To Be Argued By:
Frank A. Longo
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APL-2019-00235

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Court of Appeals

STATE OF NEW YORK

RACQUEL LIVIDINI,

Plaintiff-Respondent,

against

HAROLD L. GOLDSTEIN, D.P.M
and VINAI PRAKASH, D.P.M.,

Defendants-Respondents,

and

RYE AMBULATORY SURGERY CENTER, L.L.C.
and WESTMED MEDICAL GROUP, P.C.,

Defendants-Appellants.

BRIEF FOR PLAINTIFF-RESPONDENT

GOLOMB & LONGO, PLLC
Attorneys for Plaintiff-Respondent
370 Lexington Avenue, Suite 908
New York, New York 10017
212-661-9000
frank.longo@golomblaw.com

Of Counsel:

Frank A. Longo
David B. Golomb

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PRELIMINARY STATEMENT

Plaintiff-respondent, Racquel Lividini, submits this brief in opposition to the brief by defendants-appellants Westchester Medical Group, P.C. and Rye Ambulatory Surgery Center, P.C. (hereinafter, collectively, "Westmed"), which seeks reversal of the decision and order by the Appellate Division, First Department, which denied their application, as well as related applications by their co-defendants, to change the venue of this matter from Bronx County to Westchester County. (R. 162-176).[1]

Indeed, the Appellate Division reversed the order of the trial court that had granted a change of venue (R. 8) and held that plaintiff had properly placed venue in Bronx County, defendant-respondent Goldstein's principal office location, pursuant to CPLR §503(d), based upon the following undisputed facts:

- Goldstein affirmatively designated Bronx County as his professional address on his sworn official license registration documents with the New York State Education Department (R. 139-140);[2]

- Goldstein admitted he worked several days every week in the Bronx, had three different office locations in the Bronx and treated at least 150 patients per month at two St. Barnabas Hospital podiatric clinics in the Bronx (R. 39, 144-145);

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[1] References to "(R. __") are to the Record on Appeal.

[2] After submitting his affidavit at *nisi prius*, Goldstein renewed his NYSED license registration and again listed his professional address in the Bronx NY effective through November 2021. See, http://www.nysed.gov/coms/op001/opsc2a?profcd=65&plicno=004891&namechk=GOL.

- Goldstein was the assistant director of the Podiatry residency program at St. Barnabas Hospital in the Bronx and taught residents there (R. 39-40, 144);

- Goldstein also treated numerous patients each month at his private office on Bronxdale Avenue in the Bronx, where he was served with the summons and complaint without objection (R. 27-31, 39, 141);

- The assistant at plaintiff's surgery was defendant Prakash, one of Goldstein's residents from the St. Barnabas program (R. 40, 97-98);

- Goldstein maintained active privileges at St. Barnabas Hospital in the Bronx (R. 39).

In doing so, the First Department majority also correctly concluded that:

> "Defendant Dr. Goldstein failed to show that plaintiff's designation of Bronx as the venue at the commencement of the action was improper. It is defendant's burden to show that venue was improperly placed, and not plaintiff's, as the dissent appears to suggest. Plaintiff relied on documentary evidence to establish residency; Dr. Goldstein did not dispute this evidence, did not submit documentary evidence, and indeed admitted in his own affidavit that he maintains a regular practice in the Bronx." (R. 163, emphasis added)

See also, Lividini v. Goldstein, 175 A.D.3d 420 (1st Dept 2019). Hence, the decision and order of the Appellate Division should be affirmed in its entirety.[3]

[3] Notably, defendant-respondent Harold Goldstein, D.P.M. – whose purported principal office location in Westchester County forms the sole basis for Westmed's appeal – did not move for permission to appeal to this Court; he has abandoned his efforts to change venue. In doing so, he effectively conceded that Bronx County was properly selected by plaintiff, precisely as the Appellate Division found. Defendant-respondent Prakash also failed to move for permission to appeal.

Finally, Westmed raises the argument here – for the very first time – that a change of venue would be consistent with a "recent" amendment to CPLR §503(a) – a different venue section than the one at issue – which added as a permissible basis for venue the county where a substantial part of the underlying events occurred against an individual. At no time was this argument made or even alluded to either in the trial court or immediately below. It is unpreserved for review by this Court.

Regardless, Westmed's argument is meritless; had the legislature truly intended to favor one basis for venue over another it would have done so by so stating or by restricting or eliminating the use of the other choices of venue. It did neither and, instead, left to plaintiff four distinct and equal choices for venue under the circumstances, based either upon her residence, the place of occurrence and defendant's personal residence [CPLR §503(a)] or upon defendant's principal office location [CPLR §503(d)]. There is nothing in the statutory language favoring any one option over another.

