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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 PROOF BRIEF

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I. 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.

II. ARGUMENT

A. *Walden v. Fiore* compels a finding of no personal jurisdiction here.

Walden v. Fiore, 571 U.S. 277, 134 S.Ct. 1115, 1122 (2014) requires that a "defendant himself" create the jurisdictional contacts with the forum State. Like the Atlanta DEA agent in *Walden*, the record is devoid of any activity by Dr. Sasso to create jurisdiction here. The deputized DEA agent interacted with a traveler he was informed resided in Nevada, not only at the Atlanta airport where the agent

seized about $97,000 in cash, but later with the traveler's attorney who called from Nevada seeking a return of the funds to Nevada. *Walden*, 571 U.S. at 280. Here, Sasso learned in an unsolicited phone call that Mr. Harding was an Iowa attorney who had his own Iowa client who had been treated by an Iowa physician. None of this information can be "decisive in determining whether the defendant's due process rights are violated." *Walden*, 571 U.S. at 285. All of the Iowa contacts are Mr. Harding's, not Dr. Sasso's.

Mr. Harding cites four eighth circuit federal cases analyzing *Walden*: (a) *Morningside Church, Inc. v. Rutledge*, 9 F.4th 615 (8th Cir. 2021); (b) *Pederson v. Frost*, 951 F.3d 977 (8th Cir. 2020); (c) *Deloney v. Chase*, 755 Fed. Appx 592 (8th Cir. 2018); and (d) *Fastpath, Inc. v. Arbela Techs. Corp.*, 760 F.3d 816 (8th Cir. 2014). Citing *Walden* with approval, all four cases affirmed dismissal for lack of personal jurisdiction. *Morningside Church*, 9 F.4th at 620; *Pederson*, 951 F.3d at 979; *Deloney*, 755 Fed. Appx at 595; *Fastpath*, 760 F.3d at 820.[1]

In *Morningside Church*, televangelist Jim Bakker was investigated by different state and local governments, including the State of Arkansas, relating to his advertisements of a "Silver Solution" cure for COVID-19. *Morningside*

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[1] Mr. Harding cites one 8th Circuit case that does not cite *Walden*. *Creative Calling Solutions, Inc. v. LF Beauty Ltd.*, 799 F.3d 975 (8th Cir. 2015). The Hong Kong based defendant there solicited the Iowa plaintiff, entered into a long-term contract that resulted in extensive electronic and telephonic communications "for nearly two years." *Creative Calling*, 799 F.3d at 978. Over that two year period, the Hong Kong defendant made significant payments to Iowa and delivered sample materials there. *Id.* at 979. Nothing of the sort happened between Mr. Harding and Dr. Sasso. Mr. Harding solicited Dr. Sasso about a potential case that was never filed.

Church, 9 F.4th at 617. Bakker sued Leslie Rutledge, the Attorney General of Arkansas in federal court in Missouri for malicious investigation of consumer fraud. *Id.* at 618. The Arkansas Attorney General's contacts with Missouri were deemed insufficient because of *Walden*. *Id.* at 620. Mr. Harding's attempt to distinguish this case is that "Sasso agreed to participate in Iowa litigation." (Appellee's Brief, p. 23). What litigation? None was ever filed.

In *Pederson*, the plaintiff had served as outside counsel for a California corporation, Biozone. *Pederson*, 951 F.3d at 978-979. Pederson moved to Minnesota while continuing to serve Biozone. He then sued Biozone for inducing him to continue representing Biozone by repeated promises of an in-house position or increased compensation. Pederson sued for fraud and other intentional torts, as Mr. Harding does here. *Id.* at 979. *Walden* demanded that his Minnesota case be dismissed for lack of personal jurisdiction. *Pederson*, 951 F.3d at 980-981. Mr. Harding attempts to distinguish Pederson because "Sasso was to participate in litigation in Iowa." (Appellee's Brief, p.24) Here, no litigation was ever filed.

In *Deloney*, Arkansas plaintiffs alleged that a Louisiana attorney, Hallack, who was holding $110,000 in escrow, negligently disbursed funds to Chase, a non-lawyer who had represented the plaintiffs in a civil rights action. The plaintiffs argued that Hallack's agreement to be an escrow agent for them knowing they resided in Arkansas created minimum contacts there. The 8th Circuit disagreed.

Deloney, 755 Fed. Appx at 593. Dr. Sasso's situation is similar. Dr. Sasso worked in Indiana analyzing potential medical malpractice for an attorney who resided in Iowa. The attorney's Iowa connections do not create personal jurisdiction.

In *Fastpath*, the Iowa plaintiff software company entered into a written mutual confidentiality agreement with the defendant Arbela, which contained an Iowa choice of law provision. *Fastpath*, 760 F.3d at 819. Arbela signed the agreement at a trade show in Atlanta Georgia and Fastpath signed later in Iowa. When Fastpath employees were in Iowa, the parties then engaged in remote communication. *Id.* The 8th Circuit would not allow Fastpath's contacts with Iowa to be used to establish personal jurisdiction over Arbela. Dr. Sasso's Iowa contacts are far less than Arbela's. There was no written agreement. There was no Iowa choice of law clause. *Fastpath* also demonstrates that the proper application of *Walden* to the case here is to dismiss for lack of personal jurisdiction. Dr. Sasso himself has not created any Iowa connections.

