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COURT OF APPEALS

STATE OF NEW YORK

RACQUEL LIVIDINI,

Appellant,

-against-

NO. 57

HAROLD GOLDSTEIN,

Respondent.

20 Eagle Street
Albany, New York
September 2, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Ruth Millican
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.

2 The first appeal on this afternoon's calendar is
3 appeal number 57, Lividini versus Goldstein.

4 Counsel.

5 MR. RATNER: Good afternoon, Your Honor. My name
6 is Dan Ratner. I'm from Heidell, Pittoni, Murphy, and
7 Bach, may it please the court. I'd like to reserve two
8 minutes of rebuttal time - - -

9 CHIEF JUDGE DIFIORE: Yes.

10 MR. RATNER: -- if I can. Thank you. I
11 represent Rye Ambulatory Surgery and WestMed Medical Group.
12 No party into this medical malpractice action resides in or
13 has a principal place of business in Bronx County where
14 this case was venued, even though plaintiff placed venue in
15 Bronx County on the theory that one of the parties had a
16 principal place of business. That's not the case. Every
17 party resides in or has a principal place of business in
18 Westchester County, which is where the --

19 JUDGE RIVERA: I just - - - I just want to
20 clarify something, the statute actually says principal
21 office. So does not Dr. Goldstein have numerous offices,
22 certainly at least two in the Bronx.

23 MR. RATNER: Right. So - - -

24 JUDGE RIVERA: Am I not correct?

25 MR. RATNER: That is correct.



1 JUDGE RIVERA: Okay.

2 MR. RATNER: And we're making the distinction
3 between a principal office and a place where someone
4 regularly practices or practices some of the time.

5 JUDGE FAHEY: Could I ask this? What do you
6 think the purpose of requiring the mailing address in the
7 Education Law is rather than just say - - - just requiring
8 it bureaucratically? Why is it required in the law
9 statutorily?

10 MR. RATNER: Well, I suppose for one thing, it -
11 - - for service purposes, for process of service, which is
12 different than - - -

13 JUDGE FAHEY: Um-hum.

14 MR. RATNER: - - - venue, possibly that. I know
15 that in the Education Law, you're supposed to list a
16 mailing address, but also you're supposed to post your
17 certificate in every office that you work in. So I - - -
18 I'm not sure exactly what the purpose is, but for venue
19 purposes, there's nothing in the statute.

20 JUDGE FAHEY: I didn't - - - I didn't find any
21 legislative history on it because I was curious about the
22 same issue. But the analogy can be made to other
23 professions where it's done there. Have you thought about
24 that kind of in an analogy?

25 MR. RATNER: Well, I grant you that Dr. Goldstein



1 should have updated his license. There's no doubt about
2 that.

3 JUDGE FAHEY: Well, I'm thinking more about the
4 mailing address, the Education Law & that requirements say
5 for psychologists or for social workers, there are a number
6 of professional requirements in educational or for
7 teachers, lawyers, we're all required to do this.

8 MR. RATNER: I honestly don't know Your Honor.
9 But I - - - so I've been focused on the venue statutes,
10 which don't speak to where one regularly practices.

11 JUDGE FAHEY: Um-hum.

12 MR. RATNER: They speak to principal office or
13 where one has their - - - his or her abode. There's
14 nothing in those statutes that talk about - - - you can't
15 have the - - -

16 JUDGE RIVERA: So again, that's - - - that's my
17 problem with your argument. So he has at a minimum - - -
18 at a minimum two offices in the Bronx. One of them is the
19 one he used as a business office, not as a personal
20 address, for his registration to be licensed in the state
21 of New York. So I'm a little unclear why you think you've
22 met the burden given that he conceded those other offices.
23 The plaintiff then presents documentation about the
24 registration, which was missing from his affidavit. And he
25 doesn't give any real qualitative information or any



1 documentation to establish which office is a principal
2 office - - -

3 MR. RATNER: Well - - -

4 JUDGE RIVERA: - - - given - - - given as you
5 say, the registration, by the way, he did update it while
6 this was pending before the Appellate Division and again,
7 it shows the Bronx. So I'm not so sure there's really a
8 mistake on his part.

9 MR. RATNER: So Judge - - - so Judge, you know,
10 we did try to explain all that - - - well, Dr. Goldstein
11 explained it. It's in - - - it's in an affidavit. He
12 said, I practice - - -

13 JUDGE RIVERA: Yes. I've read his affidavit.
14 His affidavit says my principal place of business is
15 Westchester County. It doesn't say what's his principal
16 office, which is my problem because the statute says
17 principal office.

