

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

2016

## **Paterno v. Laser Spine Institute: Did the New York Court of Appeals' Misapplication of Unjustified Policy Fears Lead to A Miscarriage of Justice and the Creation of Inadequate Precedent for the Proper Use of the Empire State's Long-Arm Statute?**

Jay C. Carlisle

*Elisabeth Haub School of Law at Pace University*

Christine M. Murphy

*Elisabeth Haub School of Law at Pace University*

Kiersten M. Schramek

*Jansen & Ressler*

Marley Strauss

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Civil Procedure Commons](#), [Jurisdiction Commons](#), and the [Torts Commons](#)

---

### **Recommended Citation**

Jay C. Carlisle et al., *Paterno v. Laser Spine Institute: Did the New York Court of Appeals' Misapplication of Unjustified Policy Fears Lead to A Miscarriage of Justice and the Creation of Inadequate Precedent for the Proper Use of the Empire State's Long-Arm Statute?*, 79 *Alb. L. Rev.* 1371 (2016), <http://digitalcommons.pace.edu/lawfaculty/1076/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

**PATERNO V. LASER SPINE INSTITUTE: DID THE NEW YORK COURT OF APPEALS' MISAPPLICATION OF UNJUSTIFIED POLICY FEARS LEAD TO A MISCARRIAGE OF JUSTICE AND THE CREATION OF INADEQUATE PRECEDENT FOR THE PROPER USE OF THE EMPIRE STATE'S LONG-ARM STATUTE?**

*Jay C. Carlisle\**  
*Christine Murphy\*\**  
*Kiersten Schramek\*\*\**  
*Marley Strauss\*\*\*\**

---

\* Jay C. Carlisle, II has been a professor of law at the Elizabeth Haub School of Law at Pace University since 1978. He has been selected as the outstanding professor three times at Pace Law School and has received teaching awards from the ABA-ALI, the New York State Trial Lawyers Association, and the Westchester County Bar Foundation. Carlisle currently serves as a Referee for the NYS Commission on Judicial Conduct and as a Commissioner for the New York State Law Revision Commission. He is Senior Counsel to the law firm of Collier, Halpern, Newberg & Nolletti and is the 2017 co-recipient, with New York Chief Judge Janet Di Fiore, of the Distinguished Pace University Leadership Award.

\*\* Christine M. Murphy received her Juris Doctor from Pace University School of Law in May 2015. She has been employed at Durante, Bock & Tota, PLLC, a general practice firm located in Yorktown Heights, New York, since 2006. Ms. Murphy is currently awaiting admission to the New York State bar. She is honored to have this piece published in the Albany Law Review. Ms. Murphy thanks her family for their continued support, as well as her co-authors and all of the guidance received by the faculty of Pace Law School.

\*\*\* Kiersten M. Schramek is an Associate Attorney at Jansen & Ressler in White Plains, New York, and practices in the area of matrimonial and family law. She was admitted to practice law in the State of New York in January 2016. Ms. Schramek graduated *cum laude* from Pace University School of Law in May 2015. While attending law school, her Law Review Case Note entitled "Fleeing Cuba: A Comparative Piece Focused on *Toro* and the Options Victims of Domestic Violence Have in Seeking Citizenship in the United States and Canada" was selected for publication, and appears in the Summer 2015 edition of the Pace International Law Review Journal. Ms. Schramek is honored to have her second published piece be a part of the Albany Law Review. She would like to thank her family for their endless support, her teammates for contributing their time and effort in co-authoring this article, and her professors for their guidance and sharing their wisdom of the law.

\*\*\*\* Marley Strauss is an attorney admitted to practice law in the State of New York and the State of New Jersey. Ms. Strauss serves as an associate in the Real Estate Group at a Manhattan-based law firm. Ms. Strauss graduated *magna cum laude* from Pace Law School, and *cum laude* from Franklin and Marshall College. Ms. Strauss served as Case Note and Comment Editor of the Pace Law Review and was a participant in the Federal Judicial Honors Program. Ms. Strauss' experiences include interning in the chambers of a federal judge in the United States District Court for the Southern District of New York and at the U.S. Attorney's Office for the Southern District of New York.

## I. INTRODUCTION

This article discusses CPLR section 302(a)(1) as applied by the New York State Court of Appeals in *Paterno v. Laser Spine Institute*.<sup>1</sup> The *Paterno* Court failed to properly apply a statutory jurisdictional analysis by conflating it with a due process inquiry.<sup>2</sup> Also, the Court unnecessarily balanced the interests of the Empire State's citizens in having a forum for access to justice with unjustified policy fears of potential costs to the state from assertions of in personam jurisdiction.<sup>3</sup> Furthermore, the Court's policy focus<sup>4</sup> on the protection of medical doctors from lawsuits<sup>5</sup> and the prevention of "floodgate" litigation which would adversely affect the medical profession was not justified by the record and created poor precedent for subsequent judicial application of the state's long-arm statute.<sup>6</sup>

This article will examine CPLR section 302(a)(1), under *Paterno v. Laser Spine Institute* and some of its predecessors, to demonstrate that sometimes overarching policy concerns get in the way of a strict statutory analysis under CPLR section 302(a)(1).<sup>7</sup> We analyze

---

<sup>1</sup> *Paterno v. Laser Spine Inst.*, 23 N.E.3d 988, 990 (N.Y. 2014); 2 WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE CPLR ¶ 302.00, at 3-42 (David L. Ferstendig ed., LexisNexis Matthew Bender 2d ed. 2015). As noted in the Historical Appendix to New York Civil Practice CPLR, "[w]e have seen slow but steady development of New York's long-arm power." WEINSTEIN ET AL. at ¶ 302 App.02, at 3-113.

<sup>2</sup> See *Paterno*, 23 N.E.3d at 996.

<sup>3</sup> See *id.* at 992.

<sup>4</sup> See N.Y. C.P.L.R. 302(a)(3) (McKinney 2016); *Paterno*, 23 N.E.3d at 995.

<sup>5</sup> See, e.g., *Paterno*, 23 N.E.3d at 995; *Etra v. Matta*, 463 N.E.2d 3, 4 (N.Y. 1984) (holding that CPLR 302(a)(1) did not confer personal jurisdiction over an out-of-state doctor in medical malpractice action arising from that doctor's treatment of plaintiffs' decedent); *O'Brien v. Hackensack Univ. Med. Ctr.*, 760 N.Y.S.2d 425, 428 (N.Y. App. Div. 2003) (first citing *Hermann v. Sharon Hosp.*, 522 N.Y.S.2d 581, 582-83 (N.Y. App. Div. 1987); and then citing *Carte v. Parkoff*, 543 N.Y.S.2d 718, 719 (N.Y. App. Div. 1989)) (declining to extend long-arm jurisdiction to cover out-of-state medical centers where the contacts were limited or the injury occurred outside of New York); *Hermann*, 522 N.Y.S.2d at 582-83 (holding that the CPLR did not confer personal jurisdiction over a Connecticut hospital in a New York plaintiff's medical malpractice action arising from injuries sustained in the course of medical treatment at the hospital).

<sup>6</sup> After having a lengthy discussion with retired Justice of the Appellate Division, Second Department Daniel Angiolillo, Jurist in Residence at Pace University School of Law, he made clear that opening the "floodgates" to litigation with nondomiciliary doctors would negatively affect the medical profession. See *Black v. Oberle Rentals*, 285 N.Y.S.2d 226, 229 (N.Y. Sup. Ct. 1967) ("In other words, CPLR [Section 302(a)(3)] looks to the imparting of the original injury within the State of New York and not resultant damage, in order that jurisdiction might be effectuated. To hold otherwise would open a veritable Pandora's box of litigation subjecting every conceivable prospective defendant involved in an accident with a New York domiciliary to defend actions brought against them in the State of New York.").

<sup>7</sup> *Id.* at 990; see *infra* Parts VI-VIII.

how the Court of Appeals in *Paterno* conflated the jurisdictional basis and due process analyses and determine that the Court, based on a faulty statutory analysis, erroneously decided that there was no statutory jurisdiction.<sup>8</sup>

Our article is divided into six parts. Part II briefly discusses the history of the CPLR and the manner of obtaining jurisdiction through Sections 301 and 302, focusing mainly on long-arm jurisdiction. Part III discusses and analyzes leading cases, which involve the application of CPLR 302 in obtaining personal jurisdiction. Part IV discusses a recent case, *Paterno v. Laser Spine Institute*, in great detail, and Part V engages in a critical analysis of *Paterno* with reference to a similar case, *Grimaldi v. Guinn*.<sup>9</sup> Part VI addresses policy considerations and Part VII concludes with a discussion of how the *Paterno* Court entangled its jurisdictional analysis and where the Court may be headed with its future application of CPLR section 302(a)(1).

## II. JURISDICTION IN NEW YORK

The CPLR is over fifty years old<sup>10</sup> and is recognized as one of the oldest state procedural codes.<sup>11</sup> As such, it is important to review its history and discuss, throughout this paper, how the rules continue to evolve and develop.

Under the CPLR, a New York State court cannot render a valid, binding judgment without jurisdiction.<sup>12</sup> Until the nineteenth century, the prevailing doctrine held that due process did not permit state courts to exercise personal jurisdiction over non-domiciliaries and foreign corporations unless they were present

---

<sup>8</sup> See *infra* Parts VII–VIII.

<sup>9</sup> *Grimaldi v. Guinn*, 895 N.Y.S.2d 156 (N.Y. App. Div. 2010).

<sup>10</sup> Jay C. Carlisle, *Happy Anniversary to the CPLR: A Joint Achievement of the Practicing Bar and the Academy*, 85 N.Y. ST. B. ASS'N J. 18, 18 (2013). The CPLR is a production of the Advisory Committee on Practice and Procedure, which was appointed in 1955 by the New York State Temporary Commission on the Courts. *Id.* This project involved thousands of hours of research, hearings, draft reports, debate and consultation of the practicing bar and academy, and revisions. *Id.*

<sup>11</sup> *Id.* at 21 (discussing the history and application of the CPLR in New York).

<sup>12</sup> See, e.g., *Kagen v. Kagen*, 236 N.E.2d 475, 477 (N.Y. 1968) (discussing whether the Queens County Supreme Court had jurisdiction to render a binding judgment in the case before the court); WEISNSTEIN ET AL., *supra* note 1, at ¶ 302.00, 3-43; Jay C. Carlisle, *Recent Jurisdiction Developments in the New York Court of Appeals*, 29 PACE L. REV. 417, 418 (2009) (“Jurisdiction consists of subject matter jurisdiction (competence to entertain a claim or claims), in personam jurisdiction (power over the person or property), and proper notice.”). We will focus only on *in personam* jurisdiction in this article.

within the state at the time of the commencement of the action.<sup>13</sup> The law on jurisdiction has since changed and expanded as interstate travel increased and technology progressed.<sup>14</sup>

### A. General Jurisdiction under CPLR 301

If a defendant consents, is domiciled, incorporated, or licensed to do business in New York, a New York court may exercise personal jurisdiction over that defendant.<sup>15</sup> Jurisdiction over the property of a defendant includes both *in rem* and *quasi in rem* jurisdiction.<sup>16</sup> *In rem* jurisdiction occurs when the litigation involves property within the territorial boundaries in New York.<sup>17</sup> *Quasi in rem* jurisdiction occurs when a non-domiciliary's property within the State is attached to obtain a ground for jurisdiction in a cause of action not directly related to the property.<sup>18</sup> These traditional bases of jurisdiction are referred to as general jurisdiction and are incorporated in CPLR 301.<sup>19</sup> The 2014 U.S. Supreme Court decision in *Daimler AG v. Bauman*<sup>20</sup> limits general jurisdiction in New York to the state of incorporation, the state where the corporation has its principal place of business or to certain "exceptional circumstances" matters. It seems clear that the broad general jurisdiction of CPLR 301 permitted under *Tauza* and its progeny is no longer constitutionally permitted in New York. Since *Daimler* has no direct relevancy to CPLR 302, we chose not to discuss its implications to assertions of long arm jurisdiction in this article.

### B. Long-Arm Jurisdiction under CPLR 302

Modeled after section 17 of the Illinois Civil Practice Act,<sup>21</sup> CPLR 302 defines when courts have personal jurisdiction by acts of non-domiciliaries.<sup>22</sup>

---

<sup>13</sup> See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 720, 724, 727 (1877) (holding no state can exercise direct jurisdiction and authority over persons or property without its territory).