QUESTIONS PRESENTED

1. Did the Appellate Division, First Department, correctly decide that plaintiff had properly placed venue in Bronx County based on defendant-respondent Goldstein's principal office location pursuant to CPLR §503(d) where the documentary proof unequivocally established that Goldstein had consistently and repeatedly listed Bronx County as his professional residence in his sworn N.Y.S.

license registration filings and where he also admitted he conducted substantial professional activities, including being assistant director of the podiatric residency program at a Bronx hospital where defendant-respondent Vinai Prakash, D.P.M. was a podiatric resident assisting Goldstein during Ms. Lividini's underlying surgery which led to this action?

2. Did the Appellate Division, First Department, correctly decide that Westmed failed to meet its burden of proof and establish that Dr. Goldstein did not maintain a principal office location in Bronx County, where Goldstein's supporting affidavit was conclusory and incomplete, no explanation was provided about the different professional office locations set forth in his affidavit and in his sworn registration filings, no documentary proof was submitted to support his claim that Westchester County was his actual principal office location despite those sworn filings and the record demonstrated that, in fact, he regularly conducted significant professional business activities in Bronx County?

STATEMENT OF FACTS

a. The proof establishing that plaintiff's placement of venue in Bronx County was proper.

Plaintiff's pre-suit investigation produced documentation, *inter alia*, that Goldstein, in his then current professional license registration filing with the N.Y.S. Education Department ("NYSED"), effective through November 2018, had affirmatively represented that he maintained his professional practice in "Bronx, NY."

No other county or address was mentioned. A true copy of the printout from the "Verification" section of the N.Y.S. Education Department's Office of the Professions is included in the Record at R. 139.[4]

Further investigation established that Goldstein had listed the address of St. Barnabas Hospital, 4422 Third Avenue, Bronx, NY 10457, as his principal office address with NYSED. (R. 140, a copy of the certification from NYSED verifying Goldstein's filing information).

In addition, the then-current printout from the online directory of St. Barnabas Hospital (a/k/a SBH Health System), showed that Goldstein maintained an active office for his podiatry practice at 2016 Bronxdale Avenue, Suite 202, Bronx, NY 10462. (R. 144-145) He was also listed as St. Barnabas's Assistant Director of its podiatry residency program. *Id.*

Relying upon that information, Goldstein was served with plaintiff's Summons and Verified Complaint via a person of suitable age and discretion at that very address, 2016 Bronxdale Avenue, Bronx, NY 10462. See, R. 141, copy of affidavit of service. His answer asserted no defense that service there had been improper or defective. (R. 27-31)

[4] At its top, the NYSED printout states that "[t]he information furnished at this website is from the Office of Professions' official database and is updated daily, Monday through Friday. The Office of Professions considers this information to be a secure, primary source for license verification." (R. 139, emphasis added).

Hence, based on the clear results of the investigation by plaintiff's counsel's office, a legitimate, documented legal and factual basis existed for selecting Bronx County as the place for trial of this matter based upon Goldstein's principal office location.

b. Goldstein's conclusory, unsupported affidavit .

Despite this unimpeachable proof which originated from Goldstein himself, he moved to change venue to Westchester County (R. 9-42), submitting a carefully tailored – but wholly conclusory and incomplete – affidavit which contradicted his years of statutorily-mandated sworn professional filings and the other proof in the record. (R. 38-40)

Further, all of the assertions in Goldstein's Affidavit, such as the amount of his income purportedly earned from his Westchester practice and the days and hours allegedly spent at his Westchester offices, were unsupported by any documentary proof. *Id*. Goldstein also asserted that he had been employed by defendant Westmed for 21 years, but provided no proof for that claim even though such documentation, w-2's, 1099's, tax returns or the like, should have been readily available. *Id*.

Of equal note, Goldstein did not explain or even address why, if his principal office had truly been in Westchester for so long, he had continually designated Bronx County as his principal business address in triennial license filings with the State. *Id*.

According to the NYSED Office of the Professions website, a licensee is required to renew his registration every three years.

Goldstein also claimed that he worked 3½ days, 30 hours each week, at Westmed, treating 350-400 patients there each month, and that he derived 75 *per cent* of his income from his Westchester practice. (R. 39, ¶¶5-6) Here too, no proof was offered, such as work schedules or patient calendars, to support any of those claims.

Goldstein allowed that he worked two afternoons each week at St. Barnabas Hospital clinics in the Bronx, seeing 150 patients per month there. Unlike with his description of his Westchester activities, however, he offered no details regarding which days of the week or what hours he spent in the Bronx, much less any easily available corroborating documentation. (R. 39, ¶6) He admitted to seeing another 20-25 patients per month at a private office on Bronxdale Avenue in the Bronx but, again, offered no details as to the days or hours spent there, or any supporting evidence. *Id.*

In short, Goldstein claimed that he saw an incredible 575 patients every month at various clinics and offices – more than 25 each workday – without ever accounting for a single hour spent in surgery. In fact, the absence of any details describing when or how often Goldstein conducted his surgeries is just another of the many reasons his affidavit raised more questions than it answered, and was deemed insufficient to rebut his sworn state filings.

c. The decisions by the lower courts.

