

IN THE SUPREME COURT OF IOWA

No. 21-1666

MARC HARDING d/b/a HARDING LAW OFFICES

Plaintiff-Appellee

v.

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

Defendant-Appellant

**APPEAL FROM THE DISTRICT COURT OF POLK
COUNTY**

No. LACL150488

THE HONORABLE JEANIE VAUDT

APPELLEE'S BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The district court properly found that Sasso was subject to personal jurisdiction in Iowa.

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Brosnan v. Woodman, 939 N.W.2d 123, 2019 WL 3721348 (Iowa Ct. App. 2019)

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Campbell v. Kraft Heinz Food Company, 465 F.Supp.3d 918 (S.D. Iowa 2020)

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Gross v. Connecticut Mut. Life Ins. Co., 361 N.W.2d 259 (S.D. 1985)

Guardi v. Desai, 151 F.Supp.2d 555 (E.D. Penn. 2011)

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Heslinga v. Bollman, 482 N.W.2d 921 (Iowa 1992)
International Shoe Co. v. State of Wash., 326 U.S. 310 (1945)
In Interest of G.R., 348 N.W.2d 627, 632 (Iowa 1994)
Jennings v. Farmers Mut. Ins. Ass'n, 149 N.W.2d 298 (Iowa 1967)
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Sioux Pharm, Inc. v. Summit Nutritionals Int'l, Inc., 859 N.W.2d 182 (Iowa 2015).
Smith v. Golden China of Red Wing, Inc., 987 F.3d 1205 (8th Cir. 2021)
Walden v. Fiore, 571 U.S. 277 (2014).

II. The district court properly found there was substantial evidence to support the determination that Sasso agreed to testify in Iowa.

Capital Promotions, LLC v. Don King Prods, Inc., 756 N.W.2d 828 (Iowa 2008).
In Interest of G.R., 348 N.W.2d 627(Iowa 1994)
Jennings v. Farmers Mut. Ins. Ass'n, 149 N.W.2d 298 (Iowa 1967)
Struck v. Mercy Health Services-Iowa Corp., --- N.W.2d ---, 2022 WL 1194011 (Iowa Apr. 22, 2022).

ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101(3)(a), this case presents the application of existing principles, and therefore would appropriately be transferred to the Court of Appeals.

STATEMENT OF THE CASE

This is an interlocutory appeal of a district court's denial of a motion to dismiss based on lack of personal jurisdiction. (**App. Vol. I p. 65-71** Ruling 10/10/2021). The underlying case involves the breach of an agreement to serve as an expert witness in a medical malpractice case, resulting breach of the duties of loyalty and care, conversion and fraud. (**App. Vol. I 55-62** Amended Petition).

Plaintiff-Appellee Marc Harding d/b/a Harding Law Offices (Harding) filed his Petition on April 20, 2021. (**App. Vol. I 5-8** Petition) Defendant Rick Sasso, M.D. d/b/a Iowa Spine Group (Sasso) filed his responsive motion to dismiss for lack of personal jurisdiction on June 29, 2021. (**App. Vol. I 9-26** Motion to Dismiss).

Because defense of the motion required reference to the medical records of a third-party, Harding filed motions requesting to seal the resistance and for an extension of time on July 7, 2021. (**App. Vol. I 27-28** Motion to File Under Seal; **App. Vol. I 29-30**

Motion to Extend). The Court granted the motion to extend through July 21, 2021, on which Harding filed his Resistance without attaching the medical records as the Court had yet to rule on the sealing motion. (**App. Vol. I 31-41** Resistance).

On July 28, 2021, the Court granted the motion to restrict access to the records. (**App. Vol. I 42-43** Order). On July 28, 2021, Harding filed the Amended Resistance, attaching the medical records and other documents. (**App. Vol. II 4-60** Amended Resistance). Sasso replied on August 3, 2021. (**App. Vol. I 44-49** Reply). On August 5, 2021, Harding requested leave to file a sur-reply (with the sur-reply attached), and as Sasso had not yet answered, also filed an Amended Petition. (**App. Vol. I 50-54** Motion to File Sur-Reply and Sur-Reply; **App. Vol. I 55-62** Amended Petition).

On August 9, 2021, the Court ordered a hearing on the motion to dismiss, which was not recorded. (**App. Vol. I p. 4** Docket). On October 10, 2021, the Court denied the Motion to Dismiss, finding Sasso had sufficient minimum contacts with Iowa to be subject to its jurisdiction. (**App. Vol. I p. 70** Ruling 10/10/2021 p. 5). Sasso

did not file a motion to reconsider, enlarge or amend. (**App. Vol. I p. 4** Docket entire).

