IN THE SUPREME COURT OF IOWA

No. 21-1666

MARC HARDING d/b/a HARDING LAW OFFICES

Plaintiff-Appellee,

vs.

RICK SASSO, M.D. d/b/a INDIANA SPINE GROUP

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY

NO. LACL150488

THE HONORABLE GEANIE VAUDT

DEFENDANT-APPELLANT'S FINAL BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court erred in holding that Defendant-Appellant Rick Sasso, M.D. d/b/a Indiana Spine Group, ("Sasso") was subject to the general and specific jurisdiction of Iowa's courts when the uncontroverted facts are: (a) the plaintiff attorney Marc Harding ("Harding") solicited Sasso, an Indiana-based spine surgeon, in Indiana, to review medical records for a potential medical malpractice case Harding had not filed and never did file; (b) Harding forwarded $10,000 to Sasso, in Indiana, without any written agreement; (c) Harding forwarded medical records to Sasso, in Indiana; (d) Sasso reviewed the records, in Indiana; (e) Harding called Sasso, in Indiana, for Sasso's opinion; (f) Sasso informed Harding that Sasso did not believe the medical records showed a breach of the standard of care; and (f) Harding demanded a refund of the funds Sasso had deposited in his bank, in Indiana.

ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101(3)(a), this case should be transferred to the court of appeals as it concerns the application of existing legal principles.

STATEMENT OF THE CASE

Plaintiff Marc Harding d/b/a Harding law Offices ("Harding") filed this action on April 4, 2021, initially alleging that Sasso breached an "expert witness hourly contract" and "refuses to provide any accounting." (Petition at Law and Jury Demand, Paragraph 1, App. Vol. I, 5). For his claim for relief, Harding requested that Sasso "be ordered to refund part or all of the retainer, for costs of this action and statutory interest of 10% on the contract." (Petition at Law and Jury Demand, Page 4. App. Vol I, 8). No written agreement, hourly or otherwise, was alleged to exist, and none was attached to the complaint. (Petition at Law and Jury Demand, App. Vol. I, 5-8; Amended Petition at Law, App. Vol I, 55-62;

Sasso Affidavit ¶7, App. Vol. I, 22). On June 29, 2021 Sasso appeared and filed a motion to dismiss for lack of personal jurisdiction with a supporting brief and affidavit. (Motion to Dismiss, App. Vol I, 9-26). Harding responded to the motion to dismiss initially on July 21, 2021, which included his initial affidavit. (Harding Resistance to Motion to Dismiss, App. Vol. I, 31-38; Harding Affidavit, App. Vol, I, 39-41). On August 3, 2021 Harding amended his Resistance and filed a new Affidavit. (Harding Amended Resistance to Motion to Dismiss, App. Vol. II, 4-11; Harding Amended Affidavit, App. Vol. II, 12-15). On July 22, 2021, the trial court set the motion for hearing on August 11, 2021, at 8:30 a.m. (Order Setting Hearing, App.Vol. I, 63-64). On August 3, 2021, Sasso filed a reply in support of the motion to dismiss. (Sasso Reply, App. Vol. I, 44-49).

On August 5, 2021, Harding filed his "First Amended Petition" with four counts – Breach of Contract, Breach of Fiduciary Duty, Conversion, and Fraud. (Amended Petition, App. Vol. I, 55-62). The trial court went forward with the hearing on August 11, 2021. On October 10, 2021, the trial court denied the motion to dismiss. (Ruling, App. Vol. I, 65-71). On November 5, 2021, Sasso timely moved for an interlocutory appeal, which was granted by this Court on March 9, 2022. (Application for Interlocutory Appeal, App. Vol. I, 72-93; Order Granting Interlocutory Appeal, App. Vol. I, 113-115). On March 22, 2022, this Court ordered Sasso to file this brief on or before May 11, 2022.