<sup>14</sup> See *infra* Parts III-V.

<sup>15</sup> See DAVID D. SIEGEL, *NEW YORK PRACTICE* §§ 80-82, at 138-43 (4th ed. 2005) (giving an overview of jurisdiction and discussing different grounds for achieving *in personam* jurisdiction); WEINSTEIN ET AL., *supra* note 1, at ¶ 301.00, at 3-5, 3-6.

<sup>16</sup> SIEGEL, *NEW YORK PRACTICE*, *supra* note 15, at § 101, at 179.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at § 101, at 179-80.

<sup>19</sup> See N.Y. C.P.L.R. 301 (McKinney 2016); WEINSTEIN ET AL., *supra* note 1, at ¶ 301.00, at 3-5, 3-6.

<sup>20</sup> *Daimler AG v. Bauman*, 134 S.Ct. 746 (U.S. 2014).

<sup>21</sup> WEINSTEIN ET AL., *supra* note 1, at ¶ 302.03, at 3-54.

<sup>22</sup> N.Y. C.P.L.R. 302(a).

[B]ut unlike that [Illinois] act, which has been interpreted to “reflect a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause,” the legislative and judicial history of CPLR 302 indicates that New York’s long arm statute was not initially designed to “confer the full complement of personal jurisdiction constitutionally permitted.”<sup>23</sup>

CPLR 302 is referred to as specific jurisdiction.

Specific jurisdiction, pursuant to CPLR 302, permits courts to assert long-arm jurisdiction over non-domiciliary individuals and corporations that are not subject to general jurisdiction.<sup>24</sup> CPLR section 302(a)(1) provides, in relevant part:

Acts which are the basis of jurisdiction. As to a cause of action *arising from* any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: *transacts any business* within the state or contracts anywhere to supply goods or services in the state . . . .<sup>25</sup>

Jurisdiction is determined by a three-step process.<sup>26</sup> First, assuming the court has subject matter jurisdiction, the court determines whether the plaintiff’s service of process upon the defendant was proper.<sup>27</sup> Second, the court determines whether there is a statutory basis under CPLR 301 or 302 that renders service effective.<sup>28</sup> Third, the court determines whether the exercise

---

<sup>23</sup> WEINSTEIN ET AL., *supra* note 1, at ¶ 302.03, at 3-54–3-55 (discussing the scope of CPLR 302); *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 46 (N.Y. 1988) (“These protections are further amplified by New York’s long-arm statute, which does not confer jurisdiction in every case where it is constitutionally permissible.”); *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 209 N.E.2d 68, 80 (N.Y. 1965) (stating that the expansion of the scope of permissible jurisdiction should be decided by the legislature); SIEGEL, *NEW YORK PRACTICE*, *supra* note 15, § 84, at 145.

<sup>24</sup> WEINSTEIN ET AL., *supra* note 1, at ¶ 302.04, at 3-57 (discussing the reach of long-arm jurisdiction). Jurisdiction under CPLR 302 is restricted to the contacts enumerated in the statute, and the claim over which jurisdiction is asserted must arise out of those contacts. *Id.*

<sup>25</sup> N.Y. C.P.L.R. 302(a)(1) (emphasis added).

<sup>26</sup> Jay C. Carlisle, *Seeking Justice in the Empire State: Court of Appeals Broadens the Reach of Long Arm Jurisdiction and Clarifies the Statutory Guidelines for Application of CPLR Section 302(a)(1)*, 77 ALB. L. REV. 89, 89, 91–92 (2014) (discussing the developments of long-arm jurisdiction under CPLR 302(a)(1) and analyzing the recent New York State Court of Appeal’s decision in *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327 (2012)).

<sup>27</sup> See 1 CIVIL PRETRIAL PROCEEDINGS IN NEW YORK § 9:2 (Philip M. Halpern et. al., eds., 2000) (providing a comprehensive coverage, supported by current statutory and case law, and practical experience on the area of civil pretrial practice, including jurisdiction).

<sup>28</sup> See *id.* at §§ 9:3, 9:4.

of *in personam* jurisdiction complies with the constitutional mandate of fairness.<sup>29</sup> But, in cases of specific jurisdiction, only if there is a statutory basis must the court then decide if jurisdiction is permitted under the Due Process Clause of the United States Constitution.<sup>30</sup>

The concept of long-arm jurisdiction derives from the existence of a statute which authorizes it.<sup>31</sup> Many state statutes, including New York's long-arm statute, contain a list of specific state-directed activities that permit the assertion of *in personam* jurisdiction only if the particular claim arises from one of the enumerated forms of activity.<sup>32</sup> Jurisdiction is a fact-based determination.<sup>33</sup> It "depends on facts quite distinct from the merits of the controversy."<sup>34</sup> As such, it is necessary to separate the facts, which have jurisdictional significance from those, which bear only upon the merits.<sup>35</sup> *In personam* jurisdiction must be analyzed separately for each cause of action.<sup>36</sup>

Because, as mentioned previously, the statute does not reach constitutional limits, the statutory analysis under CPLR 302 can sometimes resemble that of a due process analysis<sup>37</sup> under the Fourteenth Amendment.<sup>38</sup> In other words, the court may incorrectly place more weight on the Due Process analysis than on

---

<sup>29</sup> See *id.* at § 9:1 (describing the traditional twin requirements of fairness: notice and opportunity to be heard).

<sup>30</sup> Carlisle, *supra* note 26, at 93.

<sup>31</sup> See WEINSTEIN ET AL., *supra* note 1, at ¶ 302.01, at 3-46.

<sup>32</sup> See, e.g., N.Y. C.P.L.R. 302(a) (McKinney 2016).

<sup>33</sup> See Adolph Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 BUFF. L. REV. 61, 84 (1966) (discussing the origins and application of the long-arm statute).

<sup>34</sup> *Id.*

<sup>35</sup> See *id.*

<sup>36</sup> Jay C. Carlisle, *Second Circuit 2000-2001 Personal Jurisdiction Developments*, 21 QUINNIPIAC L. REV. 15, 17 (2001) (reviewing district and circuit court cases and commenting on the future trends of law on personal jurisdiction in the Second Circuit).

<sup>37</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 476-77 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 297 (1980)) (explaining that a due process analysis requires a determination by the court as to whether it is fair to hail the defendant into court. Some factors that must be balanced to determine fairness are: the forum's interest in the litigation, the plaintiff's interest in efficient and convenient relief, the demands of the federal system as a whole, the best interests of the federal system, and the defendant's interest in not having to defend a suit in a remote or disadvantageous forum.).

<sup>38</sup> See *Hanson v. Denckla*, 357 U.S. 235, 241 (1958); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 247 (2d Cir. 2007) ("New York decisions thus, at least in their rhetoric, tend to conflate the long-arm statutory and constitutional analyses by focusing on the constitutional standard . . ."); *McKee Elec. Co. v. Rauland-Borg Corp.*, 229 N.E.2d 604, 607 (N.Y. 1967); Carlisle, *supra* note 26, at 92 ("Thus, sometimes a court's statutory analysis under CPLR 302 may resemble the due process analysis under the Fourteenth Amendment leading to an entanglement in New York decisional jurisprudence.").

the statutory basis analysis: “[e]xcessive emphasis on the federal Due Process Clause has obstructed and distorted the statutory inquiry of CPLR section 302(a)(1) by New York State and federal courts.”<sup>39</sup> This entangled analysis, thus, may lead to a faulty jurisdictional analysis,<sup>40</sup> and inconsistent judicial decisions.<sup>41</sup> As such, this conflation has produced a body of confusing precedent and frustrated the aforementioned legislative intent of the CPLR’s drafters.<sup>42</sup>

“While New York has not pushed an assertion of jurisdictional power to the Constitution’s outer bounds as set by the Supreme Court, the legislature, on occasion, has shown a willingness to target identifiable problems and expand CPLR 302 to meet them.”<sup>43</sup> It has thus become a “single contact” long-arm statute.<sup>44</sup> For example, a 1979 amendment to CPLR section 302(a)(1)<sup>45</sup> expanded the “transaction of business” concept to allow New York courts to exercise personal jurisdiction over a non-domiciliary who contracts outside New York to supply goods or services in New York, even if the contract is breached before the goods are ever shipped into, or the services performed in, New York.<sup>46</sup> As we see, New York’s long-arm statute was designed to take advantage of the minimum contacts approach to jurisdiction outlined in *International Shoe v. Washington*.<sup>47</sup>

---

<sup>39</sup> Carlisle, *supra* note 26, at 108.

<sup>40</sup> *See id.* at 92.

<sup>41</sup> *See Homburger, supra* note 33, at 85.

<sup>42</sup> *See, e.g.,* Fischbarg v. Douchet, 880 N.E.2d 22, 24, 30 (N.Y. 2007); Parke-Bernet Galleries, Inc. v. Franklyn, 256 N.E.2d 506, 507, 508 (N.Y. 1970) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945)).

<sup>43</sup> WEINSTEIN ET AL., *supra* note 1, at ¶ 302.03, at 3-56.

<sup>44</sup> *See* McGee v. Int’l Life Ins. Co., 355 U.S. 220, 223 (1957) (reinforcing the single act concept a few years after *International Shoe* when the Court held that due process was sufficiently satisfied where there was a single contract, which had “substantial connection with that state”); George Reiner & Co. v. Schwartz, 363 N.E.2d 551, 551, 554 (N.Y. 1977) (upholding jurisdiction under CPLR section 302(a)(1) over a salesman who had come into New York once to negotiate an employment agreement with the plaintiff-employer); Hi Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc., 300 N.E.2d 421, 421–22, 423 (N.Y. 1973) (holding a guaranty signed by a nondomiciliary, but delivered to New York, was a purposeful act that was an essential condition of the contract, which had significant New York implications); *Parke-Bernet Galleries*, 256 N.E.2d at 508 (“CPLR 302 is a single-act statute requiring but one transaction—albeit a purposeful transaction—to confer jurisdiction in New York.”).

<sup>45</sup> N.Y. C.P.L.R. 302(a)(1) (McKinney 2016) (coming into effect September 1, 1979, amended paragraph 1 of subdivision (a) expanded the “transaction of business” contact to include the situation where one “contracts anywhere to supply goods or services in the state”).

<sup>46</sup> Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 209 N.E.2d 68, 75 (N.Y. 1965) (noting that a single transaction in New York may be sufficient to invoke jurisdiction under CPLR section 302(a)(1)).

<sup>47</sup> *See* N.Y. C.P.L.R. 302(a); *Int’l Shoe Co.*, 326 U.S. at 316. *International Shoe Co.* stated a



## 1. CPLR 302(a)(1) and the “Arising out of” Requirement

By requiring that the cause of action *arise from* an enumerated act, the Court of Appeals has imposed a requirement of demonstrating an “articulable nexus.” “There is no bright-line test for determining whether [an articulable] nexus is present in a particular case.”<sup>48</sup> The “inquiry is a fact-specific one”<sup>49</sup> and must be analyzed separately for each cause of action.<sup>50</sup> The Court of Appeals has defined the required nexus as “a substantial relationship to the transaction out of which the instant cause of action arose.”<sup>51</sup> The Second Circuit has characterized the nexus as “a direct relation between the cause of action and the in-state conduct.”<sup>52</sup> However, unless the cause of action is based upon some breach of contract, the courts have been reluctant to find a nexus.<sup>53</sup> The “arising from” prong of the CPLR section 302(a)(1) essentially limits the broader “transaction of business” prong by restricting jurisdiction to claims connected in a meaningful way to the business transacted in New York.<sup>54</sup>

Causation itself, however, is not required, but rather is permissive.<sup>55</sup> In expanding the “arising out of” requirement, the *Licci* court intimated that CPLR section 302(a)(1) “does not require that every element of the cause of action pleaded must relate to the

---

new analysis to the due process requirements of personal jurisdiction. *Id.* The Supreme Court announced a two-pronged “minimum contacts” theory of personal jurisdiction. *Id.* The Court determined that due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>48</sup> *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 67 (2d Cir. 2012); *Carlisle*, *supra* note 26, at 100.

<sup>49</sup> *Licci*, 673 F.3d at 67.