Sasso filed his Application for Interlocutory Review on November 5, 2021 (**App. Vol. I p. 72-93** Application). Harding resisted the application on November 16, 2021. (**App. Vol. I 94-112** Resistance). On March 9, 2022, the Court granted the Application. (**App. Vol. I p. 113** Order).

STATEMENT OF THE FACTS

Sasso has attested that he is a resident of Indiana, does business in Indiana and that he has not advertised or solicited business in Iowa. (**App. Vol. I p. 21** Motion to Dismiss Ex. A Sasso Affidavit ¶¶ 1-3).

On February 24, 2021, Harding and Sasso spoke via telephone about Sasso serving as an expert in a potential Iowa medical malpractice action involving a resident of Winterset, Iowa. (**App. Vol. II p. 12** Amended Resistance Ex. A Harding Affidavit ¶¶ 2, 3; **App. Vol. I p. 56** Amended Petition ¶ 8). The potential defendants in that possible medical malpractice action were The Iowa Clinic, P.C. and Nicholas Wetjen, M.D. (collectively, the malpractice

defendants) - both of which practice, and treated the possible plaintiff - in Polk County, Iowa. (**App. Vol. II p. 4, 18-56** Amended Resistance Ex. A Harding Affidavit ¶ 4, Ex. C Medical Records entire; **App. Vol. I p. 56** Amended Petition ¶ 9) In fact, the medical records provided to Sasso later that day identified that the malpractice defendants were located in Des Moines, Iowa. (**App. Vol. II p. 20** Amended Resistance Ex. C Medical Records p. 3).

Sasso and Harding agreed that the former would serve as an expert at trial, and Sasso required a \$10,000.00 advance, from which he would charge \$1,000.00 per hour for his record review and trial testimony - with nothing being said about the advance being non-refundable. (**App. Vol. II p. 12** Amended Resistance Ex. A Harding Affidavit ¶¶ 5-6; **App. Vol. I p. 56** Petition ¶ 7).

Accordingly, on February 24, 2021, Harding sent Sasso a check for \$10,000.00. (**App. Vol. I p. 26** Motion to Dismiss Ex. 1A Check). Concurrently, Harding's assistant emailed Sasso, sending him the medical records to review via a Google Drive link. (**App. Vol. II p. 16** Amended Resistance Ex. B Emails p. 1). Harding's assistant also sent Sasso the opinion of another physician,

identifying to Sasso that Harding routinely sends “many of our **medical malpractice cases** to him for initial review.” (**App. Vol. II p. 16** Amended Resistance Ex. B Emails p. 1) (emphasis added). This objective evidence directly refutes Sasso’s attested statement to the district court: “Plaintiff Harding did not share with me any of his plans for litigation in Iowa or any other jurisdiction.” (**App. Vol. I p. 22** Motion to Dismiss Ex. 1 Sasso Affidavit ¶ 6).¹

The total number of pages of all of the medical records provided to Sasso - all Iowa providers - was **166 pages**. (**App. Vol. I p. 56** Amended Petition ¶ 13).

In the email with the opinion of the initial reviewer, it identified that the source of any malpractice claim was a delayed second surgery to repair a damaged throat. (**App. Vol. I p. 56** Amended Petition ¶ 12; **App. Vol. II p. 13, 16** Amended Resistance Ex. A ¶ 8, Ex. B Emails p. 1 - “The fistula or tear in the esophagus was repaired 4 days after the initial surgery.”)

¹ Sasso appears to have abandoned this clearly false assertion on appeal. (Appellant’s Proof Brief p. 8) Nonetheless, the trial court must have considered this when it made its credibility determinations.

However, in looking at the records detailing those surgeries, it is clear the initial reviewer looked at the wrong date on the medical records - the time stamp when the record was filed as opposed to the date of the actual surgery. (**App. Vol. II p. 13, 25 Amended Resistance Ex. A Harding Affidavit ¶¶ 9-10, Ex. C Medical Records p. 8**).

DD: 04/27/2019 10:32:33
DT: 04/27/2019 14:18:48
CID: 015423

Electronically verified by: Ellen Jepsen May 2 2019 3:15PM CST

(**App. Vol. II p. 25 Amended Resistance Ex. C Medical Records p. 8**). It is obvious, upon a second look, that the initial reviewer was considering the wrong date.

