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TO: MEMBERS OF THE LONG ISLAND JEWISH ORGANIZED MEDICAL STAFF

The continuous doctrine issue continues to be a hot button for the legal community and the fact patterns in the cases are sufficient to cause raised eyebrows in shock! The latest example resulted in a 4-3 decision at the Court of Appeals level – needless to say, unfortunately, the physician did not prevail.

Commencing in 1998 the patient received treatments for chronic shoulder problems and surgery finally resulted and five post-op visits were made. Nineteen months elapsed following the last post-op which had taken place one year after the surgery. Patient then returned complaining of shoulder pain and a second surgery occurred following a series of injections.

The patient had a post-op visit in April 2002 and following an aggravation of the injury there was a visit in September 2003. A period of thirty months ensued (remember the 30 month statute of limitations normally imposed) without any further treatment. The patient then reappeared and following consultation a third surgery took place with this latter surgery being performed by the partner of the original physician. We assume there was continued discomfort as the patient next visited a different physician in July 2006.

A lawsuit is brought in September 2008 alleging a failure to properly diagnose and negligent surgery in 1998. As might be expected the defendant-physician moved to bar the proceeding on the grounds that the statute of limitations should be imposed and no continuous treatment had occurred to toll the statute. The lower courts denied the motion on the grounds that there were issues of fact which had to be determined before the statute could be imposed. Appeals were taken to New York's highest court.

As earlier stated the Court of Appeals ruled in the patient's favor by a 4-3 vote but we would bring attention to rather numbing language used in the opinion . . . "a gap in treatment longer than the statute of limitations is not per se dispositive of defendant's claim that the statute has run.

The dissenting justices strongly disagreed finding that there had been no continuing efforts to treat the particular condition in question as patient had been told to return "as needed." During the 30 month period patient had not returned for any particular treatments(s)!!

The dissent continued explaining that the public policy argument protecting the patient from filing suit while treatment was being had by the prospective physician defendant was not a factor to be considered in this suit and could not justify waiving the statute. The dissent added that only a continuous diagnosis or consultative relationship does not constitute a continuous treatment. A physician should not be compelled to correspond with a patient that the relationship has ended to start the thirty months running. The judges correctly wrote that this would place a "ghastly" burden on the relationship.

Respectfully submitted,

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