Defendants' motions to change venue were granted at *nisi prius*, the court incorrectly finding that Goldstein's affidavit was sufficient to establish that his principal office was in Westchester notwithstanding its deficiencies and his unexplained, sworn state filings to the contrary. (R. 8)

Plaintiff appealed and the First Department reversed in a 3-2 decision, finding that defendants had failed to meet their *prima facie* burden to demonstrate that plaintiff had improperly selected venue, given Goldstein's sworn filings and other admissions showing that he "maintains a regular practice in the Bronx." (R. 162-176, at 168) The majority also correctly found that "Goldstein's affidavit, attesting to residency in Westchester but devoid of supporting documentation of residency, was insufficient to prove that plaintiff's designation of Bronx County was improper." (R. 165-166, emphasis added).

The First Department majority also aptly noted that to hold otherwise would be unworkable, since there would then be different rules where certain litigants would be bound by the address listed in their official State filings while others would not. (R. 168) Finally, the majority felt that the dissent had gone too far in acting as a factfinder by disregarding plaintiff's undisputed proof and "supplanting it with its own determination that the Bronx is not [Goldstein's] principal place of business" given the blatant deficiencies in defendants' proof. (R. 168)

Based on the 3-2 decision, Westmed was then granted leave to appeal to this Court. (R. 177)

POINT I

THE APPELLATE DIVISION CORRECTLY FOUND THAT VENUE WAS PROPERLY PLACED IN BRONX COUNTY AND THAT DEFENDANTS HYAD FAILED TO ESTABLISH THAT VENUE WAS IMPROPERLY SELECTED.

a. Westmed is bound by Goldstein's repeated sworn listings of Bronx County as his professional address.

Plaintiff's selection of Bronx County for trial was proper based upon Goldstein's affirmative designation of Bronx County as his principal place of business with the NYSED. Furthermore, the proof – including statements in his affidavit – demonstrated that Goldstein regularly practiced podiatry at multiple locations in the Bronx, including his own office at 2016 Bronxdale Avenue, as well as at St. Barnabas Hospital, where he not only had privileges to operate but saw dozens of patients each month and served and was publicly advertised as the Assistant Director of its podiatric residency program.

CPLR §503(a) permits venue to be placed in <u>any</u> county where one of the parties resided at the time of the action's commencement, or in the county where a substantial part of the underlying events occurred. In addition, pursuant to CPLR §503(d), <u>an unincorporated, individually-owned business, such as Goldstein's</u>

podiatric practice, has two residences for venue purposes, in the county where the business has its principal office and in the county where the individual resides.

This provision applies to an unincorporated, individual physician – here, Goldstein – sued for malpractice. See, Young Sun Chung v. Kwah, 122 A.D.3d 729 (2nd Dept. 2014) [proper venue for action against physician sued in his capacity as a medical doctor is county of residence or where his principal office is located]. See also, Cozby v. Oswald, 2013 WL 2367163 (Sup. Ct., N.Y. Cnty., Schlesinger J. 2013); Harrington v. Cramer, 129 Misc.2d 489 (Sup Ct., N.Y. Cnty., Rubin, J. 1985).

At bar, every three years Goldstein filed his mandatory licensing information with the Office of the Professions of the N.Y.S. Education Department, consistently affirmatively representing that his professional office for the practice of podiatry was in Bronx County. Such applications must be sworn to or affirmed (Education Law §6501-b), and notice of any change of address for the principal place of business must be given:

> "… within thirty days of such change. Failure to register or provide such notice within one hundred eighty days of such change shall be willful failure under section sixty-five hundred thirty of this chapter.

Education Law §6502(5) (emphasis added). Section 6530 defines "Professional Misconduct," providing the bases for disciplinary licensing violations.

Courts in New York have always treated personal or professional addresses affirmatively used or listed by a party in official State or governmental filings as being

qualitatively different than one a person might find in a phonebook or publicly available directory; they are routinely deemed sufficient and binding proof of residency, professional or otherwise, for purposes of establishing proper venue or jurisdiction. That the registration filings at bar are meant to be more than just a simple mailing address, as both the dissent below and Westmed's counsel would have it, is also supported by the mandate that any change of professional address must be reported to the Education Department within 30 days and that the failure to do so is defined as an act of professional misconduct. See, Education Law §§6502(5) and 6530.