In addition, a record memorializing the date of the first surgery was only **2 pages** away from the record that had the actual and mistaken dates of the second surgery. (**App. Vol. II p. 27 Amended Resistance Ex. C Medical Records p. 10**). And the records of the actual procedures (on 4/26/2019 & 4/27/2019) were only **29 pages** apart. (**App. Vol. II p. 13, 24-25, 53-55 Amended Resistance Ex. A Harding Affidavit ¶ 12, Ex. C Medical Records p. 7-8, 36-38**).

The entire record from The Iowa Clinic is only **39 pages**. (**App. Vol. II p. 13, 18-56** Ex. A Harding Affidavit ¶ 11, Ex. C Medical Records entire). This objective evidence completely refutes Sasso’s attested statement that the record was “extensive.” (**App. vol. I p. 23** Motion to Dismiss Ex. A Sasso Affidavit ¶ 10). Moreover, in his proof brief when discussing the “extensive” record, Sasso only identified “the chart of the initial surgery, and the subsequent surgery with the related imaging studies.” (Appellant’s Proof Brief p. 8). As identified above, both surgeries comprise **5 pages**, and the imaging studies comprise **8 pages** of the **39-page** Iowa Clinic Records. (**App. Vol. II 24-25, 34-39, 44-46, 53-55** Amended Resistance Ex. Ex. C Medical Records p. 7-8, 17-22, 27-29, 36-38).

Nonetheless, Sasso has attested to the Polk County District Court, and this Court, that his review of the **166 pages** of medical records occupied **12 hours** of his time. (**App. Vol. I p. 23** Motion to Dismiss Ex. A Sasso Affidavit ¶ 10; Appellant’s Proof Brief p. 9).

On March 4, 2021, Sasso informed Harding of his opinion that there was no malpractice, but refused to return any of the advance - because he claimed his review exhausted it. (**App. Vol. II p. 14**

Amended Resistance Ex. A Harding Affidavit ¶¶ 13-14; **App. Vol. I p. 57**; Amended Petition ¶¶ 16, 17).

Harding requested an accounting of Sasso's time, which was refused because, according to Sasso, he did not keep records of his time as that would be discoverable - something Harding did not, and would not, request of the (an) expert. (**App. vol. II p. 14** Amended Resistance Ex. A Harding Affidavit ¶ 15; **App. Vol. I p. 56** Amended Petition ¶ 18)

Harding asked Sasso for his notes, and Sasso replied that he did not take notes because that would be discoverable - again something not requested or wanted. (**App. Vol. II p. 14, 58** Amended Resistance Ex. A Harding Affidavit ¶ 16, Ex. D Correspondence p. 2; **App. Vol. I p. 57** Amended Petition ¶ 19). Harding then asked if Sasso had conducted any research, and Sasso replied he had not. (**App. Vol. II p. 14** Amended Resistance Ex. A Harding Affidavit ¶ 17; **App. Vol. I p. 20** Amended Petition ¶ 20).

Sasso has provided no documentation to memorialize his version of events - other than a copy of the \$10,000.00 check. (**App. Vol. I p. 26** Motion to Dismiss Ex. A 1 Check).

ARGUMENT

I. The district court properly found that Sasso was subject to personal jurisdiction in Iowa.

A. Preservation of error and standard of review

The issue of the district court’s personal jurisdiction over Sasso was raised and decided below. (**App. Vol. I 9-26** Motion to Dismiss; **App. Vol. II p. 4-60** Amended Resistance; **App. Vol. I 44-49** Reply; **App. Vol. I p. 50-54** Sur-Reply; **App. Vol. I p. 65-71** Ruling 10/10/2021). Accordingly, it has been preserved for review. *33 Carpenters Construction, Inc. v. State Farm Life and Casualty Company*, 939 N.W.2d 69, 75 (Iowa 2020).

The standard of review on “a ruling on a motion to dismiss for lack of personal jurisdiction [is] for correction of errors at law.” *DeAngelo v. JLG Indus., Inc.*, 924 N.W.2d 537, 2018 WL 4629128, at *1 (Iowa Ct. App. 2018) *citing* *Sioux Pharm, Inc. v. Summit Nutritionals Int’l, Inc.*, 859 N.W.2d 182, 188 (Iowa 2015).