STATEMENT OF FACTS

The following are the uncontroverted facts of this case:

1. **Sasso's Indiana connections.** Sasso is an Indiana spine surgeon who has lived and worked in Indiana since 1992. (Sasso Affidavit, ¶1, App. Vol. I, 21). He is a professor and Chief of Spine Surgery at Indiana University School of

Medicine. (Sasso Affidavit ¶5, App. Vol. I, 22). He founded his current medical practice group, Indiana Spine Group, in Indiana, in 2002. Indiana Spine Group has 15 full time physicians and more than 150 employees, all of whom live and work in Central Indiana. (Sasso Affidavit ¶2, App. Vol. I, 21). Neither Dr. Sasso nor Indiana Spine Group have advertised or solicited business in the State of Iowa. (Sasso Affidavit ¶4, App. Vol. I, 22).

2. **Harding's solicitation of Sasso in Indiana and $10,0000 payment.** In February 2021, Harding called Sasso and requested that Sasso review medical records relating to an issue of esophageal injury from cervical spine surgery. (Sasso Affidavit ¶6, App. Vol. I, 22). Sasso had never spoken to Harding before and had never solicited any work from Harding or any other attorney in Iowa. Harding agreed to send $10,000 to Sasso during their conversation and did so. (Sasso Affidavit ¶8, App. Vol. I, 22). Harding did not present any written agreement relating to his payment of the funds. (Sasso Affidavit ¶7, App. Vol. I, 22).

3. **Harding's delivery of medical records and Sasso's review and opinion.** Harding sent medical records via the internet for Sasso to review. (Sasso Affidavit ¶10, App. Vol. I, 23). Harding then called Sasso again after Sasso had reviewed the medical records provided. (Sasso Affidavit ¶¶10 & 11, App. Vo.. I,

23). Harding was not happy with the opinion Sasso had reached after review of the medical records. (Sasso Affidavit ¶11, App. Vol. I, 23).

4. **Harding's demand for a refund.** Harding demanded a refund of all or part of the funds. (7/21/21 Harding Affidavit, ¶15, App. Vol. II, 14).

5. **The absence of any litigation.** No litigation involving the alleged esophageal injury was pending in Iowa when Harding contacted Sasso. Harding never filed any lawsuit regarding this claim.

The following facts are in dispute and are not uncontroverted:

1. **The nature of the fee**. Sasso claims that the fee was a flat fee based upon the expected time he would take to review the chart and express his opinion. (Sasso Affidavit., ¶8, App. Vol. I, 22). Harding claims he sent him a retainer for hourly consulting at a rate of $1000.00 per hour. (Harding Affidavit. ¶5, App. Vol. II, 12).

2. **The purpose for the review**. Sasso claims that the purpose of his review was to provide an opinion of whether the standard of care had been met for the surgery performed. (Sasso Affidavit ¶8, App. Vol. I, 22). Harding claims that, before seeing the chart, Sasso informed Harding that Sasso could or would serve as an expert at a trial involving Harding's Iowa client and an Iowa surgeon. (Harding Affidavit. ¶¶3-5, App. Vol. II, 12).

3. **The size of the medical chart.** Sasso claims that Harding provided him a web link containing the medical chart which Harding has since removed, that was extensive and included the chart of the initial surgery, and the subsequent surgery with the related imaging studies. (Sasso Affidavit, ¶10, App. Vol. I, 23). Harding claims that the total number of pages of materials he provided was 166 pages. (Harding Affidavit, ¶8, App. Vol. II, 13).

4. **The time Sasso spent rendering the opinion.** Sasso claims that he spent approximately 12 hours carefully reviewing the records including the imaging studies which take substantial time to fully review. (Sasso Affidavit ¶10, App. Vol. I, 23). Harding claims that Sasso's review should have taken a matter of minutes. (Harding Affidavit, ¶¶8-13, App. Vol. II, 13-14).

ARGUMENT

The district court erred in holding that Sasso is subject to personal jurisdiction in Iowa.

I. Preservation of Error and Standard of Review

Sasso preserved error by filing his application for interlocutory appeal on November 5, 2021, within thirty days of the district court's October 10, 2021, ruling on his motion to dismiss for lack of personal jurisdiction. *See* Iowa R. App. P. 6.104(1)(b)(2). (Application for Interlocutory Appeal, App. Vol. I, 72-93; Ruling, App. Vol. I, 65-71). This Court granted Sasso permission to appeal on

March 9, 2022, and stay the District Court proceeding. (Order granting appeal, App. Vol. I, 113-115).

