

# **EXHIBIT C**

To be Argued by:  
DANIEL S. RATNER  
(Time Requested: 7 Minutes)

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**Supreme Court of the State of New York**  
**Appellate Division – First Department**

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RACQUEL LIVIDINI,

*Plaintiff-Appellant,*

- against -

HAROLD L. GOLDSTEIN, D.P.M., VINAI PRAKASH, D.P.M.,  
RYE AMBULATORY SURGERY CENTER, L.L.C. and  
WESTMED MEDICAL GROUP, P.C.,

*Defendants-Respondents.*

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**BRIEF FOR DEFENDANTS-RESPONDENTS**  
**RYE AMBULATORY SURGERY CENTER, L.L.C.**  
**AND WESTMED MEDICAL GROUP, P.C.**

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## STATEMENT

Defendants-respondents Rye Ambulatory Surgery Center, L.L.C. and Westmed Medical Group, P.C. ("Respondents") offer this brief in opposition to an appeal from two separate decisions and orders of the Supreme Court, Bronx County (Capella, J.). Plaintiff-Appellant Racquel Lividini ("Appellant") commenced this podiatric malpractice action in Supreme Court, Bronx County. Although none of the parties reside or have their principal place of business in Bronx County, and all medical treatment was rendered in Westchester County, Appellant maintains that she properly commenced this action in the Bronx because co-defendant-respondent Dr. Harold L. Goldstein listed a Bronx address when he filed his podiatric medical license with the New York State Education Department.

The Supreme Court disagreed and granted the defense motions to transfer venue from Bronx County to Westchester County. It correctly held that Respondents established, and Appellant did not adequately refute, that although Dr. Goldstein is affiliated with a hospital in the Bronx, Dr. Goldstein's principal place of business for venue purposes is in Westchester County. In so ruling, the lower court properly relied upon Dr. Goldstein's affidavit explaining that his employer is located in Westchester County, he treats most of his patients in Westchester County, and that seventy-percent of his income is derived from the podiatric care he provides in Westchester County.

**COUNTERSTATEMENT OF THE QUESTION INVOLVED**

Should this Court affirm the lower court's decisions and orders granting the defense motions and transferring this action from Bronx County to Westchester County where the treatment giving rise to this lawsuit was rendered in Westchester County, Appellant resides in Westchester County, and none of the defendants reside or have their principal place of business in Bronx County?

Yes. The lower court's decisions and orders granting the motions to change venue and transferring this action to Westchester County were correct in all respects and should be affirmed.

**BACKGROUND****A. Procedural History**

This podiatric malpractice action was commenced in Supreme Court, Bronx County with the filing of a Summons and Complaint on January 18, 2018 (R. 54-64). Appellant selected Bronx County as the place of trial based on "defendants' principal place of business" (R. 56). According to the Summons, Appellant is a resident of Westchester County (R. 56).

On April 2, 2018, Respondents filed and served a Demand for Change of Venue (R. 65-80). In accordance with CPLR § 511(b), Appellant served an affidavit in response, claiming that venue was proper because co-defendant-

respondent Dr. Harold L. Goldstein's principal place of business is in Bronx County (R. 37-39).

On April 4, 2018, Dr. Goldstein moved, pursuant to CPLR § 503(1), § 510, and § 511 to transfer this action from Bronx County to Westchester County because venue was improper (R. 11-12). Dr. Goldstein submitted a detailed affidavit in support of his application, explaining that (1) he resides in Westchester County; (2) he provided all podiatric care to Ms. Lividini in Westchester County; (3) he is employed by Westmed Medical Group, P.C., a corporation with its principal place of business in Westchester County; (4) he renders podiatric care to his Westmed Medical Group, P.C. patients in offices located throughout Westchester County; (5) he performs podiatric surgery at Rye Ambulatory Center, L.L.C., a corporation with its principal place of business in Westchester County; and (6) over seventy-five percent of his income is derived from podiatric care provided in Westchester County (R. 41). Dr. Goldstein further clarified that although he is affiliated with St. Barnabas Hospital in the Bronx, only a small percentage of his practice (twenty to twenty-five patients a month) is devoted to working in that county (R. 41).