<sup>50</sup> *See, e.g., id.* at 68–75 (discussing both Anti-Terrorism Act and Alien Tort Statute with respect to New York’s long-arm statute and determining an articulable nexus).

<sup>51</sup> *McGowan v. Smith*, 419 N.E.2d 321, 323 (N.Y. 1981).

<sup>52</sup> *Beacon Enterprises v. Menzies*, 715 F.2d 757, 764, 765 (2d Cir. 1983) (quoting *Fontanetta v. American Bd. of Internal Medicine*, 421 F.2d 355, 357 (2d Cir. 1970)) (failing to find a sufficient nexus between *Menzies*’ shipment of goods into New York and *Beacon*’s cause of action).

<sup>53</sup> *See, e.g., Armouth Int’l, Inc. v. Haband Co.*, 715 N.Y.S.2d 438, 439 (N.Y. App. Div. 2000) (finding no jurisdictional basis because there was no breach in delivering the goods when defendant shipped goods into New York, but cause of action arose out of breach of contract to deliver goods to Georgia); *Krajewski v. Osterlund, Inc.*, 490 N.Y.S.2d 609, 609 (N.Y. App. Div. 1985) (finding no cause of action for product liability nor a breach of contract arising from a sale of a truck in New York that defendant shipped into New York).

<sup>54</sup> *Licci v. Lebanese Canadian Bank, SAL*, 984 N.E.2d 893, 900–01 (N.Y. 2012).

<sup>55</sup> *Id.* at 900 (first citing *McGowan*, 419 N.E.2d at 323; and then citing *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 43–44 (N.Y. 1988)).

New York contacts.”<sup>56</sup> The Court stated that “where at least one element arises from the New York contacts, the relationship between the business transaction and the claim asserted supports specific jurisdiction under the statute.”<sup>57</sup> For example, claims for injuries that merely connect to *allegations* “that a defendant’s conduct violated a duty to the plaintiffs, will satisfy the “arising out of” requirement.”<sup>58</sup> Accordingly, “the ‘arising out of’ prong will be satisfied if the plaintiff alleges the defendant’s negligent conduct has an articulable nexus to the transaction even though the *injuries* may not.”<sup>59</sup>

## 2. The “Transaction of Business” Requirement

“Transacting business” is different from “doing business.”<sup>60</sup> “Once it is found that a defendant is ‘doing’ business in New York, there is general jurisdiction over that defendant,” under CPLR 301.<sup>61</sup> “Doing business” is applied to a defendant’s New York business activity that is so systematic and continuous that the plaintiff may sue the defendant here on *any* cause of action, even if it did not arise out of the defendant’s New York business.<sup>62</sup> Under CPLR 302, however, “a defendant who ‘transacts business’ in New York is subject only to specific jurisdiction”; that is, a jurisdictional “basis exists only for those causes of action that *arise from* that transaction of business.”<sup>63</sup>

The lack of in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York. Whether a non-domiciliary is transacting business within the meaning of CPLR section 302(a)(1) requires a finding that the non-domiciliary’s activities were *purposeful* and established “a substantial relationship” between the transaction and the claim

---

<sup>56</sup> *Id.* at 901.

<sup>57</sup> *Id.* at 901.

<sup>58</sup> Carlisle, *supra* note 26, at 110.

<sup>59</sup> *Id.* (emphasis added).

<sup>60</sup> See Homburger, *supra* note 33, at 63 (discussing that the language may look the same, but the terms mean two different and distinct things).

<sup>61</sup> WEINSTEIN ET AL., *supra* note 1, at ¶ 302.04, at 3-58.

<sup>62</sup> See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929 (2011) (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)) (discussing the Supreme Court’s decision which addressed for the first time in nearly thirty years whether a non-resident corporation’s contacts with a state were sufficiently “continuous and systematic” so as to justify the exercise of jurisdiction over it on claims unrelated to any activity in the state, the standard for general jurisdiction since *International Shoe Co.*).

<sup>63</sup> WEINSTEIN ET AL., *supra* note 1, at ¶ 302.04, 3-58-3-59.

asserted.<sup>64</sup> Purposeful activities are *volitional acts* by which the non-domiciliary “avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”<sup>65</sup> A non-domiciliary transacts business when “on his or her own initiative [the non-domiciliary] projects himself or herself into this state to engage in a ‘sustained and substantial transaction of business.’”<sup>66</sup> It is not the quantity, but rather is the quality and nature of the contacts that matters under New York long-arm jurisdiction analysis.<sup>67</sup> It follows then that sheer number of contacts, without more, is insufficient to satisfy long-arm jurisdiction.<sup>68</sup>

With the advancements in technology and changes in corporate structures, courts have held that jurisdiction can be obtained through contact by an agent, mail, telephone,<sup>69</sup> and electronic communications,<sup>70</sup> or a combination of any of these mediums.<sup>71</sup>

---

<sup>64</sup> See *Fischbarg v. Doucet*, 880 N.E.2d 22, 26 (N.Y. 2007) (quoting *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 850 N.E.2d 1140, 1142 (N.Y. 2006)); *Licci v. Lebanese Canadian Bank*, 673 F.3d 50, 66 (2d Cir. 2012) (quoting *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 246 (2d Cir. 2007)).

<sup>65</sup> *Fischbarg*, 880 N.E.2d at 26 (first quoting *McKee Elec. Co. v. Raulund-Borg Corp.*, 229 N.E.2d 604, 607 (N.Y. 1967) and then citing *Ford v. Unity Hosp.*, 299 N.E.2d 659, 663 (N.Y. 1973)).

<sup>66</sup> *Fischbarg*, 880 N.E.2d at 28 (quoting *Parke-Bernet Galleries, Inc. v. Franklyn*, 256 N.E.2d 506, 508 (N.Y. 1970)) (holding plaintiff has sufficiently established that defendants are subject to the long-arm jurisdiction of New York and that defendants’ activities in retaining plaintiff, a New York attorney situated in New York, to represent them in the Oregon Action was purposeful and a sufficient nexus exists between that retention of plaintiff and the instant claim regarding allegedly unpaid legal fees).

<sup>67</sup> See, e.g., *McShan v. Omega Louis Brandt et Frere, S.A.*, 536 F.2d 516, 518 (2d Cir. 1976); *Bankers Trust Co. v. Nordheimer*, 746 F. Supp. 363, 366 (S.D.N.Y. 1990) (“When a defendant is sued upon a loan made payable in New York and the loan is subsequently the sole basis of an agreement executed outside the state, the subsequent agreement does not rob the New York State courts of jurisdiction.” (citing *Lewis and Eugenia Van Wezel Foundation v. Guerdon Indus., Inc.*, 450 F.2d 1264, 1267 (2d Cir. 1971))); *Licci v. Lebanese Canadian Bank, SAL*, 984 N.E.2d 893, 900 (N.Y. 2012); *Scheuer v. Schwartz*, 839 N.Y.S.2d 485, 486 (N.Y. App. Div. 2007) (“Although the [attorney] retainer agreement in issue was not made in New York, the quantity and quality of defendant’s contacts with this state in performing that agreement demonstrate that long-arm jurisdiction . . . may be exercised over defendant.”); *Bank of New York v. Strumor*, 579 N.Y.S.2d 124, 124 (N.Y. App. Div. 1992) (involving a promissory note that was executed in New Mexico, but had proceeds payable in New York that were used to finance a New York limited partnership); *Drake Am. Corp. v. Speakman Co.*, 534 N.Y.S.2d 679, 680 (N.Y. App. Div. 1988); *M. Fabrikant & Sons, Inc. v. Adrienne Kahn, Inc.*, 533 N.Y.S.2d 866, 867–68 (N.Y. App. Div. 1988).

<sup>68</sup> See *Deutsche Bank Sec.*, 850 N.E.2d at 1143 (quoting *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 43 (N.Y. 1988)).

<sup>69</sup> *Parke-Bernet Galleries*, 256 N.E.2d at 506, 509 (holding that although the defendant only completed a single transaction, the requirements of CPLR section 302(a)(1) were satisfied when a California resident participated in a New York auction run by the plaintiff through an open telephone line).

<sup>70</sup> *Deutsche Bank Sec.*, 850 N.E.2d at 1141 (finding that a Montana agency transacted

Where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR section 302(a)(1).<sup>72</sup> As a result, use of an “interactive” website—one which allows for the exchange of information—may sometimes provide enough New York-targeted activity to qualify as a transaction of business in New York, provided the claim is based on the website activity.<sup>73</sup>

However, passive websites, which merely impart information for the sake of advertising without permitting a business transaction or contract formation, are generally insufficient to establish personal jurisdiction.<sup>74</sup> The same is true for communication which constitutes follow-up or responsive communications to inquiries via the passive website.<sup>75</sup> On passive websites, there is virtually no interaction between the website host and users, no solicitation of business in New York, no transaction of business, and as such, it would be improper for a court to exercise personal jurisdiction over a defendant.<sup>76</sup>

### III. LEADING CASE LAW APPLYING CPLR 302(A)(1)

#### A. *Parke-Bernet Galleries, Inc. v. Franklyn*

As early as 1970, the Court of Appeals has analyzed the question, “What constitutes ‘transacting business’ in the state of New York?”<sup>77</sup>

---

business in New York by negotiating and executing an agreement with plaintiff to sell securities through a “real time” communication through Bloomberg Instant Messaging).

<sup>71</sup> See, e.g., *Fischbarg*, 880 N.E.2d at 24–25 (finding that the defendant solicited plaintiff to perform legal services in New York and was in constant communication with him).

<sup>72</sup> See, e.g., *id.* at 27.

<sup>73</sup> See, e.g., *O’Keefe v. Blue & Gold Fleet, L.P.*, 634 F. Supp. 2d 284, 288 (E.D.N.Y. 2009) (holding that the maintenance of a passive website that may reach New Yorkers is not sufficient for jurisdiction unless it is combined with other business activity); *Citigroup, Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 564–66 (S.D.N.Y. 2000); *Grimaldi v. Guinn*, 895 N.Y.S.2d 156, 166–67 (N.Y. App. Div. 2010); *Vandermark v. Jotomo Corp.*, 839 N.Y.S.2d 670, 672 (N.Y. App. Div. 2007) (holding that the maintenance of a passive website that may reach New Yorkers is not sufficient for jurisdiction).

<sup>74</sup> *Grimaldi*, 895 N.Y.S.2d at 165.

<sup>75</sup> *Paterno v. Laser Spine Inst.*, 23 N.E.3d 988, 994, 996 (N.Y. 2014).

<sup>76</sup> See *Hall v. Lipstickalley.com*, No. 101342/11, 2011 N.Y. Misc. LEXIS 6828, at \*4–5 (N.Y. Sup. Ct. May 5, 2011) (“Respondent’s website did not render it subject to personal jurisdiction in New York. It was clear from the record that Lipstick Alley [was] merely a passive website which allowed users to comment on and discuss various issues with other users. There [was] virtually no interaction between Respondent and users; nor [was] there anything in the record to show that Respondent either solicited business in New York, or systematically and continuously provided services to persons in New York.”).

<sup>77</sup> *Parke-Bernet Galleries, Inc., v. Franklyn*, 256 N.E.2d 506, 506 (N.Y. 1970).

The question of whether the defendant transacted business within the state of New York, thereby subjecting him to jurisdiction, was posed in *Parke-Bernet Galleries, Inc. v. Franklyn*.<sup>78</sup>

In *Parke-Bernet Galleries*, the defendant, Dr. Franklyn, a California resident, received a catalog from the plaintiff describing paintings to be sold at auction in New York.<sup>79</sup> The non-domiciliary defendant, whose interest was intrigued by this information, sent a letter to the plaintiff in New York indicating an amount that he wished to bid for a *Les Baigneurs* painting.<sup>80</sup> The defendant also called the plaintiff before the auction to request that "telephonic communication be established"<sup>81</sup> between Parke-Bernet and him "during the course of the bidding."<sup>82</sup> The plaintiff acceded and set up a telephone line between an employee of Parke-Bernet and the defendant.<sup>83</sup> The defendant then participated in the live bidding at the auction.<sup>84</sup> Dr. Franklyn purchased two paintings, but did not submit payment to the plaintiff as agreed, and as a result the plaintiff then brought suit for \$96,000.<sup>85</sup> The defendant moved to dismiss this action pursuant to CPLR 3211<sup>86</sup> for lack of personal jurisdiction.<sup>87</sup>

Here, the Court of Appeals reminded us of the principles currently in place. As discussed in the Court's opinion, *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, the purpose of CPLR 302 is "to take advantage of the 'new [jurisdictional] enclave' opened up by *International Shoe* where the nonresident defendant has engaged in some purposeful activity in this State in connection with the matter at suit."<sup>88</sup> It is well settled that proof of a single transaction in New York would satisfy this requirement.<sup>89</sup> Thus, the Court has made clear that one does not need to be present in the state in order to be subjected to jurisdiction.<sup>90</sup> "[U]nder CPLR

---

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 507.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> N.Y. C.P.L.R. 3211 (McKinney 2015); *Parke-Bernet Galleries, Inc.*, 256 N.E.2d at 507.