18 MR. RATNER: Well, he doesn't - - -

19 JUDGE RIVERA: And in any event, that's for a
20 court to decide. Obviously, it also requires certain
21 facts.

22 MR. RATNER: And I believe that the facts were
23 laid out in the affidavit in which he said that he is in
24 Westchester County four days a week.

25 JUDGE RIVERA: Um-hum.



1 MR. RATNER: He sees twenty to twenty-five
2 patients - - -

3 JUDGE RIVERA: Um-hum.

4 MR. RATNER: - - - a week in Westchester and also
5 supervises residents at St. Barnabas. I believe he said -
6 - -

7 JUDGE RIVERA: Um-hum.

8 MR. RATNER: - - - I believe he said two
9 afternoons per week. I think that it is - - - that was not
10 simply a conclusory affidavit. It was a detailed affidavit
11 in which he explained the nature of his practice.

12 JUDGE RIVERA: Yeah. But obviously - - -

13 MR. RATNER: He realized all - - -

14 JUDGE RIVERA: - - - something was missing since
15 it took the plaintiff to point out where he's actually
16 registered. So it does put in question this affidavit.
17 But in any event you didn't have any documentation for any
18 of that. Those are of course, statements that benefit his
19 conclusion as he has made it, right, his first statement,
20 my principle place of business. Again, not his principal
21 office - - -

22 MR. RATNER: Right.

23 JUDGE RIVERA: - - - principal place of business.
24 And again, I'm a little bit uncertain how you meet your
25 burden - - -



1 MR. RATNER: Well - - -

2 JUDGE RIVERA: - - - but let me ask you a
3 different question - - -

4 MR. RATNER: Sure.

5 JUDGE RIVERA: - - - apropos of what Judge Fahey
6 was asking you.

7 Did you challenge the consideration of Dr.
8 Goldstein under the venue statute 503(d) as having his own
9 business? Did you challenge that?

10 MR. RATNER: No. What we argued was we relied on
11 the Appellate Division case law that holds that where you
12 are being sued in your professional capacity - - -

13 JUDGE RIVERA: Um-hum.

14 MR. RATNER: - - - then the venue should be
15 placed where you have your principal office - - -

16 JUDGE RIVERA: Okay.

17 MR. RATNER: - - - arising from that - - -

18 JUDGE RIVERA: So then - - - so that - - - that's
19 fair enough. And that's what I thought. Thank you. So
20 then are we able then to address the question whether or
21 not that line of case law is correct, if you've not
22 challenged there, not challenged at here? Do we have to -
23 - - in other words, do we have to work from the assumption
24 that yes, that provision applies, and then make a
25 determination based on that?



1 MR. RATNER: Well, far be it for me to tell you
2 what you have to do, but no one has - - -

3 JUDGE RIVERA: Well - - -

4 MR. RATNER: - - - challenged that line of cases
5 if that's what you're asking me, Your Honor.

6 JUDGE RIVERA: Yes. That - - - that is what I'm
7 asking.

8 MR. RATNER: And it makes sense. It - - -

9 JUDGE RIVERA: Yeah.

10 MR. RATNER: - - - makes sense. This case arises
11 from his treatment of a patient under his employment by
12 Westchester Medical - - -

13 JUDGE RIVERA: Yeah.

14 MR. RATNER: - - - Group in - - -

15 JUDGE RIVERA: Right.

16 MR. RATNER: - - - Westchester County, so if he's
17 being sued in his professional capacity, it means - - -

18 JUDGE RIVERA: Well, then that's not his
19 principal office; is it? Isn't it WestMed and Rye's
20 principal office? His principal office is he has a
21 practice in the Bronx, right?

22 MR. RATNER: His - - - well, he - - - he wrote an
23 affidavit in which he said he has a practice under the
24 purview of WestMed in Westchester County. And I - - -

25 JUDGE RIVERA: He see - - -



1 MR. RATNER: - - - saw patients - - -

2 JUDGE RIVERA: - - - he says he sees - - - right.
3 He sees patients in all of these places. And then the
4 plaintiff puts forward documentation that his license - - -
5 his license is from an address in the Bronx, which is the
6 St. Barnabas Hospital address, which in his affidavit, he
7 alleges or avers that he is indeed seeing - - - excuse me,
8 supervising residents two days - - - at two clinics, excuse
9 me, two clinics. So obviously, he has a position of
10 status.