On April 17, 2018, Respondents also moved for a change of venue to Westchester County, joining in Dr. Goldstein's motion (R. 45-46). In support of their motion, Respondents submitted the affirmation of Dr. Steven M. Meixler, the

Medical Director of Westmed Medical Group, P.C. and The Rye Ambulatory Surgery Center, L.L.C. (R. 81-83). Dr. Meixler confirmed that the principal places of business for Westmed Medical Group, P.C. and The Rye Ambulatory Surgery Center, L.L.C. were in Westchester County, that Dr. Goldstein was employed by Westmed Medical Group, P.C., and that Dr. Goldstein provided care for patients of the Westmed Medical Group, P.C. in Westchester County only (R. 81-82).

In the alternative, Respondents moved for a change of venue pursuant to CPLR §§ 510(3) and 511 on the grounds that a change of venue to Westchester County would promote the convenience of material witnesses and the ends of justice (R. 47-53). In support of their position, Respondents pointed out that the alleged underlying malpractice had no connection to Bronx County, all documentary evidence and potential witnesses were located in Westchester County, and that Westchester County is where the institutional defendants are located and where they maintain their principal places of business (R. 50-53).

On April 25, 2018, co-defendant-respondent Dr. Vinai Prakash, who resides in Washington State, cross moved for the same relief (R. 96-100).

Appellant opposed the motions, arguing that Bronx County was a proper venue because defendants failed to establish that Dr. Goldstein was not a resident of Bronx County for venue purposes (R. 122-23). Appellant further asserted that her choice of venue was proper because Dr. Goldstein's principal

place of business is in Bronx County (R. 123-24). She based this claim on Dr. Goldstein's listing of "Bronx, NY" as his address on his official license registration filed with the New York State Education Department and the fact that Dr. Goldstein occasionally sees patients at St. Barnabas Hospital in the Bronx (R. 124). Finally, Appellant maintained that Respondents did not establish that the convenience of material witnesses warranted a change of venue pursuant to CPLR §§ 510(3) and 511 (R. 136-40).

**B. The Lower Court's Decisions and Orders**

In two separate, but nearly identical, decisions and orders, the lower court granted the defense motions and transferred this action to Supreme Court, Westchester County (R. 8, 10). Noting that Appellant conceded that venue was based on Dr. Goldstein's principal place of business, the court held that although Dr. Goldstein was affiliated with St. Barnabas Hospital in the Bronx, his affidavit sufficiently established that his principal place of business was at Westmed Medical Group, P.C. in Westchester County (R. 8, 10).

**ARGUMENT**

**POINT I**

**PLAINTIFF IMPROPERLY DESIGNATED BRONX COUNTY AS THE VENUE FOR THIS ACTION**

Venue is proper in a county if one of the parties resides there at the time of the commencement of the action. CPLR § 503(a). CPLR § 503(c)

provides that a “domestic corporation . . . shall be deemed a resident of the county in which its principal office is located.” Courts have held that where a physician is sued in his or her capacity as a medical doctor, the county of an individual’s principal office is a proper venue for claims arising out of that business. *See Young Sun Chung v. Kwah*, 122 A.D.3d 729, 730 (2d Dep’t 2014).<sup>1</sup>

“The court, upon motion, may change the place of trial of an action where . . . the county designated for that purpose is not a proper county[.]” CPLR § 510(1). When making such a motion, the defendant must demonstrate that the plaintiff chose an improper venue. *Fiallos v. New York Univ. Hosp.*, 85 A.D.3d 678 (1st Dep’t 2011). If the defendant satisfies this burden, the plaintiff must show that his or her venue choice is proper or the motion will be granted. *Young Sun Chung*, 122 A.D.3d at 730.