<sup>87</sup> *Id.*

<sup>88</sup> *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 209 N.E.2d 68, 75 (N.Y. 1965) (quoting *Bomze v. Nardis Sportswear*, 165 F.2d 33, 36 (2d Cir. 1948)).

<sup>89</sup> See WEINSTEIN ET AL., *supra* note 1, § 3.06(b) ("[T]he *Parke-Bernet* holding has not been extended to include cases in which the non-resident makes a single ordinary phone call to New York, nor is it likely to be.").

<sup>90</sup> *Id.* ("*Parke-Bernet Galleries, Inc. v. Franklyn* established that a defendant can transact

302 . . . , particularly in this day of instant long-range communications, one can engage in extensive purposeful activity here without ever actually setting foot in the State.”<sup>91</sup>

Although the defendant was never actually present in New York, he received and transmitted bids over an open telephone line and actively participated in an auction in New York.<sup>92</sup> It cannot be ignored that Mr. Nash, who was indeed physically present at the time of the bidding, assisted Dr. Franklyn.<sup>93</sup> The Court gave great consideration to the fact that the defendant “projected himself into the auction room in order to compete with the other prospective purchasers . . . .”<sup>94</sup>

The Court ultimately held that Dr. Franklyn “purposefully availed himself ‘of the privilege[s] of conducting activities’ within New York and thereby ‘invok[ed] the benefits and protections of its laws.’”<sup>95</sup> As such, the Court had personal jurisdiction over the defendant. This holding was an early step toward expanding the reach of CPLR section 302(a)(1).

#### *B. Deutsche Bank Securities, Inc. v. Montana Board of Investments*

Following *Parke-Bernet Galleries, Inc.*, about thirty years later, in 2006, the Court of Appeals was again faced with the question of whether there was a sufficient basis for the exercise of long-arm jurisdiction under CPLR section 302(a)(1) in *Deutsche Bank Securities, Inc. v. Montana Board of Investments*.<sup>96</sup>

Here, the plaintiff, Deutsche Bank Securities, Inc. (hereinafter “DBSI”), a Delaware corporation with headquarters in New York, engaged in securities trading with the defendant, Montana Board of Investments (hereinafter “MBOI”), a Montana state agency.<sup>97</sup> This case concerned one bond transaction in particular; however, the parties had engaged in “eight other bond transactions with a face value totaling over \$ 100 million” over the “past thirteen months.”<sup>98</sup>

A representative from DBSI had entered into discussions soliciting the sale of Pennzoil-Quaker State Company bonds with a

---

business in New York for jurisdictional purposes without actually setting foot in the state.”).

<sup>91</sup> *Parke-Bernet Galleries*, 256 N.E.2d at 508 (citing *Int’l Shoe Co., v. Washington*, 326 U.S. at 310, 316–17 (1945)).

<sup>92</sup> *Parke-Bernet Galleries*, 256 N.E.2d at 507.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 508.

<sup>95</sup> *Id.* at 508–09 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

<sup>96</sup> *Deutsche Bank Sec., Inc. v. Mont. Bd. of Invs.*, 850 N.E.2d 1140, 1142–43 (N.Y. 2006).

<sup>97</sup> *Id.* at 1141.

<sup>98</sup> *Id.*

member of MBOI.<sup>99</sup> This discussion was conducted over an instant messaging service provider, Bloomberg Messaging System; at first, MBOI rejected the trade proposal, but approximately ten minutes after the initial online discussion, MBOI initiated a new instant message inquiring as to “whether the price originally quoted . . . applied only to the swap, or if it would be the same for a cash purchase.”<sup>100</sup> The parties agreed to a sale price of \$15 million for the Pennzoil stock and DBSI “sent a trade ticket and confirmation of the deal.”<sup>101</sup>

Only hours after the sale was completed, Shell Oil acquired Pennzoil, most likely causing the price of the bonds to increase.<sup>102</sup> The following day, MBOI advised DBSI that they were breaking the trade claiming that DBSI “had inside information and the trade was ‘unethical [and] probably illegal.’”<sup>103</sup> The plaintiff brought action for breach of contract, and the defendant argued that the plaintiff lacked personal jurisdiction.<sup>104</sup>

New York County Supreme Court held that there was in fact a lack of jurisdiction; however, the Appellate Division reversed.<sup>105</sup> The Court of Appeals affirmed holding that personal jurisdiction *did* exist over the defendant under the long-arm statute.<sup>106</sup> The Court relied heavily on an earlier decision in *Kreutter v. McFadden Oil Corp.*<sup>107</sup>

The Court stated that:

[T]he growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it. Thus, we held that “[s]o long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not ‘present’

---

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1141–42.

<sup>101</sup> *Id.* at 1142.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See id.* at 1143.

<sup>107</sup> *See id.* at 1142–43. *Kreutter* involved a purchase and leaseback of oil-drilling equipment. *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 41 (N.Y. 1988). Defendant was a Texas based corporation licensed to do business in New York. *Id.* Plaintiff’s investments were not acknowledged and he sought recovery of his expenditures, along with other relief. *Id.*

in that State.”<sup>108</sup>

Further, the Court relied on its earlier decision, as discussed above in *Parke-Bernet Galleries*, recognizing “long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions.”<sup>109</sup>

### C. *Fischbarg v. Doucet*

One year after *Deutsche Bank Securities, Inc.*, in 2007, the Court of Appeals was once again faced with the same issue of whether personal jurisdiction was correctly exercised under the transaction of business requirement of CPLR section 302(a)(1) in *Fischbarg v. Doucet*.<sup>110</sup> In this case, the defendant, Suzanne Bell-Doucet—President of Only New Age Music, Inc. (“ONAM”) and a California resident—telephoned the plaintiff, an attorney practicing in New York.<sup>111</sup> The parties discussed the plaintiff’s representation of Suzanne and ONAM in an action in Oregon.<sup>112</sup> Ms. Bell-Doucet mailed a letter to the plaintiff’s office to confirm their agreement to take the defendants’ case.<sup>113</sup> The defendants sent over documents for the plaintiff’s review and entered into a retainer agreement by phone from the New York office.<sup>114</sup>

The plaintiff represented the defendants in the Oregon action although “he was never physically present in Oregon” and he also never met with the defendants in California.<sup>115</sup> The plaintiff remained in New York for the duration of the case, and he conducted all of his work in this action from his New York office.<sup>116</sup>

[O]ver the course of approximately nine months . . . during his representation of ONAM in the Oregon action, he spoke with defendants by telephone at least twice per week regarding their case. Plaintiff’s time records also show that on at least 31 occasions defendants sent e-mails regarding the Oregon case to plaintiff, that on three occasions they

---

<sup>108</sup> *Deutsche Bank Sec.*, 850 N.E.2d at 1142–43 (quoting *Kruetter*, 522 N.E.2d at 43).

<sup>109</sup> *Deutsche Bank Sec.*, 850 N.E.2d at 1143 (first citing *Parke-Bernet Galleries, Inc., v. Franklyn*, 256 N.E.2d 506, 508 (N.Y. 1970); then citing *Ehrlich-Bober & Co. v. Univ. of Houston*, 404 N.E.2d 726, 731 (N.Y. 1980)).

<sup>110</sup> *Fischbarg v. Doucet*, 880 N.E.2d 22, 24 (N.Y. 2007).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*



faxed materials to him, and that defendants sent plaintiff documents, by either mail or e-mail, seven times.<sup>117</sup>

Plaintiff and defendants entered into a dispute regarding the terms of plaintiff's retainer agreement, resulting in plaintiff's resignation as their attorney.<sup>118</sup> The plaintiff moved for legal fees, but once denied, the plaintiff filed suit against the defendants for breach of contract and unjust enrichment, and the defendants subsequently filed a motion to dismiss for lack of personal jurisdiction under CPLR 3211.<sup>119</sup>

The Court stated, "jurisdiction is proper 'even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.'"<sup>120</sup> Not all activities will constitute a "transaction of business," such as "merely telephon[ing] a single order"<sup>121</sup> or "communications and shipments sent here by an out-of-state doctor serving as a 'consultant' to plaintiff's New York physician."<sup>122</sup> However, the Court discussed that limited contacts were not an issue here.<sup>123</sup> The Court analyzed the defendants' purposeful attempts to establish an attorney-client relationship and the related contacts.<sup>124</sup> The Court held that "[t]he quality of defendants' contacts here establishes a transaction of business in New York."<sup>125</sup> The defendants "sought out [the] plaintiff in New York and established an ongoing attorney-client relationship with him."<sup>126</sup>

The Court also relied on its earlier decision in *Parke-Bernet Galleries, Inc.* where it stated: "one need not be physically present [here] . . . to be subject to the jurisdiction of our courts under CPLR 302."<sup>127</sup> "Thus, even when physical presence is lacking, jurisdiction may still be proper if the defendant 'on his [or her] own initiative . . . project[s] himself [or herself]' into this state to engage in a

---

<sup>117</sup> *Id.* at 24-25.

<sup>118</sup> *Id.* at 25.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 26 (quoting *Deutsche Bank Sec., Inc. v. Mont. Bd. of Invs.*, 850 N.E.2d 1140, 1142 (N.Y. 2006)).

<sup>121</sup> *Fischbarg*, 880 N.E.2d at 26 (citing *Parke-Bernet Galleries, Inc., v. Franklyn*, 256 N.E.2d 506, 508 (N.Y. 1970)).

<sup>122</sup> *Fischbarg*, 880 N.E.2d at 26 (citing *Etra v. Matta*, 463 N.E.2d 3, 4 (N.Y. 1984)).

<sup>123</sup> *Fischbarg*, 880 N.E.2d at 26.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 27.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (quoting *Parke-Bernet Galleries, Inc., v. Franklyn*, 256 N.E.2d 506, 508 (N.Y. 1970)).

‘sustained and substantial transaction of business.’”<sup>128</sup> Here, as well as the earlier cases discussed in this article, the defendants were found to have “engaged in [a] sustained and substantial transaction of business in New York.”<sup>129</sup>

Finally, the Court also addressed the Constitutional considerations after completing the statutory analysis. It stated that its decision is in accordance with due process.<sup>130</sup> Given the facts here involving the parties’ contacts, the defendants should reasonably have expected to defend a suit in New York.<sup>131</sup> It is important to note however, that the Court does not define “precisely what level of communication is necessary to constitute a transaction of business.”<sup>132</sup> For example, how much work has to be done on behalf of a client? Can one contact satisfy this requirement, or does it need to be a pattern or series?<sup>133</sup> Nonetheless, it appears that with this decision, the Court is attempting to expand the reach of CPLR section 302(a)(1) in response to the changes in society.

#### *D. Licci v. Lebanese Canadian Bank, SAL*

Five years later, the Court of Appeals was once again faced with a question concerning whether jurisdiction was proper under CPLR section 302(a)(1) in *Licci v. Lebanese Canadian Bank, SAL*.<sup>134</sup> The plaintiffs in this action comprised of “several dozen United States, Canadian, and Israeli citizens who resided in Israel” on behalf of family members killed and/or injured in rocket attacks during the Second Lebanon War.<sup>135</sup> The suit was filed against the defendant, also known as LCB, alleging that they facilitated monetary transactions in aiding and abetting terrorism, along with several other claims.<sup>136</sup>

Here, the Court had to decide whether the defendant’s regular correspondence with the bank to effect transfers in New York constituted a transaction of business under CPLR section 302(a)(1), which it decided in the affirmative; the Court viewed the contacts as

---

<sup>128</sup> *Fischbarg*, 880 N.E.2d at 28 (quoting *Parke-Bernet Galleries*, 256 N.E.2d at 508).