B. There was no substantial evidence of contacts Dr. Sasso created himself to be subject to Iowa jurisdiction.

Mr. Harding characterizes his conversation as speaking with Dr. Sasso about "serving as an expert in a ***potential*** Iowa medical malpractice action involving a resident of Winterset, Iowa." (emphasis supplied)(Appellee's Brief, p.9). Before the trial court, and now this Court, Mr. Harding claims that Dr. Sasso's affidavit

somehow is “completely discredited” by Mr. Harding’s affidavit because Dr. Sasso swore in his affidavit, “Harding did not share with me any of his plans for litigation in Iowa or any other jurisdiction.” (Appellee’s Brief, p. 18). Dr. Sasso’s affidavit is true and consistent with the actual facts of this case. Conversing about “serving as an expert in a potential Iowa medical malpractice action” is not equivalent to agreeing to be a witness in an actual malpractice case.

Merriam Webster Dictionary defines “plan” as a “detailed formulation of a program of action” and as “an orderly arrangement of parts of an overall design or objective.” Mr. Harding did not have a plan for the filing of litigation when he solicited Dr. Sasso. Mr. Harding was in the process of determining whether he should file a case or not. He was considering, in his own words, a “***potential***” action, which is the possibility, after further investigation, of filing an action at some not yet determined time and place. That is not a plan. Mr. Harding did not share with Dr. Sasso a complaint that had been filed, or even a proposed complaint. Mr. Harding did not share such documents because he was investigating whether to file any litigation at all. He then determined, after learning Dr. Sasso’s opinion and reviewing the records more carefully himself, that he did not want to file an Iowa medical malpractice action.

The existence of a filed case actually being litigated when an expert agrees to perform services is crucial to the jurisdictional analysis here. Every appeal of a

finding of personal jurisdiction over a testifying expert involves an actual filed case in the state where personal jurisdiction is found. *See Golden v. Stein*, 481 F.Supp. 3d 843 (S. D. Iowa 2019)(expert agreed to serve as expert in pending federal copyright case); *Echevarria v. Beck*, 338 F.Supp. 2d 258 (Puerto Rico 2004)(expert agreed to serve in pending medical malpractice case and to travel there for testimony); *Guardi v. Desai*, 151 F.Supp. 2d 555 (E.D. Pa. 2001)(medical expert informed attorney that malpractice existed and agreed to hold the mammogram films, which were lost, while the action was pending).

Mr. Harding fails to address the possibility that Dr. Sasso would have completed his review and would have found no malpractice. That possibility, existing every time an attorney solicits an expert to review a case, became a reality. After completing his investigation, Dr. Sasso was not going to agree to serve as a testifying expert in Iowa, and Mr. Harding would not have wanted him to.[2] Any undocumented words of Mr. Harding about Dr. Sasso serving as an expert "at trial" in a case in Iowa were preliminary at best. (Appellee's Brief, p.28) The possibility of finding an expert who believed there was malpractice and would agree to testify in Iowa in support of it also continued to exist after Dr. Sasso provided his opinion.

[2] Mr. Harding claims "Sasso agreed to serve as an expert for an Iowa plaintiff and Iowa defendants, and therefore he purposely availed himself of the jurisdiction." (Appellee's Brief, p.22) The actual facts demonstrate that Dr. Sasso worked for and was paid by an Iowa attorney considering a "potential" case that never came to fruition. There is no Iowa plaintiff. There is no Iowa defendant.

If Mr. Harding disagreed with Dr. Sasso's analysis, he still could have filed his case, using an expert with a different opinion.

Dr. Sasso disagrees with Mr. Harding's arguments on the merits of the case. If this case were filed in Indiana, as it should be, Dr. Sasso would testify under oath, consistent with his affidavit, that the payment was a flat fee for analysis of the potential case and that he did spend significant time investigating the claim, including review of all the records provided to him, which included imaging studies. Dr. Sasso's duty as an expert was to carefully review all possible evidence so that he could offer a considered opinion that would survive the scrutiny of the adversarial process that might follow. Mr. Harding removed the internet link he provided to Dr. Sasso to access the medical charts before this litigation was filed. Dr. Sasso has not seen the documents that Mr. Harding claims he provided to Dr. Sasso to know whether the documents are complete. With litigation pending in Iowa, he now might well have to travel to Iowa, even though he has informed the plaintiff that there was no malpractice, to view the records again, under seal this time, in order to defend himself.

At this stage of the litigation, the due process clause of the United States Constitution demands that only personal jurisdiction, not the merits of the case, be at issue. There is no substantial evidence that Dr. Sasso himself created Iowa connections sufficient for a finding of personal jurisdiction. *See, Capital*

Promotions, L.L.C. v. Don King Productions, 756 N.W.2d 828, 838 (Iowa 2008); *All Tech v. Power Prods. Co.*, 581 N.W.2d 202, 204-205 (Iowa App. 1998).

III. 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

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/s/ *BRENT RUTHER*　　　　June 15th, 2022
Date

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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