11 MR. RATNER: Yeah. I - - - and I guess, I
12 understand that, Your Honor.

13 JUDGE RIVERA: Um-hum.

14 MR. RATNER: But what I think this - - - this
15 reliance on where Dr. - - -

16 JUDGE RIVERA: Um-hum.

17 MR. RATNER: - - - Goldstein listed his address.

18 JUDGE RIVERA: Yes.

19 MR. RATNER: There's again - - - there's nothing
20 in there. It just says a mailing address.

21 JUDGE RIVERA: No, it doesn't say that.

22 MR. RATNER: It doesn't prevent you - - -

23 JUDGE RIVERA: Where does this - - - I've seen
24 the form. The form doesn't say mailing address - - - or
25 have I missed the form? Have you got a different form?



1 MR. RATNER: Well, I guess, I was - - - I was
2 referring to the Education Law itself, what the - - -

3 JUDGE RIVERA: Well, the Education Law refers to
4 a change of address, and then you can hyperlink, but the
5 actual form to apply for the registration requests your
6 name, your address, and then it says business or personal.
7 It tells you if you choose the business, that's going to be
8 made public, your phone number, your email. It doesn't say
9 mailing address. And even if it did, when did we get to
10 the point where a principal office is not necessarily your
11 mailing address?

12 MR. RATNER: Well, I guess I would contrast that
13 with a - - -

14 JUDGE RIVERA: Yeah.

15 MR. RATNER: - - - situation in which a corporate
16 entity is required to list its principal place of business
17 with the - - - with the - - -

18 JUDGE RIVERA: I think the application says your
19 office.

20 MR. RATNER: In the - - - in the education - - -
21 in this - - - in Dr. Goldstein's situation?

22 JUDGE RIVERA: Well, correct me if I'm wrong,
23 certificate of incorporation application, doesn't it just
24 say your office?

25 MR. RATNER: I believe it says principle office,



1 but I - - - I guess it - - -

2 JUDGE RIVERA: No, I'm - - - I'm asking you.

3 MR. RATNER: I guess I'd have to say I'm not
4 exactly sure then. I'm sorry - - -

5 JUDGE RIVERA: Um-hum.

6 MR. RATNER: - - - Your Honor.

7 JUDGE WILSON: Could I try a - - - a different
8 tact, a little bit broader question. So take for granted
9 that an important objective for us, and I'm not saying it
10 is, but take for granted for a moment for this. The
11 minimization of litigation of venue, which, you know, maybe
12 is sort of, a waste of time, but it isn't really about the
13 merits. And we would like to have a rule that minimizes
14 that. What would that rule be? How would we do that?

15 MR. RATNER: Well, I think the starting point
16 would be where a physician is sued in his or her
17 professional capacity, that it should be where the
18 principal office is located. I think that the Appellate
19 Division has spoken on that. I think the Court of Appeals
20 ought to agree.

21 Secondly, I think that there should be a
22 distinction between a - - - a conclusion in an affidavit
23 versus a conclusory affidavit, if you will. In other
24 words, in this case, Dr. Goldstein, he laid out how - - -
25 what his practice. So I think it's --



1 JUDGE WILSON: But let - - - just let me - - -
2 let me just ask you this then, put a sharper point on it.
3 Suppose we had a rule that said whatever you put on this
4 form, venue's going to be proper there. That would seem to
5 eliminate a lot of back and forth, right?

6 MR. RATNER: I suppose that is correct. And I
7 suppose that if the legislature wanted to - - - to do
8 something with the venue statutes along those lines, sure.
9 Sure. But the legislature has spoken about this. And at
10 the end - - - and it has made a distinction between where -
11 - - well, it hasn't even mentioned the issue of where one
12 practices. It's a principal office. And I think that we
13 met our burden on that issue of establishing that Dr.
14 Goldstein's principal office was in Bronx County. I could
15 see them - - - excuse me, in Westchester County. I could
16 see my time is up.

17 CHIEF JUDGE DIFIORE: Thank you, Counsel.

18 JUDGE FAHEY: Can I - - -

19 CHIEF JUDGE DIFIORE: Oh, yes - - -

20 JUDGE FAHEY: Is it all right, Judge - - -

21 CHIEF JUDGE DIFIORE: - - - Judge Fahey. Excuse
22 me.

23 MR. RATNER: All right. Sure.

24 JUDGE FAHEY: How would you address the - - -
25 what the Appellate Division refers to is a lack of



1 documentary proof?

2 MR. RATNER: Well, I - - - that was what I was
3 getting at when I was making a distinction between
4 conclusory and - - - and conclusion.