<sup>129</sup> *Fischbarg*, 880 N.E.2d at 28.

<sup>130</sup> *Id.* at 30. The Court found a substantial relationship between the defendant’s activities and this claim and the plaintiff had devoted and focused directly on this work for the defendant’s behalf. *Id.* at 29–30.

<sup>131</sup> *Id.*

<sup>132</sup> Carlisle, *supra* note 12, at 423.

<sup>133</sup> *Id.* at 424.

<sup>134</sup> *Licci v. Lebanese Canadian Bank, SAL*, 984 N.E.2d 893, 895 (N.Y. 2012).

<sup>135</sup> *Id.* at 894.

<sup>136</sup> *Id.*

“a ‘course of dealing’ [which showed] purposeful avilment of New York’s dependable and transparent banking system.”<sup>137</sup> The *Licci* Court’s “holding represents a more precise definition of what constitutes a ‘transaction of business’ under CPLR section 302(a)(1) and provides proper precedent for future jurisdictional inquiries by the bench and [the] bar of New York,”<sup>138</sup> further refining the test for what constitutes a transaction of business under CPLR section 302(a)(1).

The *Licci* case upholds the arising out of requirement derived from CPLR section 302(a)(1) in which a “substantial relationship” or “articulable nexus” must exist between the transaction and the claim asserted.<sup>139</sup> As the court explained, under CPLR section 302(a)(1), the ‘transaction of business’ prong is limited by the ‘arising from’ prong, which restricts jurisdiction to claims that are arguably and meaningfully connected to the business transacted in New York.<sup>140</sup>

#### IV. *PATERNO V. LASER SPINE INSTITUTE*

The *Paterno* case was originally filed in New York State Supreme Court, Westchester County, and the trial court granted defendant’s motion to dismiss for lack of personal jurisdiction on the grounds that there was no statutory basis under CPLR section 302(a)(1).<sup>141</sup> The court held that CPLR section 302(a)(1) was inapplicable in this case and the motion insofar as it sought to dismiss for lack of long-arm jurisdiction was granted.<sup>142</sup> The court maintained that the “[d]efendants [had] no physical presence within the state and the services they offered to perform [were] outside the state.”<sup>143</sup> The court did not believe that “viewed in their totality,” the defendants

---

<sup>137</sup> Carlisle, *supra* note 26, at 102–03. This section uses the exact language contained in *Licci* when discussing how repeated use of a correspondent account on behalf of a client indicates a “course of dealing.” *Licci*, 984 N.E.2d at 900.

<sup>138</sup> Carlisle, *supra* note 26, at 103.

<sup>139</sup> *Licci*, 984 N.E.2d at 901.

<sup>140</sup> Carlisle, *supra* note 26, at 103–04 (quoting *Licci*, 984 N.E.2d at 900–01).

<sup>141</sup> *Paterno v. Laser Spine Inst.*, No. 2010-22125, 2011 WL 11003906, at \*1 (N.Y. Sup. Ct. Mar. 25, 2011).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

The only physical entry by defendants into New York [was] an occasional informational seminar which lack[ed] a substantial relationship to the claim asserted as plaintiff did not attend such a seminar.

Other activities cited by plaintiff, such as telephone calls and e-mails from defendants fail to qualify, by themselves, as a transaction of business within New York.

*Id.*

activities showed a purposeful effort “to avail themselves of the forum state,” since the activities “were related to or arose out of the services provided in Florida.”<sup>144</sup>

Plaintiff appealed to the Supreme Court, Appellate Division, Second Department, which addressed the question of whether there was a statutory basis under CPLR section 302(a)(1) for plaintiff to bring their case in a New York court.<sup>145</sup> The appellate court, after determining that defendant’s website was passive, went on to do a statutory analysis, and found that the lower court correctly concluded that the arising out of requirement of CPLR section 302(a)(1) was not met, that there was no basis for imposing long-arm jurisdiction over a Florida medical facility and physicians, and that the case was properly dismissed.<sup>146</sup> The appellate court reiterated the trial court’s holding that the “totality of circumstances” did not provide “the plaintiff with a basis for imposing long-arm jurisdiction over the defendants.”<sup>147</sup> Plaintiff appealed to the Court of Appeals of New York who affirmed the Second Department holding.<sup>148</sup>

---

<sup>144</sup> *Id.* In May 2008, plaintiff “was suffering from severe back pain.” Brief for Plaintiff-Appellant at 3, *Paterno v. Laser Spine Inst.*, 973 N.Y.S.2d 681 (N.Y. App. Div. 2013) (No. 2011-04654). While on the homepage of a well-known Internet service provider, plaintiff discovered an advertisement for LSI, a surgical facility specializing in spine surgery, with its home facility and principal place of business in Tampa, Florida. *Id.* Plaintiff clicked on the LSI advertisement and viewed a five-minute video presentation of a testimonial from a former LSI patient and professional golfer, extolling LSI’s medical services. *Id.* The advertisement appeared to hold out the promise of relief for plaintiff’s back problems. *Id.* As a result of the advertisement, Frank Paterno communicated with LSI by telephone and Internet to inquire about possible surgical procedures to alleviate his pain. *Id.* After his initial inquiries in May 2008, plaintiff sought a medical assessment of his condition by LSI, and sent to LSI’s Florida facility certain magnetic resonance imaging (MRI) films of his back. *Id.* at \*4. On May 30, 2008, the same day that he received the letter, LSI informed him that there had been a cancellation and that plaintiff could take the open spot and have the surgery performed at a significant discount due to the short notice. *Id.* LSI offered a June 9, 2008 surgery date. *Id.* On June 9th, Paterno underwent surgery at the LSI facility. *Id.* at 6. Plaintiff experienced extreme pain following the surgery. *Id.* Plaintiff underwent a second surgical procedure at LSI on June 11th. *Id.* He again experienced severe pain after the surgery. *See id.* For two weeks following his return to New York on June 12th, plaintiff contacted the LSI physicians on a daily basis to discuss his medical status and to complain about his postoperative pain. *Id.* at 6–7. LSI doctors and staff addressed his request for pain medication by calling prescriptions into local pharmacies in plaintiff’s home city, which he then filled. *Id.* at 7. For approximately three months, plaintiff claims to have communicated daily with LSI staff via text messages, emails and telephone calls. *Id.* at 8.

<sup>145</sup> *See Paterno v. Laser Spine Inst.*, 973 N.Y.S.2d 681, 683 (N.Y. App. Div. 2013), *aff’d*, 23 N.E.3d 988 (N.Y. 2014).

<sup>146</sup> *Id.* at 690, 691.

<sup>147</sup> *Id.* at 686.

<sup>148</sup> *Paterno v. Laser Spine Inst.*, 23 N.E.3d 988, 990 (N.Y. 2014).

### A. Summary of Paterno Holdings

#### 1. Trial Court Holding

The trial court's motion granting defendant's motion to dismiss was issued on March 25, 2011 in the form of a Decision and Order by Nicholas Colabella.<sup>149</sup> The trial court granted defendants', Laser Spine Institute, Craig Wolff, M.D., Kevin Scott, M.D., Robert Gruber, D.O., Vernon Morris, M.D. and Peter Horowitz, M.D. ("defendants"), motion to dismiss plaintiff's complaint for lack of jurisdiction.<sup>150</sup> The court held that there was no long-arm jurisdiction over the defendants.<sup>151</sup>

##### a. 302(a)(1)

Judge Colabella explained CPLR section 302(a)(1) was inapplicable in this case since "defendants maintain[ed] no physical presence within the state, and the services they offered to perform [were] outside the state."<sup>152</sup> Judge Colabella declared that CPLR section 302(a)(1) requires a showing that the cause of action arises from the transaction of business in the state.<sup>153</sup>

A single transaction "may be sufficient for jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful, and there is a substantial relationship between the transaction and the claim asserted . . . ."

---

<sup>149</sup> *Paterno v. Laser Spine Inst.*, No. 2010-22125, 2011 WL 11003906, at \*1 (N.Y. Sup. Ct. Mar. 25, 2011). The plaintiffs also argued jurisdiction under CPLR section 302(a)(3). *Id.* Judge Colabella maintained that CPLR section 302(a)(3) was inapplicable "as the alleged tortious activity [in the case] did not cause injury to [the] plaintiff within the state within the meaning of the statute." *Id.* The judge dismissed plaintiff's 302(a)(3) claim, stating "[t]he situs of the injury is the location of the original event which caused the injury, not the location where the resulting damages are subsequently felt by the plaintiff," and that the acts that allegedly caused Paterno's injury all took place in Florida. *Id.* (quoting *Vaichunas v. Tonyes*, 877 N.Y.S.2d 204, 205 (N.Y. App. Div. 2009); then citing *Kramer v. Hotel Los Monteros*, 394 N.Y.S.2d 415, 416 (N.Y. App. Div. 1977)).

<sup>150</sup> *Paterno*, 2011 WL 11003906, at \*1.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* Judge Colabella opined that although there were "offices for consultation and regional surgical centers in various states, none [were] in New York." *Id.* *But see* Plaintiff's Affirmation in Opposition at ¶ 18, *Paterno v. Laser Spine Inst.*, No. 2010-22125, 2011 WL 11003906 (N.Y. Sup. Ct. Mar. 25, 2011) (No. 2010-22125) ("What is most remarkable about the defendants' motion is that the defendants claim to have no business relationship with New York, yet its web site lists a location in New York, New York."); *id.* at ¶ 24 ("LSI conducts seminars for its services in the following states; [sic] New York, Florida, Pennsylvania, Arizona, Texas, New Jersey, Oregon, Ohio and California.").

<sup>153</sup> *See Paterno*, 2011 WL 11003906, at \*1.

“Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”<sup>154</sup>

In determining whether defendants engaged in sufficient purposeful activity to confer long-arm jurisdiction, Judge Colabella performed a totality of the circumstances analysis, and found that the defendant had not purposefully availed itself to the privileges associated with conducting business in New York.<sup>155</sup>

## 2. Appellate Court Holding

On October 16, 2013 the appellate court affirmed the trial court’s decision.<sup>156</sup> The appellate court concluded that the defendants’ contacts with New York were insufficient to confer long-arm jurisdiction under CPLR section 302(a)(1), and further rejected plaintiff’s alternative basis for personal jurisdiction under CPLR section 302(a)(3) because he suffered his injuries outside the State.<sup>157</sup> In doing so, the court addressed the “evolving issue of personal jurisdiction.”<sup>158</sup>

The appellate court found that “the totality of circumstances’ [did] not provide the plaintiff with a basis for imposing long-arm jurisdiction over the defendants,”<sup>159</sup> and further noted that personal jurisdiction could not be based upon LSI’s website since the website was informational and passive in nature.<sup>160</sup> Citing *Zippo*

---

<sup>154</sup> *Id.* (first quoting *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 43 (N.Y. 1988); and *Opticare Acquisition Corp. v. Castillo*, 806 N.Y.S.2d 84, 89 (N.Y. App. Div. 2005); second quoting *Fischbarg v. Doucet*, 880 N.E.2d 22, 26 (N.Y. 2007)) (citations omitted). Colabella reasoned that “[t]he only physical entry by defendants into New York was an occasional informational seminar which,” according to the Judge, “lack[ed] a substantial relationship to the claim asserted as plaintiff did not attend such a seminar.” *Paterno*, 2011 WL 11003906, at \*1.

<sup>155</sup> *Id.* According to Judge Colabella, the telephone calls and emails “viewed in their totality” “do not show a purposeful effort by defendants to avail themselves of the forum state as such activities were related to or arose out of the services provided in Florida.” *Id.*

<sup>156</sup> *Paterno v. Laser Spine Inst.*, 973 N.Y.S.2d 681, 691 (N.Y. App. Div. 2013).

<sup>157</sup> *See id.* at 686, 689.

<sup>158</sup> *Id.* at 683.

<sup>159</sup> *Id.* at 686.