Generally, a district court's decision on a motion to dismiss for lack of personal jurisdiction is reviewed for correction of errors at law. *DeAngelo v. JLG Indus.*, 924 N.W.2d 537 (Iowa App. 2018) (citing *Sioux Pharm, Inc. v. Summit Nutritionals Int'l Inc.*, 859 N.W.2d 182, 188 (Iowa 2015). When deciding whether it has personal jurisdiction, the district court must make factual findings. *Id.* "If those findings of fact are supported by substantial evidence, they are binding on appeal." *Id*. (citing *Capital Promotions, L.L.C. v. Don King Prods,* 756 N.W.2d 828, 833 (Iowa 2008). This Court is not bound, however, "by the district court's application of legal principles or conclusions of law." *See id.* (citing *Rucker v. Taylor*, 828 N.W.2d 595, 599 (Iowa 2013)).

II. Governing Principles for Iowa cases.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution "limits the power of a state to assert personal jurisdiction over a nonresident defendant." *Ross v. First Savings Bank*, 675 N.W.2d 812, 815 (Iowa 2004) (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 413-14, 104 S.Ct. 1868, 1872 (1984). Consistent with the Fourteenth Amendment, Iowa R. Civ. P. 1.306 requires that defendants have "the necessary minimum contact with the state of Iowa" to be subject to personal jurisdiction. Before a

defendant can be made to defend a lawsuit in Iowa, his or her contacts with Iowa must be such that he or she could "reasonably anticipate being haled into court" in Iowa. *Capital Promotions, LLC,* 756 N.W.2d at 833 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The two grounds for personal jurisdiction are specific jurisdiction and general jurisdiction. *Capital Promotions*, 756 N.W.2d at 833. "'Specific jurisdictions refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state', while 'general jurisdiction…refers to the power of the forum state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose.'" *Id.* (quoting *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 819 (8th Cir. 1994). Iowa courts generally use a five-factor test for the exercise of specific jurisdiction: (1) the quantity of defendant's contacts with Iowa; (2) the nature and quality of those contacts; (3) the source of those contacts and their connection to the cause of action; (4) the interest of the forum state; and (5) the convenience of the parties. *Id.* Use of this test requires a showing that the defendant "purposefully directed" his activities at residents of the forum and the litigation arise out of those activities. *Id.* at 834 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73, 105 S.Ct. 2174, 2182 (1985).

III. The district court erred by failing to follow United States Supreme Court precedent of *Walden v. Fiore*.

In *Walden v. Fiore*, 571 U.S. 277, 134 S.Ct. 1115 (2014), the United States Supreme Court unanimously found no personal jurisdiction in Nevada over a claim relating to a DEA agent alleged to have tortiously seized cash in Atlanta, Georgia from Nevada residents known to be traveling to Nevada. Justice Thomas reviewed prior minimum contacts decisions of the Court, including *Worldwide Volkswagen Corp. v. Woodson*, and held:

> For a State to exercise jurisdiction consistent with due process, the defendant's suit related conduct must create a substantial connection with the forum State. Two related aspects of this necessary relationship are relevant in this case.
>
> First, the relationship must arise out of contacts that the "defendant *himself*" creates with the forum State. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Due process limits the State's adjudicative authority principally protect the liberty of the non-resident defendant – not the convenience of plaintiffs or third parties. See *Worldwide Volkswagen., supra,* at 291-292, 100 S.Ct. 559. We have consistently rejected attempts to satisfy the defendant-focused "minimum contacts" inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

Walden, 134 S.Ct. at 1122 (emphasis in original).

Sasso *himself* created none of the contacts with Iowa. Sasso is an Indiana spine surgeon living and working in Indiana. He has never solicited business in Iowa. Harding solicited Sasso in Indiana, sent medical records to Sasso for review in Indiana, and tendered a payment of $10,000 voluntarily to Sasso in Indiana. The plaintiff simply wants some or all of it back. Sasso created none of the contacts with Iowa that arise here. All contacts come from Harding's work as an attorney located in Iowa.