Thus, for example, corporations are bound by the county designated in their filings with the Secretary of State as to their principal office location, even where the record demonstrates unequivocally that the corporation has no office in that county, the action has no nexus to that county and the corporation has its actual principal place of business in a different county. See, *e.g.*, Janis v. Janson Supermarkets, LLC, 161 A.D.3d 480(1st Dept. 2018) [defendant's designation of New York County as its place of business in its application to Secretary of State was controlling for venue purposes even if it had no actual office in New York County]; Dryer-Arnow v. Ambrosio and Co., Inc., 181 A.D.3d 651 (2nd Dept. 2020) [plaintiff properly selected venue in N.Y. County based upon corporate defendant's designation of that county as its principal place of business in its certificate of incorporation filed with Secretary of State, even though its actual office was located in Suffolk County and underlying events occurred

in Nassau County]; Vecchia v. Daniello, 192 A.D.2d 415 (1st Dept. 1993)[physician who conducts his practice in the form of professional corporation bound by address listed in its certificate of incorporation for venue purposes]; Pinos v. Clinton Café & Deli, Inc., 139 A.D.2d 1034 (2nd Dept. 2016) [residence of LLC for venue purposes is principal office location listed in its articles of organization regardless of where it actually conducts its business activities]; Gonzalez v. Weiss, 38 A.D.3d 492 (2nd Dept. 2007) [plaintiff properly placed venue in Kings County based on addresses of defendants contained in police report]; Furth v. Elrac, Inc., 11 A.D.3d 509 (2nd Dept. 2004) [plaintiff properly selected venue based on defendant driver's address as set forth on police report].

Similarly, here, Goldstein must also be bound by his affirmative designation of Bronx County as his professional address with the State licensing authority. Day v. Davis, 47 A.D.3d 750 (2nd Dept. 2008) ["since defendant held out the address where process was served as his business address, including maintaining that address as his business address on his registration with the Office of Court Administration … he cannot now disclaim such address as his 'actual place of business' for purposes of service of process." (emphasis added)]. See also, Melton v. Brotman Foot Care Group, 198 A.D.2d 481 (2nd Dept. 199) [service of summons and complaint under CPLR §308(2) was proper where process was mailed to the address listed by defendant with the New York State Department of Education Division of Professional Licensing;

defendant's failure to timely notify the State of his new address in compliance with Education Law §6502(5) estopped him from claiming he was served at the wrong address].

Also, on point is Cozby v. Oswald, *supra*. There, defendant chiropractor claimed, as does Goldstein here, that venue had been improperly placed in New York County because his principal office location was actually in Rockland County, where the underlying treatment had been rendered. He moved to change venue in a manner almost identical to Goldstein's here, claiming that while he maintained a satellite office in New York County, the majority of his professional activities had really occurred in his office in Rockland County, where he had also lived for the past 22 years.

The Cozby court denied defendant's motion to change venue, finding that despite defendant's claims, his affirmative listing of his New York office as his professional address with the N.Y.S. Department of Education's Division of Professional Licensing, as Goldstein has done here, as well as his failure to timely notify the State of any change of his professional address within 30 days as required by Education Law §6502(5), were sufficient to establish that venue had been properly laid in N.Y. County by plaintiff based on defendant's principal office in accordance with CPLR §503(d).

Moreover, courts have consistently and repeatedly estopped individuals from claiming a different address from one they listed with the Department of Motor

Vehicles, regardless of whether they actually resided at that address or the cause of action had any relation to the county selected. Mighty v. Deshommes, 178 A.D.3d 912 (2nd Dept. 2019) [defendant estopped from claiming address where plaintiff attempted service of summons and complaint was improper based on his affirmative listing of that address with the Department of Motor Vehicles and his failure to timely update his address after he moved]; Darbeau v. 136 West 3rd Street, LLC, 144 A.D.3d 420 (1st Dept. 2016) [plaintiff properly selected Bronx County venue based on address defendant listed with Department of Motor Vehicles]; Furth v. Elrac, Inc., *supra* [plaintiff properly selected venue based on defendant driver's address as set forth on police report]; Hernandez v. Seminatore, 48 A.D.3d 851 (1st Dept. 2008).

Equally on point is Vid v. Kaufman, 282 A.D.2d 739 (2nd Dept. 2001). There, plaintiff served the summons and complaint upon defendant-physician Karafiol at his actual place of business, defendant OB/GYN Associates of Long Island, P.C., based upon current telephone listings, as well as Karafiol's name on signs in both the building lobby and on the P.C.'s office door and a then-current business card identifying him as a member of the practice. Karafiol, however, argued that he was not properly served at his place of business and moved to dismiss, asserting that despite plaintiff's proof, he had had a stroke and had sold his interest in the practice months before service was attempted there and had no control over the P.C.'s continued listing of him as being part of the practice. While the lower court granted Karafiol's motion, the Second

Department reversed. It found that Karafiol's claim that he had no control over the P.C.s continued use of his name "strain[ed] credulity."