5 I think that a medical doctor who submits a sworn
6 affidavit that lays out in detail, the nature of his or her
7 practice, that ought to be good enough. I understand if it
8 was a conclusory affidavit. And then you need to prove,
9 you know - - -

10 JUDGE FAHEY: You know, I think it's a - - -
11 these cases sometimes go to the weight of the evidence.

12 MR. RATNER: Right.

13 JUDGE FAHEY: And the way I read that was that -
14 - - that you had offered some proof, but the weight wasn't
15 sufficient to convince them, and that documentary evidence
16 was that would have helped that.

17 MR. RATNER: Right. And I think, if I could just
18 say one more thing, I think Judge Wilson might not like
19 this, but I would say then in that case, in order - - -

20 JUDGE WILSON: You never know what Judge Wilson
21 is going to like. You know, don't - - - don't - - -

22 MR. RATNER: But - - -

23 JUDGE WILSON: - - - don't presume that.

24 MR. RATNER: - - - I guess, what I would say is
25 that at the worst then, then have a small hearing. Let Dr.



1 Goldstein - - - you know, if there's a little bit of a
2 credibility issue. But there really wasn't in this case,
3 Your Honor.

4 JUDGE FAHEY: Well - - -

5 JUDGE RIVERA: Did you ask him the alternative of
6 - - -

7 MR. RATNER: I - - -

8 JUDGE RIVERA: - - - well, no, you won on the
9 menu, the venue - - -

10 MR. RATNER: - - - that was the problem - - -

11 JUDGE RIVERA: - - - motion.

12 MR. RATNER: We were the - - -

13 JUDGE RIVERA: Yeah.

14 MR. RATNER: Right. We were the respondent. I
15 did hear in response to the argument that was made by - - -
16 by - - -

17 JUDGE RIVERA: Um-hum.

18 MR. RATNER: - - - by opposing counsel.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 MR. RATNER: Thank you.

21 CHIEF JUDGE DIFIORE: Counsel.

22 MR. LONGO: Thank you, Your Honors. My name is
23 Frank Longo of Golomb & Longo, PLLC in Manhattan. We
24 represent the plaintiff Racquel Lividini in this appeal.
25 May it please the court, Counsel, I believe that the First



1 Department correctly determined that Dr. Goldstein and the
2 other defendants had not meet their burden in establishing
3 that venue was improperly placed in Bronx County.

4 JUDGE WILSON: Counsel, is there something he - -
5 - over here. Sorry.

6 MR. LONGO: Yes, I'm sorry, Judge.

7 JUDGE WILSON: Is there something he could have
8 said or some evidence he could have introduced to overcome
9 the form? And what would that be if there - - - if any?

10 MR. LONGO: Dr. Goldstein? Yes, I believe he
11 could have. First of all, address the issue in his
12 affidavit as to why he listed this address in the Bronx as
13 his business address.

14 JUDGE WILSON: And so if he - - -

15 MR. LONGO: He never addressed that at all.

16 JUDGE WILSON: And so - - - so what could he have
17 said that would have then prevailed - - -

18 MR. LONGO: Well, he could have said, you know,
19 said I forgot to update it. He could have - - - he could
20 have said that - - - I don't think he - - -

21 JUDGE WILSON: It's just more convenient for me -
22 - -

23 MR. LONGO: But let me just say this.

24 JUDGE WILSON: Sure.

25 MR. LONGO: I don't think he forgot to update it



1 because as - - -

2 JUDGE WILSON: Now, I'm asking - - - I'm asking
3 something completely different. I would like to know what
4 you think at a minimum he could have said to controvert the
5 filing.

6 MR. LONGO: He could have said - - - first of
7 all, he doesn't really address the issue of how much time,
8 or he spends in the Bronx with all of these activities that
9 he admitted performing; the clinics, the office, hundreds
10 of patients he admitted seeing every month in the Bronx.
11 He's on - - - he's the assistant director of the podiatry
12 department - - - of podiatry residency program at St.
13 Barnabas. As the Court I think noted earlier, he worked
14 out of WestMed's offices, not out of his own office. His
15 own office was on Bronxdale Avenue in the Bronx. And
16 that's where we served him. And there was no objection.