<sup>160</sup> *Id.* at 690. The Second Department found that “[t]he record in this case . . . contained only sparse evidence regarding the nature of LSI’s website.” *Id.* at 696 (Dickerson, J., dissenting). The plaintiff stated that he learned of LSI through an advertisement on AOL’s home page. Brief for Plaintiff-Appellant, *supra* note 144, at 3. As a result of observing this advertisement and viewing the testimonial, the plaintiff contacted LSI. *Id.* There is also a printout in the record of LSI seminar dates which was allegedly printed from LSI’s website. *Paterno*, 973 N.Y.S.2d at 696 (Dickerson, J., dissenting). Besides these documents, the Second Department found “the record devoid of evidence concerning the nature of LSI’s

*Manufacturing Co. v. Zippo Dot Com, Inc.*,<sup>161</sup> the appellate court concluded that based on the record, there was no basis to conclude that LSI's website could be characterized, under the *Zippo* continuum,<sup>162</sup> as anything other than a passive website.<sup>163</sup>

The Second Department acknowledged that, with regard to internet websites and personal jurisdiction:

[A] website's interactivity may be useful for analyzing personal jurisdiction under [CPLR section] 302(a)(1), but only insofar as it helps to decide whether the defendant "transacts any business" in New York—that is, whether the defendant, through the website, "purposefully avail[ed] himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws."<sup>164</sup>

The appellate court found that:

[N]either the fact that the plaintiff underwent certain testing in New York . . . in connection with his Florida treatment, nor the fact that the individual defendants telephoned prescriptions to the plaintiff's New York pharmacy, nor even that the defendants had conversations with the plaintiff's local physician, requir[ed] the conclusion that the defendants

---

website from which to reach any conclusions concerning that website's degree of interactivity." *Id.* "When a website is passive . . . plaintiffs may have to prove 'something more' to justify the exercise of personal jurisdiction—that is, plaintiffs must show that defendant 'purposefully (albeit electronically) directed his activity in a substantial way to the forum state.'" *Morilla v. Laser Spine Inst., LLC*, No. 2:10-cv-01882 (WHW), 2010 U.S. Dist. LEXIS 83608, at \*11 (D.N.J. Aug. 16, 2010) (citing *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 540 (E.D. Pa. 1999)).

<sup>161</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

<sup>162</sup> *Id.* at 1124 ("At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. . . . At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. . . . The middle ground is occupied by interactive web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." (first citing *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1264–65, 66 (6th Cir. 1996); second citing *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996); third citing *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333–34 (E.D. Mo. 1996)) (citations omitted).

<sup>163</sup> See *Paterno*, 973 N.Y.S.2d at 686 (citing *Zippo Mfg. Co.*, 952 F. Supp. at 1124).

<sup>164</sup> *Paterno*, 973 N.Y.S.2d at 696 (Dickerson, J., dissenting) (quoting *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252 (2d Cir. 2007)).

transacted business in New York.<sup>165</sup>

### 3. Court of Appeals

On November 20, 2014, the Court of Appeals affirmed the court below, dismissing “plaintiff Frank Paterno[s] appeal[] from the dismissal for lack of personal jurisdiction of his medical malpractice action against non-domiciliary defendants Laser Spine Institute (LSI) and various LSI professionals.”<sup>166</sup> The Court of Appeals concluded that defendants’ contacts with New York were insufficient to confer long-arm jurisdiction under CPLR section 302(a)(1), as the defendants did not transact business in New York, their website was passive, and their communications were merely responsive in nature and did not constitute purposeful availment.<sup>167</sup> Put simply, the court determined that the record in this case did not contain any evidence that LSI ‘solicited’ the plaintiff’s business, other than the internet advertisement by which the plaintiff became aware of its services.<sup>168</sup> The Court of Appeals also stressed that New York’s long-arm jurisdiction requires more than most states.<sup>169</sup> According to the Court of Appeal’s decision, these factors led the Court to find that there was no long-arm jurisdiction over the defendants.<sup>170</sup>

#### *B. Analysis of Court of Appeals Reasoning in Paterno*

##### 1. “Transaction of Business” Requirement

The Court of Appeals addressed the question of whether LSI’s conduct constituted a “transaction of business” under CPLR section 302(a)(1).<sup>171</sup> The Court began its analysis by laying out CPLR section 302(a)(1) and expressed “[w]hether a non-domiciliary is transacting business within the meaning of CPLR 302(a)(1) is a fact

---

<sup>165</sup> *Paterno*, 973 N.Y.S.2d at 687.

<sup>166</sup> *Paterno v. Laser Spine Inst.*, 23 N.E.3d 988, 990 (N.Y. 2014).

<sup>167</sup> *See id.* at 994.

<sup>168</sup> *See id.*

<sup>169</sup> *See id.* at 995, 996. For the proposition that New York courts have repeatedly recognized that New York’s long-arm statute does not confer jurisdiction in every case where it is constitutionally permissible. *See id.* at 996; *Talbot v. Johnsons Newspaper Corp.*, 522 N.E.2d 1027, 1027 (N.Y. 1998) (citing *Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust, Ltd.*, 464 N.E.2d 432, 435 (N.Y. 1984)); *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 46 (N.Y. 1988); *Banco Ambrosiano*, 464 N.E.2d at 435.

<sup>170</sup> *See Paterno*, 23 N.E.3d at 995, 996.

<sup>171</sup> *Id.* at 990, 992.



based determination, and requires a finding that the non-domiciliary's activities were purposeful and established 'a substantial relationship between the transaction and the claim asserted.'<sup>172</sup> The Court disagreed with plaintiff's argument that the totality of defendants' contacts established that it conducted business in New York, and stated that "[i]n order to satisfy 'the overriding criterion' necessary to establish a transaction of business' within the meaning of CPLR 302(a)(1), a non-domiciliary must commit an act by which it 'purposefully avails itself of the privilege of conducting activities in New York.'<sup>173</sup> Citing *Fischbarg v. Doucet*, the Court expressed that there must be a substantial relationship between the transaction and the claim asserted.<sup>174</sup>

The Court of Appeals relying on its decision in *Fischbarg*, conflated its CPLR section 302(a)(1) analysis with a due process analysis in considering whether LSI performed an act by which it purposefully availed itself to the privileges of conducting business in New York.<sup>175</sup> The Court, citing to *Deutsche Bank Securities Inc.*, noted that although "[t]he lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York[.]" LSI had not by conduct of individual actors or by technological methods permitted business transactions which would constitute transaction of business in New York.<sup>176</sup> The Court of Appeals, referencing *Fischbarg* and quoting *Parke-Bernet Galleries, Inc.*, stated that:

Regardless of whether by bricks and mortar structures, by conduct of individual actors, or by technological methods that permit business transaction and communications without the physical crossing of borders, a non-domiciliary transacts business when "on his . . . own initiative . . . [the non-domiciliary] projects himself" . . . into [New York] to engage in a "sustained and substantial transaction of

---

<sup>172</sup> *Id.* at 992 (quoting *Fischbarg v. Doucet*, 880 N.E.2d 22, 26 (N.Y. 2007)).

<sup>173</sup> *Paterno*, 23 N.E.3d at 993 (quoting *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 834 (N.Y. 2007)).

<sup>174</sup> *Paterno*, 23 N.E.3d at 993 (citing *Fischbarg*, 880 N.E.2d at 27).

<sup>175</sup> *Paterno*, 23 N.E.3d at 993 ("Thus, where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302(a)(1)." (citing *Fischbarg*, 880 N.E.2d at 27)).

<sup>176</sup> *Paterno*, 23 N.E.3d at 993 (citing *Deutsche Bank Sec., Inc. v. Mont. Bd. of Invs.*, 850 N.E.2d 1140, 1143 (N.Y. 2006)). "More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York." *Paterno*, 23 N.E.3d at 993 (citing *Ehrenfeld*, 881 N.E. at 834).

business.”<sup>177</sup>

Additionally, the Court of Appeals discussed whether LSI’s website was sufficient to establish personal jurisdiction over the defendants.<sup>178</sup> In doing so, the Court found that LSI’s website was passive since it “merely impart[ed] information without permitting a business transaction . . . .”<sup>179</sup> Since the Court of Appeals ultimately found that the website alone was insufficient to establish personal jurisdiction, the Court then examined whether the *quality* of defendant’s contacts with plaintiff would allow for long-arm jurisdiction over the defendants.<sup>180</sup> The Court found the additional telephone and other correspondence was not enough to constitute the transaction of business required by CPLR section 302(a)(1).<sup>181</sup> The Court focused on the fact that plaintiff made the call to LSI that initiated the contact.<sup>182</sup>

According to the Court of Appeals, LSI did not project itself into New York to engage in a sustained and substantial transaction of business.<sup>183</sup> The Court did not agree with the plaintiff’s argument that the totality of defendants’ contacts established that it conducted business in New York through its solicitation and several communications related to LSI’s medical treatment of plaintiff.<sup>184</sup>

---

<sup>177</sup> *Paterno*, 23 N.E.3d at 993 (quoting *Fischbarg*, 880 N.E.2d at 28). See also *Deutsche Bank Sec.*, 850 N.E.2d at 1143 (holding that CPLR section 302(a)(1) long-arm jurisdiction over out-of-state institutional investor who called plaintiff, a New York securities firm, to make a trade and the suit arose from that transaction); *Parke-Bernet Galleries, Inc. v. Franklyn*, 256 N.E.2d 506, 508 (N.Y. 1970) (finding that a California defendant who actively participated in live auction held in New York via telephone was subject to jurisdiction under CPLR section 302(a)(1) in an action arising out of that auction).

<sup>178</sup> *Paterno*, 23 N.E.3d at 994 (citing *Grimaldi v. Guinn*, 895 N.Y.S.2d 156, 165 (N.Y. App. Div. 2010)). See also discussion *supra* note 76 and accompanying text (discussing passive websites).

<sup>179</sup> *Paterno*, 23 N.E.3d at 994.

<sup>180</sup> *Id.* Passive websites, such as the LSI website, which “merely impart information without permitting a business transaction are generally insufficient to establish personal jurisdiction.” *Id.* (citing *Grimaldi*, 895 N.Y.S.2d at 165). See also discussion *supra* note 76 (discussing passive websites).

<sup>181</sup> *Paterno*, 23 N.E.3d at 994–95.

<sup>182</sup> See *id.* at 993–94; Affidavit of Frank Paterno in Opposition to Motion at ¶ 5, *Paterno v. Laser Spine Inst.*, 2011 WL 11003906 (N.Y. Sup. Ct. Mar. 25, 2011) (No. 22125/10) (“As a result of this advertisement, I contacted LSI by telephone and internet to inquire of the procedures and to get an evaluation of my personal medical condition.”).

<sup>183</sup> *Paterno*, 23 N.E.3d at 994–95.

<sup>184</sup> *Id.* at 994. The Court of Appeals did not believe that contacts made after plaintiff’s June and August surgeries in Florida could be the basis to establish defendant’s relationship with New York because they did not serve as the basis for the underlying medical malpractice claim. *Id.* at 995 (citing *Harlow v. Children’s Hosp.*, 432 F.3d 50, 62 (1st Cir. 2005) (“[I]n most cases, where the cause of action must arise from the contacts, contacts after the cause of action arises will be irrelevant.”)). Further, the Court of Appeals opined, “defendants’ contacts with New York at the behest of the plaintiff subsequent to the first two Florida

Rather, “[t]urning to the content and ‘quality’ of defendants’ contacts with plaintiff,” the Court of Appeals reasoned that the contacts “were *responsive* in nature, and not the type of interactions that demonstrate the purposeful availment necessary to confer personal jurisdiction over . . . out-of-state defendants.”<sup>185</sup> The Court in its analysis highlighted that the plaintiff admitted that he was the party who sought out and initiated contact with defendants after viewing LSI’s website.<sup>186</sup>

The Court of Appeals referenced its prior decisions: *Fischbarg, v. Doucet, Parke-Bernet Galleries v. Franklyn*, and *Deutsche Bank Securities, Inc. v. Montana Board of Investors*, where the Court found jurisdiction under CPLR section 302(a)(1).<sup>187</sup> However, the Court of Appeals erroneously concluded that a factual comparison of the defendants’ contacts in those cases did not support the outcome in *Paterno*.<sup>188</sup> Arguably the Court of Appeals simply paid “lip service” to its prior decisions and distorted the statutory analysis of CPLR section 302(a)(1), with its due process-fairness concerns and policy considerations.<sup>189</sup> The court should have first determined if there was a statutory bases for jurisdiction and then have done a

surgeries but before the third cannot be used to demonstrate defendants actively projected themselves into New York.” *Paterno*, 23 N.E.3d at 995 (citing *Skrodzki v. Marcello*, 810 F. Supp. 2d 501, 510, 512 (E.D.N.Y. 2011) (“[D]efendant’s contacts with forum state arising from initial communication with plaintiff irrelevant for CPLR 302(a)(1) jurisdictional analysis.”)).