More important, the Court found that Karafiol had also affirmatively held himself out as being affiliated with the P.C. by submitting a verified statement to that effect with the N.Y.S. Medical Directory and by his failure to notify the State's Division of Professional Licensing of his change of address, as required by Education Law §6502(5), even after service had been effected. Thus, the Appellate Division found that since Karafiol had failed to take prompt steps to change the address of his place of business and disassociate himself from the P.C., service at the P.C. was proper and reinstated plaintiff's complaint.

Similarly, at bar, Goldstein has affirmatively and repeatedly – for years – sworn that his professional address was in Bronx County, where he has admitted he continues to maintain a significant, active professional presence, at multiple offices. Not only has he never taken any of the legally required steps to update his address with the N.Y.S. Department of Education's Division of Professional Licensing, but he even re-filed, designating that same Bronx address, during the pendency of his appeal below to the Appellate Division. See, p. 1, fn. 2, *supra*.

Thus, plaintiff properly selected Bronx County as the venue for this matter and Goldstein should be estopped from claiming his principal office is not in Bronx County.

b. Defendants failed to meet their burden to establish that venue was improperly selected.

Given, as Westmed's counsel concedes, that it was defendants' burden to demonstrate that venue had been improperly placed in Bronx County, their failure to submit any documentary proof supporting Goldstein's claims is fatal to its application at bar. This is especially so given Goldstein's sworn registration filings and numerous proven and admitted professional activities in Bronx County. Further, the failure by Goldstein to submit any documentary proof to support the contradictory claims in his affidavit about his purported Westchester activities deprives this Court – as it did the lower courts – of any means by which to discount plaintiff's proof or to verify whether Goldstein's carefully crafted claims were true, or even plausible. See, Singh v. Empire International, Ltd., 95 A.D.3d 793 (1st Dept. 2012); Fix v. B&B Mall Associates, Inc., 118 A.D.3d 477 (1st Dept. 2014). Broderick v, R.Y. Management Co., Inc., 13 A.D.3d 197 (1st Dept. 2004); Hernandez v. Seminatore, *supra*.

Westmed's counsel nevertheless argues that despite Goldstein's sworn filings and other proof establishing that he has consistently and continually held himself out as having a principal office in the Bronx, his selective, unsupported affidavit – alone – is sufficient to support a change of venue. The few cases cited by Westmed in this regard, however, Palsey v. St. Agnes Hospital, 244 A.D.2d 469 (2nd Dept. 1997) and Kielczewski v. Pinnacle Restoration Corp., 226 A.D.2d 211 (1st Dept. 1996), scarcely support any such conclusion. In neither, nor in DiCicco v. Cattani, 5

A.D.3d 318 (1st Dept. 2004), were the courts faced with a situation like the one at bar where the claims in a defendant's affidavit were directly contradicted by his own prior sworn statements and filings and other admissions.

On the other hand, in similar situations where a party's claim of a different residence or office address contradicted sworn or other, credible proof in the record such as an address listed with the Department of Motor Vehicles, the courts have consistently required that such party submit a detailed affidavit along with credible supporting documentation or evidence before a change of venue can even be considered. Directly on point is Fix v. B&B Mall Associates, Inc., *supra*. There, the court held that defendant's conclusory affidavit, unsupported by documentary evidence, was insufficient to establish that defendant's office was actually located in Westchester, not the Bronx; further, even if defendant had met its initial burden, plaintiff established in opposition that defendant had an office address in the Bronx and had designated Bronx County as its place of business with the Secretary of State, requiring denial of the motion.

Similarly, in Hernandez v. Seminatore, *supra*, the court rejected a plaintiff's attempts to establish via an affidavit that he resided in Bronx County, not Ulster County, the county listed as his place of residence on his driver's license, "absen[t] … any probative documentary evidence showing a Bronx residence when the action was commenced." See also, Darbeau v. 136 West 3rd Street, LLC, *supra* [defendant's

affidavit claiming that he lived in Queens County was "insufficient to satisfy burden of showing that venue chosen by plaintiff was improper," given DMV records showing defendant resided in Bronx.]; Furth v. Elrac, *supra* (2nd Dept. 2004)[defendant driver who listed address in Kings County on police report was "required to establish, through documentary evidence," that he was actually a resident of another county at time action was commenced in order to meet his burden that a change venue should be granted]; see also, Labissiere v. Roland, 231 A.D.2d 687 (2nd Dept. 1996).