Respondents satisfied their initial burden of showing that Bronx County was an improper venue and that Westchester County was a proper venue. Specifically, they established that (1) all treatment rendered to Appellant, who

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<sup>1</sup> Co-defendant-respondent Dr. Vinai Prakash argues in his opposing brief that the location of a physician’s principal place of business is irrelevant where, as here, a physician is sued in his or her individual capacity. *See Prakash Br.* at pp. 1-2. Thus, Dr. Prakash argues, because Dr. Goldstein was sued in his individual capacity and is a resident of Westchester County, it is irrelevant whether his principal place of business is located in Westchester County or in Bronx County. *Id.* at pp. 5-9. Should the Court adopt Dr. Prakash’s reasoning that only the residency of a physician is dispositive for purposes of venue, the lower court’s decision and order transferring venue from Bronx County should clearly be affirmed because Dr. Goldstein’s residence is undisputedly in Westchester County.

resides in Westchester County, was provided in Westchester County; (2) Dr. Prakash is a resident of Washington State; (3) Rye Ambulatory Surgery Center, L.L.C. and Westmed Medical Group, P.C. have principal places of business in Westchester County; and (4) Dr. Goldstein, who resides in Westchester County and is employed by Westmed Medical Group, P.C., maintains a principal place of business in Westchester County (R. 41, 81-87).

Appellant claims that Respondents did not sustain their burden because Dr. Goldstein did not submit proof, beyond his affidavit, proving that Westchester County, not Bronx County, is where he maintains his principal place of business. *See* App. Br. at pp. 17-21. Appellant is mistaken. Courts have routinely held that an affidavit, like the detailed affidavit proffered by Dr. Goldstein, is sufficient to demonstrate the location of a defendant's principal place of business. *See DiCicco v. Cattani*, 5 A.D.3d 318 (1st Dep't 2004)(motion to change venue properly granted on the ground that defendant's affidavit sufficiently demonstrated that his principal office was located in Staten Island where alleged malpractice occurred); *Pasley v. St. Agnes Hosp.*, 244 A.D.2d 469 (2d Dep't 1998)(motion for change of venue as a matter of right properly granted where affidavits of respondent physicians were sufficient to demonstrate that their principal medical offices were located in Westchester County).

Appellant further asserts that she offered conclusive proof that Bronx County is the proper venue because a Bronx address is reflected on the form filed by Dr. Goldstein when he filed his podiatric medical license with the New York State Education Department. *See* App. Br. at pp. 12-16. In addition, Appellant contends that Dr. Goldstein sees “dozens of patients” in the Bronx each month. *Id.*

The relevant inquiry, however, is not whether Dr. Goldstein listed a particular address on a form or whether he occasionally sees patients at a hospital located in another county. Indeed, the inclusion of a Bronx address on a podiatric medical license, or even the fact that he periodically treats patients in the Bronx, does not create venue. Rather, what is dispositive when determining a party’s principal place of business for venue purposes, and what is undisputed here, is that Dr. Goldstein is employed by a Westchester County corporation, primarily sees patients in Westchester County, and derives most of his income from his treatment of patients in Westchester County. Accordingly, there is no basis for finding that Dr. Goldstein has a principal place of business in Bronx County.

This Court’s decision in *DiCicco, supra*, is instructive. In that action, the plaintiff contended that New York County was a proper venue because the defendant physician’s letterhead and website listed his Manhattan address first and other medical-related websites, including the New York State Directory of Physicians, provided only the Manhattan address. This Court rejected the

plaintiff's argument and affirmed the lower court's order transferring the action to Richmond County, noting that the defendant provided an affidavit that demonstrated that his principal office was located in Richmond County and that the alleged malpractice occurred in Richmond County. *DiCicco*, 5 A.D.3d at 318. *See also Magrone v. Herzog*, 304 A.D.2d 801, 802 (2d Dep't 2003)(plaintiffs improperly placed venue of action in Kings County based on location of medical office that defendant Herzog maintained in that county; although Herzog had medical office in Kings County, defendants established that Herzog maintained his principal medical office in Richmond County where alleged malpractice occurred).