While the district court cited *Walden* for the definitions of general and specific jurisdiction, the court ignored the clear holding that a defendant *himself* must create the contacts with the forum state for jurisdiction to exist. The district court instead relied on a single allegation in Harding's amended petition that Sasso agreed both to evaluate a potential malpractice claim and to testify in any litigation. (Ruling on Motion to Dismiss, p. 3, App. Vol. I, 65-71) .

Sasso could not possibly have agreed to both evaluation of the claim and later testimony. Without dispute, Sasso had not yet evaluated the claim. Without dispute, there was no litigation pending at the time. Sasso would reasonably anticipate that no plaintiff's malpractice attorney would ever call a physician as an expert witness in his or her medical malpractice case who would testify that there was no malpractice. Instead, the attorney would either not file the case or would

find a second opinion. Here, Harding's consultation with Sasso would have become work product that generally is not discoverable by the other side except under "exceptional circumstances." Iowa R. Civ. P. 1.508(e)(2).

Every case cited by the plaintiff in briefing below and by the district court involved an ongoing relationship with an expert witness, not a simple preliminary evaluation where neither the expert nor the attorney knows whether the expert will be called.

In *Golden v. Stein*, 481 F.Supp. 3d 843 (S. D. Iowa 2019), attorney Stein was sued for legal malpractice relating to a copyright infringement case. Stein brought a third party claim against a damages expert, White Zuckerman, whom Stein had retained for the pending copyright infringement case. White Zuckerman signed a contract with Stein that "specifically envisioned preparation of the Damage Expert Report specifically for the Underlying Action." White Zuckerman knew and approved of its appointment as a Federal Rule 26 expert in the "Underlying Action" and approved of the filing of its report in that case. The "Underlying Action" for which White Zuckerman prepared the report had been pending in Iowa for eight months. White Zuckerman was paid a fixed fee of $30,000 and agreed in writing to hourly compensation for depositions and trial testimony and portal to portal travel charges.

In *Echevarria v. Beck*, 338 F.Supp. 2d 258 (Puerto Rico 2004), a case cited in *Golden* and decided before *Walden*, the defendant medical expert was specifically retained through an expert witness service to provide an expert report and testimony in a medical malpractice case pending in Puerto Rico. The plaintiff's attorney specifically requested in writing that the expert witness would agree to come to Puerto Rico to testify. The plaintiff's attorney paid the expert witness service, and the expert provided a written report in the pending litigation, but then cancelled a scheduled deposition and refused to reschedule it. And then, when informed that the case was set for trial and he needed to attend, wrote that he was not available to testify outside of the United States – the opposite of what he had agreed to previously. Here, there is no pending litigation. Sasso was not retained to testify in any particular case. There is no written agreement whatsoever to require billing by the hour or visiting Iowa for any reason whatsoever.

In *Guardi v. Desai*, 151 F.Supp. 2d 555 (E.D. Pa. 2001), the court found personal jurisdiction over a Colorado physician who received medical records including actual mammogram films from a Pennsylvania attorney, provided an opinion that the mammogram was improperly interpreted, requested future opportunities to write expert reports, agreed to hold the mammogram films for the litigation to be filed, and then lost the films. The commitments made created an ongoing relationship with the Pennsylvania attorney and the litigation the attorney

did file sufficient to establish specific jurisdiction. *Id.* at 560. Here, no ongoing relationship was created.

As pointed out to the trial court, the closest pre-*Walden* case on the limits of the 14th Amendment over personal jurisdiction in a dispute over the return of a retainer is *Goldstein v. Opolka*, 1990 WL 178853, 1990 Ohio App. LEXIS 4992 (Ohio App. 1990). In that case, the Ohio Court of Appeals affirmed the dismissal of such an action when a client sued an attorney in the client's home state of Ohio for a refund after payment of a retainer made to the attorney in Florida. Citing *Worldwide Volkswagen*, the Ohio Court of Appeals held:

> [W]e conclude that defendant would not reasonably anticipate being haled into court in Columbus, Ohio. Defendant resides in Miami, Florida; has never been in Columbus, Ohio; has never been in the state of Ohio; has never maintained a business in Ohio; and has never maintained an interest in a business in Ohio. The only contacts that defendant has had with this state were interstate communications with his client, *i.e.*, mail and telephone calls between defendant in Miami, Florida, and plaintiff in Columbus, Ohio. We note that even these contacts appear to have been primarily initiated by the plaintiff. Thus, we do not believe that in applying the due process standard, plaintiff has established that defendant has sufficient minimum contacts with Ohio in order to establish personal jurisdiction over him.