“Unlike other grounds for dismissal ... a court considering a motion to dismiss for lack of personal jurisdiction must make factual findings to determine whether it has personal jurisdiction over the defendant.” *DeAngelo*, at * 1 *citing* *Shams v. Hassan*, 829

N.W.2d 848, 853 (Iowa 2013). “Those factual findings are binding on appeal if supported by substantial evidence.” *DeAngelo*, at *1 citing *Capital Promotions, LLC v. Don King Prods, Inc.*, 756 N.W.2d 828, 832-33 (Iowa 2008).

Below, the district court did not expressly set-out its factual findings, as such, and instead couched its findings in accordance with the standard that it must “accept as true the allegations of the petition.” *Addison Ins. Co. v. Knight, Hoppe, Kurnik & Knight, L.L.C.*, 734 N.W.2d 473, 476 (Iowa 2007) And, while technically the district court was to “find facts,” as Sasso “did not ... seek enlargement of the ruling,” this Court should presume the lower court “decided the facts necessary to support its decision.” *Bankers Trust Co. v. Fidata Trust Co. New York*, 452 N.W.2d 411, 413 (Iowa 1990).

B. Specific jurisdiction, generally.

Personal jurisdiction may be either specific or general:

“Specific” ... jurisdiction depends on an affiliation between the forum and the underlying controversy (i.e., an activity or occurrence that takes place in the form State.... “[G]eneral ... jurisdiction ... permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit.

Walden v. Fiore, 571 U.S. 277, 283 n. 6 (2014). The record does not support an assertion of general jurisdiction over Sasso.

“Iowa Rule of Civil Procedure 1.306 expands Iowa’s jurisdictional reach to the widest due process parameters allowed by the United States Constitution.” *Addison Ins.*, 734 N.W.2d at 476. Iowa will exercise personal jurisdiction over a nonresident where “the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Ross v. First Savings Bank of Arlington*, 675 N.W.2d 812, 815 (Iowa 2004) *citing* *Heslinga v. Bollman*, 482 N.W.2d 921, 922 (Iowa 1992); *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945)

The factors considered in determining if due process is satisfied are: (1) the nature and quality of the contacts; (2) the quantity of those contacts; (3) the source and connection of the cause of action with those contacts; (4) Iowa’s interest; and (5) the convenience to the parties. *Addison Ins.*, 734 N.W.2d at 476.

Iowa’s test for minimum contacts is identical to the federal test, and Iowa courts frequently look to federal decisions in this

area. See *Fastpath, Inc. v. Arbela Technologies Corp.*, 760 F.3d 816, 821 (8th Cir. 2014); *Ross*, 675 N.W.2d at 815.

“A defendant’s conduct relative to the forum state must be such that the defendant should reasonably anticipate being haled into court there.” *Addison Ins.*, 734 N.W.2d at 476. “In determining whether minimum contacts exist, we focus on the relationship among the defendant, the forum, and the litigation.” *Id.* at 477.

C. Sasso’s version of events was rejected by the trial court, as it should have been.

As noted above, the facts necessary to support the decision are presumed. *Bankers Trust*, 452 N.W.2d at 413. Moreover, even were a de novo review conducted, this Court would surely agree with the district court’s decision - as Sasso’s version has been refuted in part, is entirely unsupported and defies all logic and common sense, to wit:

Sasso’s attestation to the district court that “Harding did not share with me any of his plans for litigation in Iowa or any other jurisdiction” is completely discredited by the objective evidence of the email identifying the “medical malpractice case,” and the medical records identifying an Iowa plaintiff and Iowa defendants.

(**App. Vol. I p. 22** Motion to Dismiss Ex. 1 Sasso Affidavit ¶ 6; **App. Vol. II p. 16, 20** Amended Resistance Ex. B Emails p. 1, Ex. C Medical Records p. 3).

His claim that someone would pay \$10,000.00 simply for a record review of a neck disc surgery with an esophageal injury (**App. Vol. II p. 16** Amended Resistance Ex. B Emails p. 1) defies logic and the common knowledge and experience of mankind. *Jennings v. Farmers Mut. Ins. Ass'n*, 149 N.W.2d 298, 301 (Iowa 1967) (noting finders of fact apply the “common experience of mankind” to circumstantial evidence to determine an issue of fact); *In Interest of G.R.*, 348 N.W.2d 627, 632 (Iowa 1994) (“A trial judge may rely on general knowledge commonly possessed by human kind”); *Gross v. Connecticut Mut. Life Ins. Co.*, 361 N.W.2d 259, 270 (S.D. 1985) (“Sitting as the trier of fact, the circuit judge, likened unto a juror, had the right to consider his ordinary experiences and observations in the daily affairs of life.”)