<sup>185</sup> *Paterno*, 23 N.E.3d at 994 (emphasis added).

<sup>186</sup> *Id.* at 993–94 (rejecting the plaintiff’s argument that due to the extent and “sheer volume of contacts, defendants are subject to personal jurisdiction”). The Court found that: [o]nce plaintiff confirmed his interest, and the . . . surgery date was set, he fully engaged with defendants in order to ensure that all pre-surgical matters were completed. . . . As part of the preparation for plaintiff’s arrival, these communications served the convenience of plaintiff and . . . failed to establish that defendants “availed themselves of the privileges of conducting activities within the forum state.”

*Id.* at 994–995 (first citing *Milliken v. Holst*, 612 N.Y.S.2d 660, 661 (N.Y. App. Div. 1994); then quoting *Fischbarg v. Doucet*, 880 N.E.2d 22, 26 (N.Y. 2007)) (internal citations omitted).

<sup>187</sup> See *Paterno*, 23 N.E.3d at 994; *Fischbarg*, 880 N.E.2d at 30; *Deutsche Bank Sec., Inc. v. Mont. Bd. of Invs.*, 850 N.E.2d 1140, 1143 (N.Y. 2006); *Parke-Bernet Galleries, Inc. v. Franklyn*, 256 N.E.2d 506, 509 (N.Y. 1970).

<sup>188</sup> *Paterno*, 23 N.E.3d at 993 (citing *Deutsche Bank Sec., Inc.*, 850 N.E.2d at 1142 (“holding that CPLR 302(a)(1) long-arm jurisdiction over out-of-state institutional investor who called plaintiff, a New York securities firm, to make a trade, and the suit arose from that transaction”)); *Paterno*, 23 N.E.3d at 993 (citing *Parke-Bernet Galleries, Inc.*, 256 N.E.2d at 508 (“California defendant who actively participated in live auction held in New York via telephone [was] subject to jurisdiction under CPLR 302(a)(1) in an action arising out of that auction.”)).

<sup>189</sup> See discussion *supra* note 188. See also *Paterno*, 23 N.E.3d at 995 (“[T]o find defendants’ conduct here constitutes transacting business within the meaning of CPLR 302(a)(1), based on contacts before and after the surgeries, would set a precedent for almost limitless jurisdiction over out-of-state medical providers in future cases.”). This statement should not be included in the Court’s statutory analysis of basis. It is appropriate for a due process inquiry which the Court failed to conduct.

due process inquiry.

## V. CRITIQUE OF *PATERNO*

### A. *Grimaldi v. Guinn*

The Court of Appeals failed to address or to distinguish the jurisdictional analysis of the Appellate Divisions dissent in *Paterno*. In this respect the dissent, authored by Justice Dickerson, relies on *Grimaldi v. Guinn*, which we will discuss before analyzing the Dickerson dissent.

The plaintiff, Mark. A. Grimaldi, owned a 1969 Chevrolet Camaro for which he purchased a cross-ram manifold and carburetor assembly.<sup>190</sup> The cross-ram was sold to him by Rick's First Generation Camaro in Athens, Georgia, and shipped to the plaintiff at his home address in New York.<sup>191</sup> The shipment also contained a "certification by the defendant, Wayne D. Guinn of Guinn's engineering, located in" New Jersey, stating that the cross-ram was authentic.<sup>192</sup> After several communications, the plaintiff delivered the Camaro to the defendant, Guinn, in order for him to install the cross-ram and communicated with the defendant via "numerous telephone calls, faxes, and e-mails" and viewing Guinn's website as to his involvement in installing the cross-ram.<sup>193</sup>

The defendant used this project in order to solicit further business and advertised the project on their websites.<sup>194</sup> For a period spanning over one year, the plaintiff had submitted payment to the defendants over and above the original quote.<sup>195</sup> After a multitude of communications between the parties, the plaintiff received the Camaro more than one year later, and the cross-ram was completely disassembled and nowhere close to completion.<sup>196</sup> Plaintiff brought suit against defendant for several causes of action.<sup>197</sup> By order

---

<sup>190</sup> *Grimaldi v. Guinn*, 895 N.Y.S.2d 156, 158 (N.Y. App. Div. 2010).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 158–59.

<sup>195</sup> *Id.* at 158, 159.

<sup>196</sup> *Id.* at 159.

<sup>197</sup> *See id.* at 159. The *Grimaldi* complaint contained four causes of action. *Id.* at 159–60. First, the plaintiff alleged that the parties reached an agreement, which the defendants had breached. *Id.* at 159. The plaintiff alleged that defendants violated General Business Law § 349 and made inducements to the plaintiff allowing him to rely on their representations. *Id.* Finally, plaintiff sought punitive damages. *Id.* at 160. Defendants Guinn and Tischler moved to dismiss the complaint pursuant to CPLR section 3211(a)(8) for lack of jurisdiction. *Id.*

dated July 18, 2008, the Honorable James V. Brands, denied the defendant's motion to dismiss was denied under CPLR section §302(a)(1).<sup>198</sup> Judge Brands held that the defendants have subjected themselves to this court's personal jurisdiction and Defendant Guinn appealed the order.<sup>199</sup>

Honorable Judge Thomas Dickerson rendered the Appellate Court decision.<sup>200</sup> The court discussed New York's long-arm jurisdiction statute, that "a court may exercise jurisdiction over a [defendant] who . . . 'transacts any business within the state or contracts anywhere to supply goods or services in the state.'"<sup>201</sup> It examined in detail three elements: "the [q]uality of [c]ontacts and [o]ngoing [r]elationships;" "[p]ersonal [j]urisdiction and the Internet;" and "[p]urposeful [c]reation of [c]ontinuing [r]elationship."<sup>202</sup> We take each element in turn.

### 1. Quality/Quantity of Contacts

First, the court established that the quality of the contacts is to be considered and weighed, based on *Fischbarg* and *Parke-Bernet Galleries, Inc.*<sup>203</sup> As discussed above, in *Fischbarg v. Doucet*, the defendants, through numerous means of communication, attempted to establish an attorney-client relationship with the plaintiff.<sup>204</sup> The Court held that the "[d]efendants sought out [the] plaintiff . . . [and]

---

<sup>198</sup> *Id.* at 161 ("[A]ny nondomiciliary who transacts any business within New York State or contracts anywhere to supply goods or services in the state is subject to the personal jurisdiction of New York courts.").

<sup>199</sup> *Id.* ("The [Dutchess County] Supreme Court concluded that, in communicating with the plaintiff, performing work on the plaintiff's vehicle, having others perform work on the plaintiff's vehicle, accepting payment from the plaintiff for that work, and providing goods and services to the plaintiff in New York, [Guinn] subjected [himself] to [personal] jurisdiction.").

<sup>200</sup> *Id.* at 158; see *Justices of the Court: Associate Justice Thomas A. Dickerson*, N.Y.S. UNIFIED CT. SYS., APP. DIV., SECOND DEPT., [http://www.courts.state.ny.us/courts/ad2/justice\\_dickerson.shtml](http://www.courts.state.ny.us/courts/ad2/justice_dickerson.shtml) (last visited Apr. 8, 2016). It is important to keep in mind that later we will see Judge Dickerson delivering the dissent in *Paterno v. Laser Spine Institute*, 973 N.Y.S.2d 681, 691 (N.Y. App. Div. 2013) (Dickerson, J., dissenting).

<sup>201</sup> *Grimaldi*, 895 N.Y.S.2d at 162.

<sup>202</sup> See *id.* at 163–68 (focusing on the quality of the contacts, rather than the quantity); *id.* at 162 ("Although it is impossible to precisely fix those acts that constitute a transaction of business, [the Court of Appeals'] precedents establish that it is the quality of the defendants' New York contacts that is the primary consideration." (quoting *Fischbarg v. Doucet*, 880 N.E.2d 22, 26 (N.Y. 2007))); *id.* ("Whether a non-domiciliary has engaged in sufficient purposeful activity to confer jurisdiction in New York requires an examination of the totality of the circumstances." (quoting *Farkas v. Farkas*, 830 N.Y.S.2d 220, 221 (N.Y. App. Div. 2007))).

<sup>203</sup> See *Grimaldi*, 895 N.Y.S.2d at 163–64.

<sup>204</sup> See *supra* Part III.C.

defendants communicated regularly with plaintiff in this state.”<sup>205</sup> In addition, in *Parke-Bernet Galleries, Inc.*, “[t]he Court of Appeals determined that the defendant was subject to the jurisdiction of the New York courts in connection with an action arising out of the auction.”<sup>206</sup>

## 2. Active/Passive Website

Second, the defendants advertised on their websites that they perform services “in the Northeast.”<sup>207</sup> Plaintiff stated that he first contacted the defendant by calling the number found on the website.<sup>208</sup> Plaintiff also states that his wife ordered a book through the website as well.<sup>209</sup> The court here analyzed the use of online presence in establishing jurisdiction. One of the leading cases used in its analysis was *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*<sup>210</sup> *Zippo Manufacturing Co.* was a trademark infringement action where the defendant was based in California and maintained an interactive website to “exchange[] information with Pennsylvania residents in hopes of using that information for commercial gain later.”<sup>211</sup> The court held that there was personal jurisdiction of the defendant because of their “conscious choice to conduct business”<sup>212</sup> and further stating that “[a] passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction” and goes on to state that “the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”<sup>213</sup>

“However, passive Web sites, when combined with other business activity, may provide a reasonable basis for the assertion of personal jurisdiction.”<sup>214</sup> In *Citigroup, Inc. v. City Holding Co.*,<sup>215</sup>

---

<sup>205</sup> *Grimaldi*, 895 N.Y.S.2d at 163 (quoting *Fischbarg*, 880 N.E.2d at 271).

<sup>206</sup> *Grimaldi*, 895 N.Y.S.2d at 163–64 (citing *Parke-Bernet Galleries, Inc. v. Franklyn*, 256 N.E.2d 506, 508 (N.Y. 1970)).

<sup>207</sup> *Grimaldi*, 895 N.Y.S.2d at 164.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 164–65.

<sup>211</sup> *Id.* at 164 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125 (W.D. Pa. 1997)).

<sup>212</sup> *Id.* at 1126 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

<sup>213</sup> *Id.* at 1124 ( first citing *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996); then second citing *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1334 (E.D. Mo. 1996)).

<sup>214</sup> *Grimaldi*, 895 N.Y.S.2d at 165 (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257,

for example, the court found that customers in New York can apply for loans on-line, print out applications to send by fax, and even chat with a representative on-line, which was held sufficient to support personal jurisdiction.<sup>216</sup> In *Grimaldi*, the court found that the website was passive, even though the plaintiff obtained contact information from it, and the plaintiff's wife was able to conduct a transaction online.<sup>217</sup>

### 3. Purposeful Availment/Establishing a Continuing Relationship

Finally, the court also considered the defendant's purposeful availment and attempt to create a continuing relationship. It is here that the court concluded:

[I]n light of the number, nature, and timing of all of the contacts involved, including the numerous telephone, fax, e-mail, and other written communications with the plaintiff in New York that Guinn initiated subsequent to his initial involvement in the project, as well as the manner in which Guinn employed his decidedly passive Web site for commercial access, Guinn must be deemed to have sufficient contacts with this state.<sup>218</sup>

The court's position was that the defendant created a purposeful relationship with the plaintiff where he would be involved in the project, holding that the numerous email contacts between the parties and at least twenty-seven calls made from the defendants to the plaintiff, were sufficient contact to hold them accountable in this state.<sup>219</sup> Importantly, the court considered the constitutional aspects of finding that the defendants transacted business in New York, and concluded that taking into account these circumstances of this case, exercising jurisdiction over the defendants "would not be inconsistent with traditional notions of due process, fair play, and substantial justice."<sup>220</sup>

---

1264 (6th Cir. 1996)).

<sup>215</sup> Citigroup Inc. v. City Holding Co., 97 F. Supp. 2d 549 (S.D.N.Y. 2000).

<sup>216</sup> *Id.* at 570, 571.