17 JUDGE WILSON: Well, you're giving a whole lot of
18 reasons why he didn't. I'm asking you, what could he have
19 put into an affidavit or provided by the way of documentary
20 proof to satisfy - - -

21 MR. LONGO: Right.

22 JUDGE WILSON: - - - you that venue was not
23 proper in the Bronx?

24 MR. LONGO: Well, I think one would've been to
25 explain why he used the Bronx address - - -



1 JUDGE WILSON: And so if he said - - -

2 MR. LONGO: - - - and put it in the form.

3 JUDGE WILSON: And what would be a good
4 explanation?

5 MR. LONGO: I don't know. I don't think there is
6 one.

7 JUDGE WILSON: Well, okay. Then that's not
8 something he could have said. So now, go back - - -

9 MR. LONGO: So he could of put in patients'
10 schedules. He could've put in appointments schedules - - -

11 JUDGE WILSON: Patient schedules that - - -

12 MR. LONGO: - - - he could have - - -

13 JUDGE WILSON: Sorry. That showed what?

14 MR. LONGO: That showed how much time he spent in
15 each - - -

16 JUDGE WILSON: And - - -

17 MR. LONGO: - - - each place.

18 JUDGE WILSON: - - - and what amount of time
19 would be sufficient?

20 MR. LONGO: A majority of the time.

21 JUDGE WILSON: Okay.

22 MR. LONGO: He only - - - the only reference he
23 makes to that in his affidavit is that seventy-five percent
24 of his income is made in Westchester. But you know, there
25 could be a lot of scenarios where you have a principal



1 office somewhere and make most of your income somewhere
2 else.

3 JUDGE GARCIA: So Counsel - - - Counsel, to
4 follow up on that, if he didn't have this form, but you had
5 all these other things, would venue be proper in the Bronx?

6 MR. LONGO: I believe it would be under this - -
7 -

8 JUDGE GARCIA: So you didn't need the form here.

9 MR. LONGO: No, we need the form. I think the
10 form is a compelling piece of evidence showing that this is
11 where he affirmed and really designated his place of
12 business.

13 JUDGE GARCIA: So my question here then following
14 up is, New York has a very generous venue statute, much
15 more generous in these circumstances than the federal, for
16 example, because the plaintiff can actually venue the case
17 where the plaintiff lives, which is pretty accommodating.
18 And despite that very generous venue statute, we find
19 ourselves in the position of looking at whether or not an
20 address listed on a form is a mailing address or is it a
21 principal office. I mean, given the rules that we have
22 here and the fairly easy way it is to venue something in a
23 convenient spot for the plaintiff, namely where the
24 plaintiff lives, which is fairly unique, why are we going
25 to get into this business? Like, why are we parsing



1 through a form that doesn't really set a firm criteria for
2 what this address is to see if it's the equivalent of one
3 of the ways under our very generous statute you could get
4 venue in the Bronx?

5 MR. LONGO: Well, Your Honor, I think that, first
6 of all, I don't believe this is just a form. This is a
7 licensing-registration document that you must file with the
8 New York State Department of Education, which you have to
9 swear to and which you have to file and complete accurately
10 in order to practice your profession. So I don't equate
11 this - - -

12 JUDGE CANNATARO: But there's no - - - excuse me,
13 but there's no dispute here that that's a good address. He
14 works there. He acknowledges that he works there. But
15 what is it about the form or the regulations that compel
16 it, that give it such dispositive effect in this case or
17 any other case?

18 MR. LONGO: Well, I don't know that if - - - the
19 case law as it's developed in venue has shown that when you
20 affirmatively designate an address with the state, whether
21 it's Department of Motor Vehicles, a corporate address, an
22 address with OCA, you're bound by the address that you put
23 in those - - - in those registration documents.

24 I think the better rule to follow is look, if
25 you're going to affirmatively represent where your office



1 is or where you practice in a state document, you should be
2 bound by that. And a lot of this other stuff shouldn't
3 really matter.

4 JUDGE CANNATARO: Okay. Can - - -

5 MR. LONGO: But on top of that, we showed that
6 she does have substantial - - -

7 JUDGE RIVERA: Well, I think the issue is - - -
8 sure, he's conceding in his affidavit that he works at St.
9 Barnabas Hospital, right. He supervises at two clinics at
10 the hospital. So it is a business address of his, but the
11 statute says a principal office. And so he's arguing that
12 the affidavit otherwise is an attempt to say that my
13 principal office, because I've got several offices, is
14 here. I mean, I think there's a problem as I already said
15 with the questions that he doesn't really talk about an
16 office, just a county. And that's not what the statute
17 says. But put that one aside for a moment.

18 If you're - - - if you're like this practitioner,
19 I would assume there are many like this practitioner, you
20 have more than one office. Certainly the statutes
21 recognize that because you've got these other certificates
22 that are supposed to be tied to other offices where you
23 regularly practice. What - - - what is magical, let me put
24 it that way, about the application that we should say - - -
25 other than perhaps as Judge Wilson was suggesting before



1 that there's some practicality to just saying that's - - -
2 we'll just say that your principal office. That avoids all
3 of this. Is there something else that's inherent in the
4 form - - -

5 MR. LONGO: Well, I just think the - - -

6 JUDGE RIVERA: - - - that - - - that would
7 suggest that, of course you've listed your principal
8 office?

9 MR. LONGO: Well, because I think when you
10 register your profession with the state, whether it's a
11 corporation or - - - or a driver's license, they're
12 expecting you to put the address that - - - where you are
13 for that profession or for that business. And the only way
14 to know is by what you affirmatively put down as the
15 applicant.