Sasso’s claim that the record was extensive is unsupported by any objective evidence, while Harding’s claim that it was not is supported by the **39 pages** of the actual medical records of both

surgeries and all of the imaging studies. (**App. Vol. I p. 23** Motion to Dismiss Ex. A Sasso Affidavit ¶ 10; **App. Vol. II 24-25, 34-39, 44-46, 53-55** Amended Resistance Ex. C Medical Records p. 7-8, 17-22, 27-29, 36-38).

Sasso's claim that it took him **12 hours** to determine that there was no malpractice for failing to timely make the repair is also unsupported by objective evidence, and wholly contradicted by the objective evidence that the facts to determine this were only **2 pages** and/or **29 pages** apart. (**App. Vol. I p. 23** Motion to Dismiss Ex. A Sasso Affidavit ¶ 10; Appellant's Proof Brief p. 9; **App. Vol. II 24-25, 27, 53-55** Amended Resistance Ex. C Medical Records p. 7-8, 10, 36-38).

Given the trial court's role in finding facts, summary judgment principles may be applied, such that Sasso's lack of objective evidence renders his affidavit incredible. It is "black letter summary judgment law that a conclusory, self-serving affidavit will not defeat an otherwise meritorious summary judgment motion." *Smith v. Golden China of Red Wing, Inc.*, 987 F.3d 1205, 1209 (8th Cir. 2021); *accord Clinton v. Garrett*, 551 F.Supp.3d 929, 959 (S.D.

Iowa 2021) *citing Dotson v. Delta Consol. Indus. Inc.*, 251 F.3d 780, 781 (8th Cir. 2001). *See also KDG, LLC v. City of Fort Dodge, Iowa*, 2021 WL 5741482, at *6 (N.D. Iowa Oct. 25, 2021) (“A properly supported motion for summary judgment is not defeated by self-serving affidavits. Rather, the plaintiff must substantiate allegations with sufficient probative evidence that would permit a finding in the plaintiff’s favor”) *quoting Frevert v. Ford Motor Co.*, 614 F.3d 466, 473-74 (8th Cir. 2010).

“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Brosnan v. Woodman*, 939 N.W.2d 123, 2019 WL 3721348, at *3 (Iowa Ct. App. 2019) (discussing video evidence); *accord Campbell v. Kraft Heinz Food Company*, 465 F.Supp.3d 918, 924 (S.D. Iowa 2020) *quoting Scott v. Harris*, 550 U.S. 372, 380 (2007).

Therefore, as the district court properly accepted Harding’s supported version of events, this Court should, as well. *Capital Promotions*, 756 N.W.2d at 832-33.

D. *Walden v. Fiore* support the assertion of personal jurisdiction in this matter.

As Appellant identified, *Walden v. Fiore*, 571 U.S. 277 (2014) established two criteria for establishing minimum contacts: (1) the defendant “himself,” must create a contact with: (2) the forum State “itself,” as opposed to just its residents. *Walden*, 571 U.S. at 284-85.

The creation of a contract that carries with it “continuing obligations between himself and residents of the forum,” “manifestly” shows the defendant has “availed himself of the privilege of conducting business” in the forum,” such that it is “not unreasonable to require him to submit to the burdens of litigation in that forum.” *Deloney v. Chase*, 755 Fed. App’x 592, 596 (8th Cir. 2018) quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985).

And while a “contract ... is not sufficient in and of itself” to establish personal jurisdiction, *Fastpath*, 760 F.3d 821, when the “future consequences which themselves are the real object of the business transaction,” create an obligation within the forum, minimum contacts is established. *Deloney*, 755 Fed. App’x at 596

quoting *K-V Pharm. Co. v. J. Uriach & CIA, S.A.*, 648 F.3d 588, 592-93 (8th Cir. 2011) (cleaned up).

This is precisely the case here: Sasso agreed to serve as an expert for an Iowa plaintiff and Iowa defendants, and, therefore, *he* has purposely availed *himself* of the jurisdiction. *Walden*, 571 U.S. at 284-85; *Deloney*, 755 Fed. App'x at 596.