Goldstein at *5.

Substantially similar circumstances exist here. Sasso is an Indiana physician treating patients in Indiana at a medical campus that houses the Indiana-based

Indiana Spine Group. If the plaintiff here wants a refund, due process requires filing suit in Indiana where Sasso worked while providing the services the plaintiff requested Sasso to perform. Forcing Sasso to come to Iowa to litigate whether the plaintiff made a flat fee payment or an unwritten and undocumented hourly retainer agreement which Sasso allegedly breached, when the plaintiff initiated the relationship and the payment, does not comply with due process.

Walden v. Fiore, 134 S. Ct. 1115 (2014) requires that Sasso, not Harding, create the Iowa contacts that support asserting personal jurisdiction. That has not happened here. All Iowa contacts relating to this claim for a refund have been created by the plaintiff. To assert jurisdiction over Sasso or the Indiana Spine Group offends due process.

IV. The district court erred in relying on Harding's unfounded claim that Sasso agreed both to evaluate the claim and to testify in Iowa litigation.

The district court cited *Addison Ins. Co. v. Knight, Hoppe, Kurnik, Knight & Knight, LLC*, 734 N.W.2d 473 (Iowa 2007) for the proposition that it must accept the allegation in Harding's amended petition that Sasso agreed to testify in Iowa. *Addison* does not reasonably extend to the circumstances of this case. Without dispute, the defendant law firm in *Addison* had a long-standing business relationship with defendant law firm involving appearing and representing the

plaintiff's policyholders in Illinois. In *Addison*, there was substantial evidence supporting personal jurisdiction. Here there was not. *See, Capital Promotions, L.L.C.*, 756 N.W.2d at 833; *All Tech v. Power Prods. Co.*, 581 N.W.2d 202. 204-205 (Iowa App. 1998) (no substantial evidence of minimum contacts when defendant was solicited by Iowa plaintiff to sell a single power unit).

Harding's allegation that Sasso agreed not only to evaluate the medical records but also to provide testimony was made ***after*** Sasso already provided affidavit testimony that the review he was called upon to provide did not include testifying in litigation in Iowa. Sasso's brief in support of his motion to dismiss cited case law demonstrating the absence of personal jurisdiction when there is no pending litigation in the forum jurisdiction.

The Amended Petition and resulting amended affidavits filed were created in an attempt to avoid dismissal on jurisdictional grounds. Harding had filed no litigation and now never will. Harding could not possibly have known, nor could have Sasso, whether Sasso would ever testify in Iowa until after Sasso had analyzed the medical records to be sent to him. No plaintiff's malpractice attorney would call an adverse expert witness intentionally. Instead, if the attorney continued with the case, he would consult with and find an expert witness with a supporting opinion.

Thus, Harding's bare allegation is not "substantial evidence" to support finding personal jurisdiction here. It is nothing more than Harding's foggy memory of a conversation he had with Sasso. There was no written agreement here to engage in expert witness services and no meeting of the minds to create an oral contract.

CONCLUSION

Sasso respectfully requests that this Court reverse the district court and dismiss this case for lack of personal jurisdiction.

REQUEST FOR ORAL ARGUMENT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

   [X] this brief contains 3,407 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

   [ ] this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

   [X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 font size and Times New Roman style, or

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s/ BRENT RUTHER June 15th, 2022

CERTIFICATE OF SERVICE AND FILING

I certify that on June 15th, 2022, the foregoing document was electronically filed with the Court using the CM/ECF system and served to the parties listed by electronic means through the ECF system.

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