Myriad other cases support the conclusion that defendants at bar failed to meet their *prima facie* burden and establish that venue in Bronx County was improperly selected. See, *e.g.*, Broderick v. R.Y. Management Co., Inc., *supra* [Defendant's motion to change venue from Bronx County to New York County, based upon an affidavit claiming that its principal and only office was in New York County, was properly denied by lower court as no documentation was submitted to support that claim and defendant's affidavit was "insufficient evidence" to establish that venue had been improperly placed in Bronx County, particularly in light of documentation submitted by plaintiff that defendant did, in fact, have offices at two different Bronx locations]; Singh v. Empire International, Ltd., *supra* ["conclusory affidavit attesting to a Queens County residency, unsupported by documentation of such residency, was insufficient to satisfy defendant's initial burden of showing that the venue chosen by plaintiff was improper."]; Book v. Horizon Asset Management, 105 A.D.3d 661 (1st

Dept. 2013) [self-serving and conclusory affidavit with no supporting documentation claiming a Bronx residence was insufficient to establish residency for venue purposes]; Furlow v. Braebrun, 259 A.D.2d 417 (1st Dept. 1999)[plaintiffs' conclusory affidavits attesting to Bronx residency, unsupported by any documentation, insufficient to rebut motor vehicle records showing plaintiffs resided in Westchester County]; Gonzalez v. Weiss, *supra* [conclusory affidavits insufficient to establish that defendants were not residents of Kings County at time action commenced given contrary proof submitted in the form of motor vehicle and medical records]; McKenzie v. Maj Transit, Inc., 204 A.D.2d 154 (1st Dept. 1994)[defendant's affidavit that he lived in Queens County was insufficient, standing alone, to satisfy his burden of proof on motion to change venue where his driver's license listed an address in Bronx County].

At bar, neither Goldstein nor Westmed has proffered any such proof. In fact, despite ample opportunity below, Westmed and the other moving defendants made a deliberate, conscious decision not to submit any of the easily available documentary evidence, such as work schedules, tax records, billing records, appointment books or the like, which could have laid bare the truth regarding Goldstein's claims. Indeed, Westmed provided only the most minimal of "support," a conclusory affidavit by its medical director which simply asserted that Goldstein was one of its employees, nothing more, not even anything attesting to or corroborating his claimed hours, the

number of his patients, his work schedule or even how long he had been employed there. (R. 79-81)

Nevertheless, Westmed asks this Court to afford them special treatment by accepting Goldstein's affidavit at face value while ignoring Goldstein's repeated, official, sworn New York State professional registration filings, as well as the other proof that he regularly practiced in the Bronx. As the majority of the Appellate Division correctly noted, however, the circumstances at bar are qualitatively and substantively different from the proof submitted by the plaintiff in DiCicco v. Cattani, *supra*, upon which Westmed so heavily relies. (R. 165, *fn*. 1) In DiCicco, the proof consisted not of sworn filings, but only of unofficial medical websites and a copy of defendant's letterhead, both of which listed defendant's office addresses.

Similarly, in Kielczewski v. Pinnacle Restoration Corp., *supra*, also relied upon by Westmed, the proof of defendant's principal office location amounted to nothing more than a "c/o" mailing address set forth in an unsworn filing with the County Clerk, an obvious indication that its principal office location might be located elsewhere. Regardless, it was not an official sworn registration statement filed with a State professional licensing agency.[5]

[5] Westmed's counsel appears to take umbrage with the Appellate Division majority's finding that Goldstein maintained a "regular practice" in Bronx County, arguing that even if Goldstein had a regular practice in the Bronx, that does not necessarily make it his principal office location. Westmed's Brief at 12-13. While that may or may not be true, where a party regularly practices his or her profession would seem to be a significant factor for a court to consider when determining that same party's principal office location, particularly when there are also, as here,

Finally, while the court in Harvey v. Ogunfowora, 179 A.D.3d 779 (2nd Dept. 2020), may have denied the defendants' motion to change venue because it found that an attorney's affirmation alone, absent supporting affidavits by the defendants themselves, was insufficient to *prima facie* establish defendants' residency in a different county, there was no broader statement or pronouncement that such an affidavit by a defendant would satisfy a defendant's burden of proof as to residency in every case regardless of facts or other proof of residency submitted by the parties.

c. There is no requirement under CPLR §503(d) that the underlying events giving rise to the action must have occurred in the county wherein defendant's principal office was located.

In an effort to circumvent these fatal deficiencies, Westmed's counsel attempts to bootstrap an additional requirement as a basis for venue under §503(d) – that the underlying malpractice or events must also have occurred in the county of defendant's principal office. This argument has no merit.