Thus, this case is unlike those where the contacts were held to be insufficient. For example, in *Walden*, that defendant - a law enforcement officer in Georgia - detained a Nevada couple in Georgia and seized monies; no charges were filed, the money was returned, and as the officer had no contact with Nevada, the Court found no personal jurisdiction in Nevada. *Walden*, 571 U.S. at 283-289. Here, Sasso agreed to serve as an expert in an Iowa malpractice suit, establishing his contact with the State.

Likewise, in *Fastpath*, the parties had agreed only to an “exchange of confidential information for the purpose of discussing future business deals,” that would occur on a “world-wide” or “nationwide basis.” *Fastpath*, 760 F.3d at 822. The Court found that as there was never a deal to actually do business in Iowa, there was

insufficient contact. *Id.* Here, there was an actual deal to do business in Iowa.

In *Morningside Church, Inc. v. Rutledge*, 9 F.4th 615 (8th Cir. 2021), a 1983 claim brought by a church for what it claimed was a malicious investigation of consumer fraud, those government defendants only emailed and phoned requests for information. *Id.* at 620. This was deemed insufficient, as the “only connection between the defendants and the forum state is the plaintiff himself.” *Id.* Here, conversely, Sasso had agreed to participate in Iowa litigation.

Similarly, in *Pederson v. Frost*, 951 F.3d 977 (8th Cir. 2020), that Minnesota plaintiff conducted business for the California defendant outside of Minnesota, and nearly no events in their relationship occurred in Minnesota. *id.* at 979-981. Here, as stated above, Sasso was to participate in litigation in Iowa.

Rather, this case is more akin to those relied on by Harding below.

Where, as here, there is an agreement for an expert to “provide expert services for legal proceedings in this forum... it is

the defendant’s conduct that forms the connection with the forum state.” *Golden v. Stein*, 481 F.Supp.3d 843, 857 (S.D. Iowa 2019). In *Golden*, the firm that agreed with a California attorney to supply an expert (but then didn’t) in an Iowa lawsuit never was physically in Iowa, did “not market its services in Iowa or solicit business in Iowa... [did] not have offices” in Iowa and had “never contract[ed] to perform services for any Iowa citizen or company.” *Id.* However, it, and its expert, “reasonably anticipated testifying in Iowa,” and “by agreeing to provide expert witness services in litigation in Iowa, [knew that] some of the future consequences of failing to provide those services would occur to some degree in Iowa.” *Id.* at 857-58 (noting that parties had even thought “there was a 95-99 percent chance that the case would settle.”) In holding the firm and expert subject to personal jurisdiction in Iowa, the analysis turned on the “prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing.” *Id.* at 857; accord *Creative Calling Solutions, Inc. v. LF Beauty Ltd.*, 799 F.3d 975, 980 (8th Cir. 2015). This is on all fours with the present case.

Note, too, that even if Sasso's version was credited - that Harding paid him \$10,000.00 to conduct a record review, alone - this is also sufficient to confer personal jurisdiction. Consider this from a Pennsylvania lawsuit regarding an out-of-state expert, where the Eastern District identified sufficient contact for personal jurisdiction:

Even though the [plaintiffs] initiated the first contact with [out-of-state expert]... (1) by reviewing the [record and reporting to plaintiffs] in their potential medical malpractice action; (2) by requesting future opportunities from Plaintiffs' counsel to write expert reports; and (3) by agreeing to retain the mammogram films to write an addendum for the plaintiffs, [expert] reached out beyond one state and created continuing relationships and obligations with citizens of another state.

Guardi v. Desai, 151 F.Supp.2d 555, 560 (E.D. Penn. 2011).

Likewise, in *Echevarria v. Beck*, 338 F.Supp.2d 258 (D.P.R. 2004), a non-resident doctor who had agreed to be an expert in Puerto Rico was found to have created sufficient contacts with Puerto Rico by being appointed as an expert, sending a report to Puerto Rico and having direct contact by mail with the plaintiffs' attorney in Puerto Rico. *Id.* at 261-62. This court found particularly compelling that the doctor "knew that his expert opinion would be

utilized in Puerto Rico, and that the contract had a substantial connection to Puerto Rico,” and therefore, it “was foreseeable that a cause of action could arise,” in Puerto Rico. *Id.* at 262. This is precisely akin to the conduct Sasso agreed he engaged in, and far less than that demonstrated by Harding. Clearly, then, he has sufficiently availed himself of Iowa’s courts that he is subject to personal jurisdiction here.

