

**IN THE SUPREME COURT OF IOWA**

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**No. 21-1666**

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**MARC HARDING d/b/a HARDING LAW OFFICES**

**Plaintiff-Appellee**

**v.**

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

**Defendant-Appellant**

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**APPLICATION FOR FURTHER REVIEW**

(Iowa Court of Appeals decision of December 21, 2022)

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## QUESTION PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it held that an out-of-state defendant who agreed to evaluate a medical malpractice claim and testify as an expert was not subject to personal jurisdiction in Iowa because litigation was never commenced?

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## STATEMENT SUPPORTING FURTHER REVIEW

COMES NOW Plaintiff Marc Harding d/b/a Harding Law Offices, pursuant to Appellate Rule 6.1103, seeking further review of the Court of Appeals' decision in *Marc Harding d/b/a Harding Law Offices v. Rick Sasso, M.D. d/b/a Indiana Spine Group*, No. 21-1666 (Dec. 21, 2022).

This application offers the Court the opportunity to correct the Court of Appeals' erroneous decision of a substantial question of constitutional law that has not been settled by the supreme court, Rule 6.1103(b)(2), namely:

**Does an Iowa district court have jurisdiction over a physician who agreed to evaluate a medical malpractice claim and serve as an expert in any ensuing litigation, when no litigation was commenced?**

### BRIEF

#### Introduction

Plaintiff Marc Harding d/b/a Harding Law Offices (Harding) hired Defendant Rick Sasso, M.D. d/b/a Indiana Spine Group

(Sasso) to evaluate a medical malpractice claim and serve as an expert in any ensuing litigation in exchange for a \$10,000.00 advance, to be drawn from at a rate of \$1,000.00 per hour. (**App. Vol. II p. 12** Amended Resistance Ex. A Harding Affidavit ¶¶ 5-6; **App. Vol. I p. 56** Petition ¶ 7).

Sasso, a resident of Indiana, performed his review of the 166-page record and evaluated the medical malpractice claim in Indiana. (**App. Vol. I p. 21, 23** Motion to Dismiss Ex. A Sasso Affidavit ¶¶ 1, 10). Sasso concluded there was no malpractice, and when Harding requested a refund of the balance of the \$10,000.00 deposit, Sasso claimed he had exhausted it. (**App. Vol. II p. 14** Amended Resistance Ex. A Harding Affidavit ¶¶ 13-14; **App. Vol. I p. 57** Amended Petition ¶¶ 16, 17). Although Harding requested an accounting of Sasso's time, or his notes or any research he had conducted, Sasso refused to provide any claiming that he had not conducted research, and he does not account for his time or take notes because those would be discoverable. (**App. Vol. II p. 14, 58** Amended Resistance Ex. A Harding Affidavit ¶¶ 15-17, Ex. D

Correspondence p. 2; **App. Vol. I p. 56** Amended Petition ¶¶ 16, 18-20)

### **Course of Proceedings and Disposition Below**

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).



Sasso filed his final brief, reply and the appendix on June 15, 2022, and Harding filed his final brief on June 17, 2022. On August 4, 2022, this Court transferred the interlocutory appeal to the Court of Appeals. (Notice of Nonoral Submission). The Court of Appeals reversed the trial court's determination that it had jurisdiction and remanded the action on December 21, 2022. (Decision).

### **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).<sup>1</sup>

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.”)

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<sup>1</sup> 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 Court of Appeals erred when it held that Sasso was not subject to personal jurisdiction in Iowa.**

**Standard of Review:** 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). The Court of Appeals agreed with this analysis, and “assume[d] the court accepted Harding’s claim that Dr. Sasso agreed to both evaluate the potential malpractice claim and to testify as an expert in any ensuing litigation.” (Decision 12/21/22 p. 6)<sup>2</sup>

***Preservation of Error:*** 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

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<sup>2</sup> Harding briefed this issue far more extensively with the Court of Appeals, but as the Court adopted his reasoning, it has been omitted here. If the Supreme Court desires more thorough briefing on the issue, Harding requests leave to amend this Application.



for review. *33 Carpenters Construction, Inc. v. State Farm Life and Casualty Company*, 939 N.W.2d 69, 75 (Iowa 2020).

**Argument:** The fighting issue is whether the Polk County District Court may properly assert specific personal jurisdiction over Sasso. *Walden v. Fiore*, 571 U.S. 277, 283 n. 6 (2014) (“Specific jurisdiction depends on an affiliation between the forum and the underlying controversy.”)

Iowa has an expansive view of its long-arm jurisdiction. *Addison Ins.*, 734 N.W.2d at 476. (“Iowa Rule of Civil Procedure 1.306 expands Iowa’s jurisdictional reach to the widest due process parameters allowed by the United States Constitution.”) Accordingly, its courts will exercise 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 Court of Appeals explained the inquiry as beginning with two issues: “(1) the defendants have purposely directed their activities at residents of the forum state and (2) the litigation results from alleged injuries that arise out of or relate to those activities.” (Decision p. 8 *citing Book v. Doublestar Dongfeng Tyre Co., Ltd.*, 860 N.W.2d 576, 586 (Iowa 2015)) (internal punctuation omitted).