The only requirement for venue based on a professional's office location is that the underlying events relate to the defendant's business or profession, not that they must also have occurred in the same county. Thus, in the seminal case of Young Sun Chung v. Kwah, 122 A.D.3d 729 (2nd Dept. 2014), the court held that plaintiff had

unexplained, sworn registration filings by that same party attesting to a professional address in the same county where he frequently practices and conducts business.

correctly chosen Kings County as the venue for his medical malpractice action based upon defendant's principal office location in Kings County, even though no party resided in Kings County and the malpractice had occurred in Queens County. See, Young Sun Chung v. Kwah, 2013 WL 5184731 (Sup. Ct., Kings Cnty. 2013)[trial court decision]. Hence, Westmed's claim at p. 12 of its Brief that no appellate court has upheld venue under similar circumstances is simply incorrect. See also, Bostick v. Safa, 122 A.D.3d 729 (2nd Dept. 2019) [venue properly placed in Kings County where individual defendant's principal office was located even though malpractice was claimed to have occurred in Suffolk County].

Similarly, Westmed's reliance on Venuti v. Novelli, 179 A.D.2d 477 (1st Dept. 1992) is also misplaced. There, the court held that Bronx County had been chosen improperly based upon defendant's principal office location because the underlying claims had nothing to do with defendant's video repair business, located in the Bronx, not because the underlying events had not occurred in the Bronx. Notably, the Court recognized that venue would have been proper in the Bronx had those underlying events – which occurred in Westchester County – had some connection to defendant's video repair business. The same result was reached in Berman v. Gucciardo, 50 A.D.3d 717 (2nd Dept. 2008), where venue was held to be improper in the county of plaintiff's principal office location because the underlying events were "not related to plaintiff's law practice," not because they had not occurred in Queens.

See also, Friedman v. Law, 60 A.D.2d 832 (1st Dept. 1978)[action involving issue of ownership of cooperative apartment in Manhattan was improperly venued in Kings County, the location of one defendant's law practice, because the underlying claims were unrelated to the defendant's practice of law].

There has never been any requirement under §503(d) that the underlying events must also be connected to the county wherein defendant's principal office is located; the only requirement is that the underlying events be related to the defendant's professional or business activities. Westmed has cited no authority to the contrary and that they found several older cases where a change of venue was granted because the defendant's principal office location was also in the county where the underlying events happened to have occurred scarcely mandates the opposite result here. See, Shanahan v. Klinginstein, 280 A.D.2d 464, (2nd Dept 2001); Castro-Recio v Rottenberg, 287 A.D.2d 532 (2nd Dept. 2001); and Magrone v. Herzog, 304 A.D.2d 801 (2nd Dept. 2003).[6]

Rather, in each of those cases, after specifically first finding that venue was not placed in the same county as defendant's principal office location based on the

[6] Westmed also cites Jacobson v. Gaffney, 178 A.D.3d 1026 (2nd Dept. 2019), in support of this claim. In that case, however, according to the underlying briefs, the court granted a change of venue from Dutchess County to Tompkins County because the proof showed that the individual defendant had his principal office in Tompkins County including that he had formed his own professional corporation which had designated Tompkins County as its principal place of business. Similarly, here, Goldstein designated Bronx County as his principal office location.

proof submitted, the courts simply noted that the underlying events had also occurred in the same county. None of these cases, however, specifically addressed the issue of whether the underlying events also must have had to have occurred in the same county as the principal office location, nor dictated or created any such mandate, and the Second Department's subsequent holdings in Young Sun Chung v. Kwah and Bostick v. Safa, *supra,* proved that this was not the rule defendants would now have this Court enact.

At bar, since there is no question that plaintiff's claims arise from Goldstein's professional activities as a podiatrist, the fact that the underlying treatment may have occurred in Westchester does not in any way render venue in Bronx County improper.[7]

d. Westmed's claim that there is a legislative preference that venue be placed in the county where the underlying events occurred is unpreserved and should not be considered by this Court; regardless, no such preference exists.

Westmed argues here for the first time in this case that the "recent" amendment to CPLR §503(a) – which a few years ago added the provision permitting venue to be placed in the county in which the underlying events occurred – supports a

[7] Moreover, even if – as Westmed's counsel wrongly suggests – some actual connection of the underlying events to Bronx County was required, such a connection did, in fact, exist. Defendant-respondent Prakash, the assistant surgeon during the procedure in which the malpractice took place, was a podiatry resident in Goldstein's teaching program at St. Barnabas Hospital and participated in plaintiff's surgery under Goldstein's supervision only because of his role as a resident in that hospital's program. (R. 40) Goldstein, assistant director of the St. Barnabas residency program was acting in that role, supervising Prakash during the very procedure in which plaintiff alleges she was injured. *Id*. Hence, a significant nexus to Goldstein's and Prakash's professional activities in the Bronx does exist.

change of venue at bar.[8] This argument, however, was never asserted at *nisi prius* or in the Appellate Division and, therefore, is unpreserved for consideration by this Court. See, *e.g*., Misicki v. Cardonna, 12 N.Y.3d 511 (2007); Elezaj v. P.J. Carlin Constr. Co., 89 N.Y.2d 992 (1997).