II. The district court properly found there was substantial evidence to support the determination that Sasso agreed to testify in Iowa.

A. Preservation of error and standard of review

It would appear Sasso has failed to preserve this issue for review, as Sasso never raised the issue of any lack of substantial evidence in the motion, brief or reply. (**App. Vol. I p. 9-26** Motion to Dismiss; Brief in Support of Motion to Dismiss; **App. Vol. I p. 44-49** Reply).

“Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court.” *Struck v. Mercy Health Services-Iowa Corp.*, --- N.W.2d ---, 2022 WL 1194011, at *4 (Iowa Apr. 22, 2022).

In any event, a trial court’s findings on a motion to dismiss are binding on appeal if they are supported by substantial evidence.

Capital Promotions, 756 N.w.2d at 833.

B. Substantial evidence supports the district court’s finding that Sasso agreed to serve as an expert in an Iowa trial.

To recap the prior recitation of evidence demonstrative of Sasso’s agreement to serve as an expert at an Iowa trial:

<u>Contact</u>	<u>Undisputed or Evidence</u>
Harding sent Sasso \$10,000 for Sasso’s expertise	Undisputed. Also App. Vol. I p. 26 Motion to Dismiss Ex. 1A Check
Sasso’s rate was \$1,000 per hour.	Undisputed. Or App. Vol. II p. 12 Amended Resistance Ex. A Harding Affidavit ¶ 5
Harding sent Sasso medical records of an Iowa patient and Iowa providers	Undisputed. Or App. Vol. II p. 16-17, 20 Amended Resistance Ex. B Emails; Ex. C Medical Records p. 3
Harding attested the agreement was to serve as an expert at trial.	App. Vol. II p. 12 Amended Resistance Ex. A Harding Affidavit ¶ 5.
Harding’s assistant identified the matter was a “medical malpractice case.”	App. Vol. II p. 16 Amended Resistance Ex. B Emails p. 1

Concurrent with identifying the medical malpractice case, the assistant sent medical records of an Iowa resident and Iowa providers	App. Vol. II p. 12, 16 Amended Resistance Ex. A Harding Affidavit ¶ 4, Ex. B Emails p. 1
The procedure to be analyzed was a disc surgery and esophageal injury	App. Vol. II p. 16 Amended Resistance Ex. B Emails p. 1
The records of both surgical procedures comprise 5 pages	App. Vol. II p. 24-25, 53-55 Amended Resistance Ex. Ex. C Medical Records p.7-8, 36-38
The records of all imaging studies comprise 8 pages	App. Vol. II 34-39, 44-46 Amended Resistance Ex. Ex. C Medical Records p.17-22, 27-29

Note that of the nine pieces of evidence Plaintiff proffered that Sasso agreed to serve as an expert at an Iowa trial, only one is unsupported by objective evidence - Harding's statement of such.

Everything else is supported by the documents: (1) Harding paid Sasso \$10,000.00; (2) Harding's assistant identified the matter was a "medical malpractice case;" (3) the surgeries were two relatively minor neck surgeries; (4) the records of the surgeries and imaging comprise **13 pages**; (5) Sasso charged \$1,000 per hour; and (6) the records show an Iowa patient and Iowa providers.

In making its determination, the district court was authorized to use its common knowledge and experience to decide that this circumstantial evidence was enough to demonstrate that Sasso had agreed to serve as an expert at an Iowa trial. *See Jennings*, 149 N.W.2d at 301 (Iowa 1967); *In Interest of G.R.*, 348 N.W.2d at 632 (“A trial judge may rely on general knowledge commonly possessed by human kind”).

Clearly, this evidence taken together is sufficiently substantial to meet the standard, such that the trial court’s findings should be binding on appeal. *Capital Promotions*, 756 N.W.2d at 833.

CONCLUSION

For the reasons aforesaid, the district court’s denial of Defendant-Appellant’s motion to dismiss should be affirmed.

Respectfully submitted,

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REQUEST FOR ORAL SUBMISSION

Counsel for Appellee respectfully requests this appeal be heard in oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of the Iowa Rules of Appellate Procedure because it has been prepared in proportionally spaced typeface using Century Schoolbook in 14 point font and contains 5,180 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or (2)

/s/ Jeffrey M. Lipman

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of this brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon all parties to this appeal by EDMS on the 17th day of June, 2022.

/s/ Jeffrey M. Lipman