16 JUDGE SINGAS: Well, shouldn't they say that - -
17 -

18 MR. LONGO: You know, we are - - - we're - - -

19 JUDGE SINGAS: - - - shouldn't they say that more
20 explicitly - - -

21 MR. LONGO: Yeah.

22 JUDGE SINGAS: - - - shouldn't people be on
23 notice that when they provide that address for what purpose
24 it will be used. Are we - - - are we just - - -

25 MR. LONGO: I mean, it - - - well, it - - - it -



1 - -

2 JUDGE SINGAS: - - - to just surmise.

3 MR. LONGO: I'm sure it would help. And - - -
4 but I think it's kind of self-evident, in a way, that when
5 you're doing your registrations for your profession, that
6 you put the address accurately where you practice.

7 JUDGE SINGAS: In some of the forms - - -

8 MR. LONGO: I think it's the judge noted that - -
9 -

10 JUDGE SINGAS: - - - in some forms, you can put
11 your personal address, your home address.

12 MR. LONGO: Right. But I think as the Judge
13 noted, the form has you know, different addresses. What's
14 your business address? And that's part of the problem why
15 Goldstein's affidavit is not - - - he's not even here by
16 the way arguing today. He - - - you know, doesn't explain
17 what he meant by it. So I think that makes his affidavit
18 deficient as well because you know, he's the only one who
19 really can say what I intended when I filled this out. And
20 he doesn't - - -

21 JUDGE FAHEY: Well, isn't - - - isn't - - -

22 MR. LONGO: - - - he doesn't even talk about.

23 JUDGE FAHEY: Isn't that the - - - it seems to me
24 that - - - seem - - - is the core of the Appellate
25 Division's decision, which is this is a burden-of-proof



1 question. The Appellate Division says he didn't meet his
2 burden of proof here, prima facie proof. It's straight
3 forward. Well, and I - - - he didn't - - - his weight was
4 insufficient here. And both, it wasn't prima facie, so
5 therefore it was also insufficient as to weight. So the
6 only way for us to touch this is we would have to say that
7 as a matter of law, that affidavit would be sufficient to
8 establish venue.

9 MR. LONGO: I agree. And I don't think that,
10 with all due respect, you should do that.

11 JUDGE FAHEY: In other words, it would - - - we
12 could not - - - we can't engage in a factual evaluation.

13 MR. LONGO: And I - - -

14 JUDGE FAHEY: That's beyond our powers.

15 MR. LONGO: - - - and I would just also point out
16 that in situations where, you know, there has been issues
17 over an address and where it was inaccurate, and one party
18 comes forward with proof as we did of a - - - you know - -
19 - sworn-registration document as well as other proof, the
20 courts have consistently said, you have to do more than
21 just put in an affidavit, says I don't live there, or I
22 don't - - -

23 JUDGE FAHEY: Well - - -

24 MR. LONGO: - - - work - - -

25 JUDGE FAHEY: Yeah. But I - - - I don't know if



1 what you put in is particularly relevant because the
2 Appellate Division pretty much said he didn't meet his
3 burden period. They're done.

4 MR. LONGO: I agree with that, Your Honor.

5 JUDGE FAHEY: Yeah.

6 MR. LONGO: But I had to address it with this.

7 JUDGE FAHEY: In terms of the shifting burdens
8 it's kind of straight forward legally.

9 MR. LONGO: Absolutely.

10 JUDGE SINGAS: Are you suggesting, Counsel, that
11 a sworn affidavit is not enough, that we need documentary
12 evidence?

13 MR. LONGO: I'm saying that in this situation,
14 it's not enough. In another situation - - - yeah, it's
15 hard to say. I can't say a thousand percent, but I think,
16 you know, certainly in situations where you put in a sworn-
17 registration document, you have undenied proof of all of
18 these professional activities in the Bronx. You have to do
19 something more than just putting in - - -

20 JUDGE RIVERA: Well - - -

21 MR. LONGO: - - - an affidavit.

22 JUDGE RIVERA: Do you dispute when you - - - his
23 averment that 75 percent of his time and revenue is gained
24 through the work at WestMed in Westchester County?

