

VENUE SHOPPING: PLAINTIFFS AVOIDING TORT REFORM

Court decision helps ensure patient access to care across state lines

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A recent New Mexico Supreme Court decision has huge professional liability ramifications for physicians treating patients from another state. The March 13, 2017, ruling is of importance to emergency physicians who, under EMTALA, are unable to deny a patient care due to illness, injury, inability to pay, or lack of health history.

The issue at stake in *Montaño v. Frezza* was which state's laws claim legal jurisdiction when a patient who resides in one state (New Mexico, in this case) receives care in another (Texas, in this case).

Montaño-Frezza Case Background

More than a half million patients from eastern New Mexico rely on a range of medical care from physicians in Lubbock, Texas. Texas has significant medical liability reforms; New Mexico does not.

In 2003, Texas passed comprehensive reforms regarded nationally as the gold standard in medical liability legislation. These reforms included a \$250,000 cap on pain-and-suffering-type damages and a heightened willful and wanton standard of negligence for those providing emergency care.¹ A voter-approved constitutional amendment affirmed the legality of the damage cap.² Since 2003, 118 counties have grown their base of emergency physicians, including 53 counties where previously no emergency physicians practiced.^{3,4}

Eastern New Mexico is largely rural and has a significant shortage of primary and tertiary care. Patients often drive one to three hours from New Mexico to Texas to receive

needed care. Covenant Health, the dominant hospital system in the Texas Panhandle, accepts multiple critically ill patients from New Mexico daily.

In 2004, Kimberly Montaño, a New Mexico resident, traveled to Lubbock to have gastric bypass surgery. The operation was performed in-network by bariatric surgeon Eldo Frezza, MD. At the time, Dr. Frezza was the chief of bariatric surgery at Texas Tech Hospital in Lubbock, a facility owned and operated by Texas Tech University Health Sciences Center. In the ensuing years, Dr. Frezza provided follow-up care for complications related to Ms. Montaño's surgery. All of the care rendered by Dr. Frezza was in Texas. Dr. Frezza's only connection to New Mexico was the fact that he was the only bariatric surgeon on the Lovelace New Mexico Health Plan.

Ms. Montaño sued Dr. Frezza in a New Mexico court. She argued her case should be tried under New Mexico law because her injuries "manifested" in New Mexico.

The Courts' Decisions

The New Mexico appellate court agreed with the plaintiff, concluding the "place of wrong" is the place where the injury manifested and not where the alleged injury occurred.

The court also concluded the "choice of law" favored New Mexico since applying Texas liability law violated New Mexico public policy that provides a greater remedy for plaintiffs. The points of contention—place of the injury and the jurisdiction—affect physicians of every specialty.

The New Mexico Court of Appeals ruled

that New Mexico law is controlling, but ultimately, the state's Supreme Court overturned that decision.⁵ The Texas College of Emergency Physicians and ACEP joined a "friend of the court" brief challenging the lower court's ruling.⁶

The New Mexico Supreme Court instructed the lower court to dismiss the complaint without prejudice. Writing for the majority, Justice Edward Chavez stated, "The public interest in maintaining access to cross-border medical services is promoted by applying the law where such services were rendered."⁷

The ruling, while not binding in all states, has persuasive authority, according to Alice Lorenz, New Mexico co-counsel for the Texas Alliance for Patient Access, the lead amicus who challenged the lower court's ruling. In all, 31 parties signed on to the brief: 10 from New Mexico, 18 from Texas, and three national organizations, including ACEP and the American Medical Association.

A Win for Emergency Physicians

Had the plaintiff prevailed, Texas doctors would have been twice bitten. They would have lost Texas medical liability protections and yet remained ineligible to buy into and receive the benefits of the New Mexico Patient Compensation Fund. The Patient Compensation Fund provides an excess layer of liability coverage for doctors and hospitals that qualify under New Mexico's Medical Malpractice Act. Dr. Frezza did not qualify to purchase such coverage because he practiced in Texas only.

A loss in the *Montaño* case would likely have caused Texas doctors and hospitals to reconsider their willingness to accept trans-

fers or referrals of New Mexico patients. After all, why would or should doctors agree to assume greater liability risk simply by agreeing to see New Mexican patients in Texas? Additionally, Texas hospitals, such as Covenant, would have had trouble retaining emergency physicians and trauma specialists who are required to meet the obligations of its regional trauma center.

ACEP President-Elect Paul Kivela, MD, MBA, FACEP, describes the court victory as "a win for minimizing venue shopping by plaintiffs' attorneys and, more importantly, maintaining patient access to care."

Because of the victory in *Montaño*, the time-honored patient referral pipeline remains open between New Mexico and Texas.

The outcome is best summarized by one of Covenant Health's patients, Lovington, New Mexico-resident Samuel Murphy. "I'd be dead today if not for the great care I received in Lubbock," he said. "These were doctors and nurses I wanted to work on me. They gave me a fighting chance, and for that I am eternally grateful. Lots of people I know here in Lovington rely on the availability of medical care in Lubbock. I like our local hospital, but Lubbock is our lifeline."⁸

References

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