In addition to each of these considerations, as the Court of Appeals identified: “If sufficient minimum contacts exist, the court must then determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.” (Decision p. 8 *citing Sioux Pharm*, 859 N.W.2d at 196). This analysis considers: “the burden on the defendant, the forum State’s interests in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.” *Capital Promotions*, 756 N.W.2d at 834.

While this Court has articulated that a contract, alone, is insufficient to establish minimum contacts, *Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882, 892 (Iowa 2014), as Iowa's appellate courts have yet to address the types of contact present in this matter, the Court of Appeals, like Harding, focused on three federal cases: *Golden v. Stein*, 481 F.Supp.3d 843 (S.D. Iowa 2019); *Echevarria v. Beck*, 338 F.Supp.2d 258 (D.P.R. 2004); and *Guardi v. Desai*, 151 F.Supp.2d 555 (E.D. Pa. 2001).

However, the Court of Appeals erred in its analysis of these three cases, finding important a distinction that is actually irrelevant: i.e., in each of those cases, the litigation actually commenced, whereas in this case, there was no malpractice litigation. (Decision p. 9-12)

But this is irrelevant because in each of these three cases, those experts had no greater contact with the forum than Sasso here; that is, they engaged in pre-trial activities that mirrored Sasso's pre-litigation activities, to wit:

***Golden v. Stein*, 481 F.Supp.3d 843 (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. It is particularly important to note that that parties had even thought that "***there was a 95-99 percent chance that the case would settle.***" *Id.* (emphasis added).

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 (emphasis added); accord *Creative Calling Solutions, Inc. v. LF Beauty Ltd.*, 799 F.3d 975, 980 (8th Cir. 2015).

Accordingly, the fact that litigation had actually been filed was irrelevant, as the parties thought almost certainly that the expert would never have to appear in Iowa litigation, and the court identified the concern involved the “prior negotiations.” *Golden*, 481 F.Supp.3d at 857-58.

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

The fact of existing litigation in *Guardi* was equally not a consideration for the Pennsylvania district court, which instead found minimum contacts from: “(1) by reviewing the films and writing a report for the Guardis in their ***potential medical malpractice action***; (2) by requesting ***future*** opportunities from Plaintiffs’ counsel to write expert reports; and (3) by agreeing to [simply] retain the mammogram films to write an addendum for the Guardis.” *Id.* at 560 (emphasis added). Again, any participation in existing litigation, itself, was not really at issue; instead, the focus was on the pre-litigation, out-of-state action that had a distinct impact in the forum. *Id.* (Identifying that by so acting, the doctor “reached out beyond one state and created continuing relationships and obligations with citizens of another state.”)

***Echevarria v. Beck*, 338 F.Supp.2d 258 (D.P.R. 2004)**

In *Echevarria*, a Florida corporation agreed to provide an expert in a Puerto Rico medical malpractice action. *Id.* at 260. The corporation chose a surgeon, Beck,” who prepared a report that “was sent to plaintiffs in Puerto Rico, and there was direct contact by mail between Beck” and the attorney “with respect to the first scheduling of the deposition... which was later cancelled at Beck’s request.” *Id.* at 261 (“The sending of information into the forum state via telephone or mail constitutes evidence of jurisdictional contact directed into the forum.”)

As for purposeful availment, the district court noted:

Beck’s only contacts with the forum state were (1) his ***acceptance*** of the Puerto Rico case... (2) Beck’s ***preparation of a report*** ... and (3) Beck’s ***correspondence*** with the plaintiffs concerning the deposition he failed to provide.

*Id.* at 262 (emphasis added). In holding that the surgeon had purposely availed himself of the forum, the Court noted “Beck knew that his expert opinion was ***to be*** utilized in Puerto Rico and that the contract had a ***substantial connection to Puerto Rico***. It was

thus foreseeable that a cause of action *could arise*.” *Id.* (emphasis added).

Therefore, once again, the existence of pending litigation was irrelevant to establishing purposeful availment; rather, it was the doctor’s pre-litigation conduct that established it. *Id.*

Finally, the Court of Appeals held that *Walden v. Fiore*, 571 U.S. 277 (2014) foreclosed Harding’s claim because: “The plaintiff cannot be the only link between the defendant and the forum.” (Decision p. 12 quoting *Fastpath, Inc. v. Arbela Techs. Corp.*, 760 F.3d 816, 823 (8th Cir. 2014) quoting *Walden*, 571 U.S. at 825). But in both *Walden* and *Fastpath*, there were no other links, to wit:

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.

Therefore, the Court of Appeals’ conclusion that because the second part of the agreement did not come to pass (actually serving as an expert in existing litigation), Sasso did not direct his activities toward Iowa residents, is unsupportable. *Id.*

### **Conclusion**

As demonstrated above, the Court of Appeals erred when it reversed and remanded the Polk County District Court’s determination that it had personal jurisdiction over Sasso. Thus, the Court of Appeals’ decision should be vacated and the district court judgment affirmed.

Respectfully submitted,

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### **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 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 9th day of January, 2023.

/s/ Jeffrey M. Lipman