25 MR. LONGO: I have no way of knowing - - -



1 JUDGE RIVERA: Do you dispute that? I mean,
2 that's in the affidavit. Do you dispute that? Did you
3 dispute that? I mean, I know you objected. I understand
4 that.

5 MR. LONGO: Right.

6 JUDGE RIVERA: And your point was always, he has
7 a practice in the Bronx, and this is the form. I'm asking
8 a different question. Do you dispute these other
9 averments?

10 MR. LONGO: I dispute them to the extent that
11 there's no proof behind what he says.

12 JUDGE RIVERA: And did - - - and did you say
13 that? Did you argue that - - -

14 MR. LONGO: Yes. Well, that - - -

15 JUDGE RIVERA: - - - in the objection?

16 MR. LONGO: - - - was part of my argument that -
17 - -

18 JUDGE RIVERA: In the objection?

19 MR. LONGO: - - - he didn't meet his burden of
20 proof and that was part of it.

21 JUDGE RIVERA: Um-hum.

22 MR. LONGO: You know, he didn't.

23 JUDGE CANNATARO: Would his affidavit have met
24 your requirement if he had attached say his appointment
25 book or his billing records? Would - - - would even be



1 here arguing this, if that had happened - - -

2 MR. LONGO: If I - - - I - - -

3 JUDGE CANNATARO: - - - and it supported his
4 allegation?

5 MR. LONGO: Right. I'd have to look at it. But
6 that certainly would - - - would - - - I think, go more
7 towards meeting his burden of proof. But I - - - you know,
8 we're doing this at a time where we don't have any
9 discovery on any of these issues. So we're working on what
10 we were able to find in our investigation.

11 And you know, to the point made earlier about,
12 you know, why the Bronx; why not Westchester? I mean,
13 there are - - - these are different departments, the Bronx
14 and Westchester. One's first; one's second. If there are
15 appellate issues, I mean, a difference right now is the
16 backlog of cases. If you have an appeal in one department,
17 it's going to be heard a lot sooner than in another.

18 There are also issues that can come up in
19 discovery where one department may have different views
20 than another, that may or may not affect the case.

21 So I don't think, you know, it's - - - there are
22 very valid, legitimate reasons why a party would want to
23 place a case in the first department as opposed to the
24 second.

25 And you know, I did quite frankly - - - when I



1 was going through the brief last night, I was a little
2 offended by the dissent's - - - the first department's
3 dissent, where they kind of compared this case to Koschak,
4 where, you know, a plaintiff and their lawyer actually
5 conspired to change venue to the Bronx from Staten Island.
6 The plaintiff moved five days before the complaint was
7 filed. The attorney bought the house and financed it for
8 the plaintiff. I mean, to compare what we're doing here to
9 that is really - - - it's unfair. And I was offended by
10 it. And - - -

11 JUDGE RIVERA: Is - - -

12 MR. LONGO: - - - and you know, the - - -

13 JUDGE RIVERA: Let me ask you this. Is there
14 anything in the record that shows sort of over the course,
15 he's obviously been practicing more than 20 years because
16 he indicates that he's been at WestMed for 21. Is there
17 anything over - - - in the record that shows over the
18 course of time, whether or not the St. Barnabas address has
19 always been the address or if that has changed over time?
20 Is there anything like that in the record?

21 MR. LONGO: There's nothing in the record or in
22 his affidavit that addresses that.

23 JUDGE RIVERA: Okay. Thank you.

24 MR. LONGO: There is proof in the record, though,
25 that since this has happened, he's actually renewed his



1 registration twice. And both times is again, listed the
2 Bronx.

3 JUDGE RIVERA: Oh, I'm sorry. I only noticed
4 one. There's twice in the record?

5 MR. LONGO: I believe there's an update. I
6 looked at it last night. He's now, I believe, registered -
7 - -

8 JUDGE RIVERA: Oh, I see. But that's the - - -
9 or as the record, you mean as a public - - - public
10 information?

11 MR. LONGO: Yes. Correct. Yes.

12 JUDGE RIVERA: Okay. Thank you.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 MR. LONGO: Thank you, Your Honor.

15 CHIEF JUDGE DIFIORE: Counsel, you're - - -
16 you're rebuttal.

17 MR. RATNER: Yes. Just quickly, Your Honor. I
18 believe counsel said when asked, you know, how he would
19 define, you know, principal office, I believe he said where
20 he - - - where one would spend the majority of his or her
21 time. I think the affidavit clearly lays out that the
22 majority of Dr. Goldstein's time was spent working at a - -
23 - at WestMed facilities - - -

24 JUDGE RIVERA: Well, which - - -

25 MR. RATNER: - - - Westchester County.



1 JUDGE RIVERA: So he's got several places he
2 practices in Westchester County. Which one's the principal
3 office?

4 MR. RATNER: You know, I - - - it's the county
5 where - - - well, it's - - - it's WestMed has its
6 headquarters in one place. But he splits his time between
7 Rye and White Plains - - -

8 JUDGE RIVERA: Yeah. So which one is it?
9 Because obviously, you seem to - - - and I can understand
10 why. You're not arguing it's the hospital in White Plains
11 because of course, he gives no information about that. So
12 when - - - it's very hard to draw from this affidavit that
13 he's arguing that would be a principal office. Which - - -
14 which one is it?