Appellant attempts to equate the filing of a medical license with that of a corporation designating a county as its principal place of business. This analogy is unavailing. In contrast to a corporation, when a physician lists his or her address on a form like the one filed by Dr. Goldstein, he or she is not designating that address as the place of his or her business. Rather, the physician is simply asserting his or her right to practice medicine in the State of New York. Appellant has not cited any authority from this Court specifically holding otherwise.

The bottom line is that Appellant forfeited her right to select the venue because she designated an improper county, failed to submit competent evidence showing that Bronx County was a proper venue, and did not establish that

Respondents' designation of Westchester County was improper. *See IME Watchdog, Inc. v. Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 A.D.3d 464, 465 (1st Dep't 2016) ("Having designated an improper county for venue and not submitted an affidavit showing either that its designation was proper or that Baker McEvoy's designation was improper, plaintiff forfeited its right to select the venue."). The lower court's decisions and orders transferring this action from Bronx County to Westchester County should therefore be affirmed.

## POINT II

### **A CHANGE OF VENUE FROM BRONX COUNTY TO WESTCHESTER COUNTY WOULD PROMOTE THE CONVENIENCE OF MATERIAL WITNESSES AND SERVE THE ENDS OF JUSTICE.**

Pursuant to CPLR § 510 (3), a court upon motion, may change the place of trial of an action where "the convenience of material witnesses and the ends of justice will be promoted by the change." *See O'Brien v. Vassar Brothers Hosp.*, 207 A.D.2d 169, 171 (2d Dep't 1995). Although the lower court was not required to consider the applicability of CPLR § 510 (3), it would have been an appropriate exercise of discretion if it had transferred venue based on this provision.

As Appellant concedes, venue is solely based on the "principal place of business" of co-defendant, Dr. Goldstein. Yet, this podiatric malpractice action relates to treatment rendered to Ms. Lividini by defendants from April 1, 2016 to

September 30, 2016 at Westmed Medical Group, P.C.'s Westchester office locations in Rye and White Plains. Westchester County is (1) where the claim arose; (2) where the institutional defendants are located and where they maintain their principal places of business; (3) where Appellant lives; (4) where Dr. Goldstein resides and has his principal place of business; and (5) where material witnesses and the documentary evidence are located. Considering all of the above factors, venue could have been transferred to Westchester County in accordance with CPLR § 510 (3). *See Pavesi v. Salzberg*, 57 A.D.3d 750, 750 (2d Dep't 2008)(affirming order granting defendants' motion pursuant to CPLR § 510(3) for a change of venue from Suffolk County to Westchester County because "all of the alleged negligent acts occurred during the surgical and medical care rendered by the defendants to the plaintiff . . . which took place in and around northern Westchester County"); *Giambona v. Stein*, 233 A.D.2d 274, 274 (1st Dep't 1996)(holding that venue should be transferred to the county where plaintiff received most of his medical treatment and most of the nonparty witnesses work or reside).

### CONCLUSION

For all of the forgoing reasons, this Court should affirm the decisions and orders of the Supreme Court, Bronx County.

Dated: White Plains, New York  
February 27, 2019

Respectfully submitted,

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**AFFIDAVIT OF SERVICE**

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 )  
COUNTY OF WESTCHESTER )

Ivan Diaz, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 2160 Holland Avenue, Bronx, New York 10462.

That on the 27<sup>th</sup> day of February, 2019, deponent personally served the within

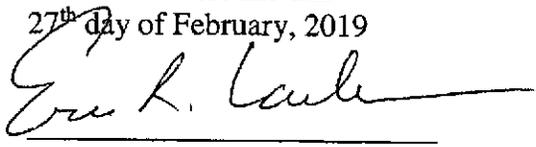
**BRIEF FOR DEFENDANTS-RESPONDENTS  
RYE AMBULATORY SURGERY CENTER, L.L.C. AND  
WESTMED MEDICAL GROUP, P.C.**

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Notary Public



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Commission Expires March 5, 2019

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