezza occurred in Texas. Dr. Frezza's only direct connection to New Mexico was that he was listed on the panel of a New Mexico Managed Care Plan and was the only bariatric surgeon listed.

Subsequently, Ms. Montaño sued Dr. Frezza and the Health Plan in a New Mexico court. Ms. Montaño argued her case should be tried under New Mexico law because her injuries "manifested" themselves in New Mexico. This was contested in a New Mexico Appellate Court, which agreed with Ms. Montaño, concluding the "place of the wrong" is the place where the injury "manifested," and not where the alleged injury occurred, at the surgical facility. Also, the court determined the "choice of law" favored New Mexico since applying Texas' more restrictive tort claims act violated New Mexico public policy that provides a greater remedy for plaintiffs.

The court elected to treat Dr. Frezza as a New Mexico state employee, extending the fact that he, as a faculty at Texas Tech, was a Texas state employee. Subsequently, the court's ruling affects all Texas state and local government employees.

If affirmed by the New Mexico Supreme Court, the Montaño appellate court decision likely will serve as a precedent for expanded New Mexico-based liability for Texas physicians in private practice as well. The Texas caps on non-economic damages likely would not be applied in subsequent cases if an alleged injury "manifested" itself in New Mexico and the suit was filed in New Mexico. Doctors from out-of-state would have difficulty finding available and affordable liability insurance to cover their treatment of New Mexican patients; their options will be to pay excessive liability premiums, go "bare", or to refuse to treat patients coming across state lines from New Mexico.

In response to the law suit, New Mexico Medical Society has taken two major actions. First, in partnership with many partners including the medical societies from Curry, Roosevelt, DeBaca, Chaves, Dona Ana, Eddy, Lea, Luna, and Otero, NM Hospital Association, UNM Health Sciences, Texas Medical Association, American Association of Orthopaedic Surgeons, the American Medical Association and others, NMMS submitted a friend-of-the-court brief to the Supreme Court on behalf of Dr. Frezza's effort to stop New Mexico law from applying to the case.

Secondly, NMMS has introduced SB121 (Sen. Stuart Ingle) and HB270 (Rep. Terry McMillan MD) at the 2016 legislative session. Included with this letter are copies of the bill itself and the NMMS briefing paper. The bill is straightforward - liability claims should be filed in the state in which the services are provided.

Now is the time for you to help. Please call your Senators and Representatives directly -- or the Capitol Switchboard at (505) 986-4300 -- and ask that they support SB 121 and HB 270.

Thank you for your support and good work.