15 MR. RATNER: Well, put it this way. He says he
16 spends two full days in White Plains and one-and-a-half
17 days in Rye. So I guess White Plains is fairly - - -

18 JUDGE RIVERA: So is - - - is that how one
19 measures principal office, number of hours in an - - - in
20 an office - - - in a physical office?

21 MR. RATNER: Well, I think to where he sees the
22 most patients, the revenue, those things weigh into - - -

23 JUDGE RIVERA: What - - - what if - - -

24 MR. RATNER: - - - too, it's not simply time.
25 That's - - -



1 JUDGE RIVERA: What if in - - - let's say you had
2 the hearing, what if it turns out that the Bronx practice
3 not only has all these - - - all hours and the patients he
4 says he sees, and the residents he supervises, though, I
5 don't think he said how many residents he supervises, so we
6 don't really know that way. But it turns out that he
7 actually spends many, many, many hours beyond that, beyond
8 that to prepare for all of that work in the Bronx. And
9 afterwards, whether it's the billing I have - - - has a
10 private practice at the pavilion, right?

11 MR. RATNER: I suppose if the Court - - - if this
12 Court offers some more guidance to the lower courts, we
13 could have a hearing and resolve all these issues. And
14 then I would try to argue that there was - - -

15 JUDGE RIVERA: But see that's my - - -

16 MR. RATNER: - - - an abuse of discretion.

17 JUDGE RIVERA: - - - that's my - - -

18 MR. RATNER: - - - and I - - -

19 JUDGE RIVERA: - - - that's in part my point. It
20 it's your burden. It's his affidavit. He could have said
21 something like, I spend no other time in the Bronx. This
22 is all I do.

23 MR. RATNER: And I believe that he - - -

24 JUDGE RIVERA: I pick up my mail there because
25 it's more - - - whatever you wanted to say.



1 MR. RATNER: Right.

2 JUDGE RIVERA: But see what I'm saying? I - - -
3 I have a little bit of difficulty with this affidavit
4 because I feel it lacks a certain amount of information
5 that - - - that, in part, becomes more obvious once
6 plaintiff objects and put forward the form because that is
7 suggesting at a minimum, might draw more out of it, but at
8 a minimum that his presentation to government for purposes
9 of his licensure is, I'm based in the Bronx.

10 MR. RATNER: Maybe part of the problem, Your
11 Honor, was that he was being sued in his individual
12 capacity for professionally work he - - - he did on behalf
13 of WestMed Medical Group as an employee of WestMed Medical
14 Group. This case has absolutely nothing to do, as you
15 know, with St. Barnabas Hospital or anything - - -

16 JUDGE RIVERA: No. But it has to do with his - -
17 - his profession as a podiatrist, it's not unrelated,
18 right? And - - -

19 MR. RATNER: My point is, is that he was sued as
20 - - - in his individual capacity as an employee of WestMed
21 treating a WestMed patient in Westchester County. So maybe
22 that's why the affidavit focused on the fact that he treats
23 most of his patients as an employee of WestMed in
24 Westchester County and didn't go into quite the level of
25 detail that - - -



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JUDGE RIVERA: True. But of course the burden is to show why the selection of the Bronx is improper.

MR. RATNER: Right. And I - - - I - - -

JUDGE RIVERA: You can show many, many connections to - - -

MR. RATNER: Right.

JUDGE RIVERA: - - - Westchester. I'm not - - - I'm not suggesting that is - - -

MR. RATNER: I - - - and I - - -

JUDGE RIVERA: - - - that is inappropriate.

MR. RATNER: Right.

JUDGE RIVERA: But you've got to say why the choice of the Bronx is wrong.

MR. RATNER: And I believe that he did meet that burden, Your Honor.

JUDGE RIVERA: Thank you.

MR. RATNER: Thank you.

JUDGE RIVERA: Thank you.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Ruth Millican, certify that the foregoing transcript of proceedings in the Court of Appeals of Racquel Lividini v. Harold Goldstein, No. 57 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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