The rationale behind this rule is quite simple; it prevents one party from prejudicing another by raising arguments without proper notice or the development of a proper record. As this Court stated succinctly in Misicki:

> "We are not in the business of blindsiding litigants, who expect us to decide appeals on rationales advanced by the parties, not arguments their adversaries never made."

Misicki v. Cardonna, *supra*, at 519 (emphasis added).

The Misicki court continued:

> "Our system depends in large part on adversary presentation. Our role in that system 'is best accomplished when [we] determine[] legal issues of statewide significance that have first been considered by both the trial and the intermediate appellate court.' (People v. Hawkins, 11 N.Y.3d 484, 493 [2008, Kaye, C.J.])"

Id., at 519. (emphasis added)

At bar, neither plaintiff nor the two lower courts were provided with any opportunity to address this claim of a purported "legislative preference" and plaintiff

[8] The amendment was passed in October 2017 and took effect on January 1, 2018.

has not been afforded any chance to develop any record opposing this belated, unpreserved claim. Hence, it should not be considered by this Court.

Even if this Court had jurisdiction to consider Westmed's belated argument, the claim still must fail; it is not just unpersuasive but irrelevant. When plaintiff commenced this action in January 2018, she had the option of placing venue based upon her residence, the place of occurrence, defendant's residence [CPLR §503(a)] or defendant's principal office location [CPLR §503(d)]. All of these options stood on equal legal footing based upon the legislative scheme; no choice was then or is now somehow favored or preferred under the statute than any other.

When the legislature added the *situs* of events as a choice, had it intended also to affirmatively make venue based upon the *situs* a preferred choice, as Westmed's counsel now argues, it could simply have replaced the venue provisions based upon residency or principal office, not just added an additional option to the existing ones, which it left untouched. It could also have made the location of the events an option or a supportive factor for a discretionary change of venue under CPLR §510(3) – it did not. Thus, plaintiff's choice is entirely consistent with the statutory scheme which afforded her those options.[9]

[9] Further, while §503(a) was amended to add the county where the underlying events occurred as an additional basis for venue, §503(d), the section plaintiff relied upon, was not.

Indeed, as the sponsoring memorandum quoted by Westmed explains, it was the legislature's view that the venue options were too "restrictive" and should also allow venue to be based upon the place of the underlying events if that was what a plaintiff chose. Hence, Westmed's argument is actually contrary to the legislature's intent in amending the statute. See also, Harrington v. Cramer, *supra*, 129 Misc.2d at 490 ["Subdivision (d) (of CPLR 503) is designed to give additional county residences to residents of this State for the purposes of determining the venue of an action. (citation omitted)." (emphasis added)].

Therefore, at the end of the day, it remained and remains plaintiff's choice. So long as venue was properly selected based upon the principal office location of one of the parties, as it was here, there is simply no statutory basis or preference for changing venue based upon where the underlying events occurred.

Moreover, it is abundantly clear based upon the case law and the statutory framework regarding venue that except for cases involving municipalities or public authorities, New York has never traditionally preferred venue based upon the *situs* of the events in cases involving private litigants, and has never required that there be any nexus between the county selected and the underlying events. Even now, venue based upon residence of one of the parties, whether the home or principal office location, can only be changed to the place of the incident where a discretionary change of venue is

sought under CPLR §510(3) in the interests of justice or for the convenience of non-party witnesses.

Notably, while Westmed made the argument at *nisi prius* that non-party witnesses' convenience warranted such a change of venue at bar, it never submitted any of the requisite proof to support it. Westmed made the same half-hearted witness-convenience argument in the Appellate Division, which the majority of that court also rejected, but does not advance any such argument in its Brief to this Court. Hence, Westmed has effectively abandoned its attempt to obtain a discretionary change of venue. See, *e.g.*, Court of Appeals Rules of Practice, §500.11(f).

Finally, Westmed's claim that a jury in Westchester should decide whether the care rendered by defendants met or was consistent with "community" standards is meritless. Beside the fact that counsel has not addressed how, in this day and age, the standards for care and treatment in the Bronx may somehow differ from those in adjacent Westchester, much less submitted any proof to that effect, it was and is plaintiff's right under the statutory scheme – not defendant's – to select the community which will decide the fate of her case.

CONCLUSION

Based upon the foregoing, Westmed's appeal seeking reversal of the Appellate Division's decision and order should be denied in its entirety.

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September 30, 2020

Respectfully submitted,

Frank A. Longo
GOLOMB & LONGO, PLLC
Attorneys for Plaintiff-Respondent
370 Lexington Avenue, Suite 908
New York, NY 10017
(212) 661-9000

CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c)

The foregoing brief was prepared on a computer (word processor). A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

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