<sup>217</sup> *Grimaldi*, 895 N.Y.S.2d at 164, 167.

<sup>218</sup> *Id.* at 167.

<sup>219</sup> *Id.* at 167-68.

<sup>220</sup> *Id.* at 168 (quoting *Bogal v. Finger*, 874 N.Y.S.2d 217, 219 (N.Y. App. Div. 2009)).

*B. Judge Dickerson's Dissent: Paterno v. Laser Spine Institute  
Dissent*

The majority, at the appellate level, argued the contacts that occurred in *Grimaldi v. Guinn*<sup>221</sup> were more extensive than those at issue in *Paterno*.<sup>222</sup> It is important to note that Judge Dickerson, who authored the majority decision in *Grimaldi*<sup>223</sup> also wrote the dissent in *Paterno*.<sup>224</sup> The dissent in *Paterno* found jurisdiction under CPLR section 302(a)(1) and argued that the defendants purposefully availed themselves of the benefits of New York as the forum state and that litigating in New York would not offend notions of fair play and substantial justice.<sup>225</sup>

Similar to the approach taken by the majority in *Grimaldi*, Judge Dickerson also analyzed the *Paterno* case based on the totality of circumstances, but came to a different conclusion than the majority. He argued that based on the totality of circumstances:

[I]n light of the number, nature, and timing of all of the contacts involved, including the numerous telephone, email, and text message communications with the plaintiff in New York, the consultations with the plaintiff's New York physicians, the filling of prescriptions in New York pharmacies, and the ordering of blood work and MRIs in New York, as well as LSI's use of its website to solicit business from internet users, LSI had sufficient contacts with New York to be subject to its long-arm jurisdiction.<sup>226</sup>

Comparing *Paterno's* contacts with the contacts in *Grimaldi*, Judge Dickerson opined that *Paterno's* contacts were more extensive than those at issue in *Grimaldi*, in which the Second Department concluded that:

“[B]ased on the deployment of a passive website, coupled with the ‘number, nature, and timing of all of the contacts involved, including the numerous telephone, fax, e-mail, and other written communications with the plaintiff in New York,’ the defendant Guinn had sufficient contacts with New

---

<sup>221</sup> See *Grimaldi*, 895 N.Y.S.2d at 165.

<sup>222</sup> *Paterno v. Laser Spine Inst.*, 973 N.Y.S.2d 681, 686 (N.Y. App. Div. 2013) (quoting *Grimaldi*, 895 N.Y.S.2d at 165).

<sup>223</sup> *Id.* at 158.

<sup>224</sup> *Paterno*, 973 N.Y.S.2d at 691 (Dickerson, J., dissenting).

<sup>225</sup> *Id.* at 698, 700 (citing *Grimaldi*, 895 N.Y.S.2d at 168).

<sup>226</sup> *Paterno*, 973 N.Y.S.2d at 697 (Dickerson, J., dissenting).



York State to confer jurisdiction over him.”<sup>227</sup>

Although LSI cannot be deemed to have been physically present in New York, the exercise of jurisdiction over LSI, and, by extension, the physician defendants, does not offend due process. LSI purposefully availed itself of the benefits of the forum state by the manner in which it projected itself into New York. It had sufficient minimum contacts . . . .<sup>228</sup>

Because Judge Dickerson found jurisdiction under CPLR section 302(a)(1), he then went into a due process analysis. Dickerson cited to his *Grimaldi* decision and argued that “[s]o long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its action there, due process is not offended if that party is subjected to jurisdiction even if not ‘present’ in that state.”<sup>229</sup> In order to provide some context, we will discuss this holding in relation to *Grimaldi v. Guinn*.

## VI. POLICY CONSIDERATIONS: HOW DO WE ACCOUNT FOR THE DISCREPANCY BETWEEN THE COURTS?

It appears that public policy weighed heavily on the Court’s decision in *Paterno*. The Court of Appeals unveiled its policy concerns in one short paragraph in its 7-0 opinion.<sup>230</sup> The Court stated, given the reality that:

It is no longer unusual or difficult, as it may once have been, to travel across state lines in order to obtain health care from an out-of-state provider. It is also not unusual to expect follow-up for out-of-state treatment. . . . [T]o find defendants’ conduct here constitutes transacting business within the meaning of CPLR 302(a)(1), based on contacts before and after the surgeries, would set a precedent for

---

<sup>227</sup> *Id.* (quoting *Grimaldi*, 895 N.Y.S.2d at 167). Dickerson cited *Grimaldi* and quoted *Fischbarg* to support his position that the contacts described above demonstrate the “purposeful creation of a continuing relationship’ with the plaintiff.” *Paterno*, 973 N.Y.S.2d at 697 (Dickerson, J., dissenting). Furthermore, Dickerson bolstered his argument by pointing out that “national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it.” *Id.* at 694 (quoting *Grimaldi*, 895 N.Y.S.2d at 162). Dickerson went on to say “it is not necessarily who initiated contact that is determinative, but rather, the *nature and quality* of the contacts and the relationship established as a result.” *Paterno*, 973 N.Y.S.2d at 695 (Dickerson, J., dissenting) (quoting *Fischbarg v. Doucet*, 880 N.E.2d 22, 28 (N.Y. 2007)) (emphasis added).

<sup>228</sup> *Paterno*, 973 N.Y.S.2d at 698 (Dickerson, J., dissenting).

<sup>229</sup> *Id.* at 694 (quoting *Grimaldi*, 895 N.Y.S.2d at 162).

<sup>230</sup> *Paterno v. Laser Spine Inst.*, 23 N.E.3d 988, 989, 995 (N.Y. 2014).

almost limitless jurisdiction over out-of-state medical providers in future cases.<sup>231</sup>

The Court of Appeals was unwilling to interpret the expanse of CPLR section 302(a)(1) to be boundless in its application. The Court was concerned with the significant effects that an adverse holding would entail.<sup>232</sup> According to the New York Court of Appeals, and the Supreme Court of New York, Appellate Division, Second Department, allowing plaintiffs to bring claims against defendants similar to those in this case would open the “floodgates” for out of state medical malpractice cases to be brought in New York courts.<sup>233</sup> It appears that it was important to the court to protect doctors all over the country from being called into New York State courts.<sup>234</sup> People travel all over the country for medical treatment, thus it appears that the Appellate Court and Court of Appeals did not believe it would be fair for foreign doctors to be dragged to New York to defend against claims that stemmed from conduct in foreign states.

As a practical matter, New York State residents who are patients in out-of-state clinics want to sue in New York State. There are various reasons why people receive medical treatment in other states: they may want to get surgery in a foreign state due to a particular doctor’s reputation, they may have relatives in a foreign state, or they may simply want to get surgery in a warm-weather state so that they can experience a more pleasant recovery by the beach rather than in the cold.<sup>235</sup> Regardless of the specific reason a patient may have, there are countless explanations why people travel out of state for medical treatment. However, while they may choose to obtain medical services outside of New York, they will likely still want to sue in New York, their home state, due to its

---

<sup>231</sup> *Id.* at 995.

<sup>232</sup> *See id.*

<sup>233</sup> *See id.*; see generally *Paterno*, 973 N.Y.S.2d at 689 (stating how just because an individual suffers pain in a state, that does not mean they are entitled to sue a physician based upon a procedure that occurred in another state). This would add to the 4,000 medical malpractice cases already filed each year. See *NY Courts to Focus More on Medical Malpractice*, CRAIN’S N.Y. BUSINESS (Nov. 11, 2011, 1:26 PM), [http://www.crainsnewyork.com/article/20111111/HEALTH\\_CARE/111119970/ny-courts-to-focus-more-on-medical-malpractice](http://www.crainsnewyork.com/article/20111111/HEALTH_CARE/111119970/ny-courts-to-focus-more-on-medical-malpractice).

<sup>234</sup> *See Paterno*, 973 N.Y.S.2d at 689.

<sup>235</sup> See, e.g., Amanda Gardner, *6 Million Americans Travel Abroad Each Year for Surgeries, Medical Treatments*, HEALTH (Apr. 8, 2009), <http://news.health.com/2009/04/08/traveling-treatment/>; Elisabeth Rosenthal, *The Growing Popularity of Having Surgery Overseas*, N.Y. TIMES (Aug. 6, 2013), <http://www.nytimes.com/2013/08/07/us/the-growing-popularity-of-having-surgery-overseas.html>.

convenience and its reputation for comparably large damage awards.<sup>236</sup>

According to previous Court of Appeals opinions, doctors treating large numbers of New York State patients and advertising for them using an *active* website may very well be held accountable in New York State courts rather than in courts of their own foreign states. That being said, it appears that a defendant medical clinic or doctor who operates a *passive* website may not be held accountable in New York State courts. In *Paterno*, it was significant for the Court that defendants operated a *passive* website.<sup>237</sup> The other key point for the Court was that the plaintiff initiated the contacts.<sup>238</sup> The combination of the fact that the website was found to be passive and the fact that the contact was initiated by the plaintiff led the Court to find that advertising in the manner that LSI did would not lead clinics to be accountable in New York State courts.<sup>239</sup>

Furthermore, while a Florida clinic may easily hire a New York State lawyer who litigates for them while they remain afar, the same is not necessarily true for the doctors.<sup>240</sup> It is significant that

---

<sup>236</sup> See Greg Roslund, *The Medical Malpractice Rundown: A State-by-State Report Card*, EMERGENCY PHYSICIANS MONTHLY (July 21, 2014), <http://www.epmonthly.com/departments/subspecialties/medico-legal/the-medical-malpractice-rundown-a-state-by-state-report-card/> (stating that New York has frequent malpractice litigation and high malpractice payouts); Dylan Scott, *California and New Jersey Hospitals Charge Highest Average Prices*, GOVERNING (May 9, 2013), <http://www.governing.com/blogs/view/gov-california-and-new-jersey-hospitals-charge-highest-average-prices.html> (showing New York placed 12th on a list ranking the 50 states average provider charges and total hospital discharges by state for fiscal year 2011); see generally THOMAS H. COHEN & KYLE HARBACEK, U.S. DEP'T JUST., NCJ 233094, PUNITIVE DAMAGES AWARDS IN STATE COURTS, 2005, at 10 (Mar. 2011) (proving the proposition that the percentage of civil trials in state courts with litigants seeking punitive damages is higher in New York than in some other states).

<sup>237</sup> *Paterno*, 973 N.Y.S.2d at 686. The appellate court cited *Zippo* for the proposition that the website was passive. See *id.* (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

<sup>238</sup> *Paterno*, 973 N.Y.S.2d at 684; see also *Paterno v. Laser Spine Inst.*, 23 N.E.3d 988, 993–94 (N.Y. 2014) (“Plaintiff here admits that he was the party who sought out and initiated contact with defendants after viewing LSI’s website. According to plaintiff, that website informed viewers about LSI medical services and its professional staff. However, he has not asserted that it permitted direct interaction for online registration, or that it allowed for online purchase of LSI services. . . . Passive websites, such as the LSI website, which merely impart information without permitting a business transaction, are generally insufficient to establish personal jurisdiction. . . . Thus, as plaintiff concedes, the mere fact that he viewed LSI’s website in New York is insufficient to establish CPLR 302(a)(1) personal jurisdiction over defendants.” (citing *Grimaldi v. Guinn*, 895 N.Y.S.2d 156, 165 (N.Y. App. Div. 2010))) (citations omitted).

<sup>239</sup> See *Paterno*, 23 N.E.3d at 993–94.

<sup>240</sup> See Mark A. Rothstein, *Health Care Reform and Medical Malpractice Claims*, 38 J.L. MED. & ETHICS 871, 872 (2010) (showing a survey of the reasons why people bring medical malpractice cases).

the defendants in this case were the LSI Institute *and* the doctors.<sup>241</sup> While a large institute like LSI may have the legal resources to litigate in New York, doctors operating foreign, boutique, private practices may not have the resources to hire New York attorneys.<sup>242</sup> An additional policy consideration is that evidence of an alleged malpractice claim resides in the foreign state, where the injury occurred, not in New York. Further, the location of witnesses in medical malpractice cases is generally in the foreign state where the surgery occurred. It would be difficult for the defendant to bring witnesses to New York State when the accident occurred in another part of the country.<sup>243</sup> For these reasons, the Court of Appeals was unwilling to open the “floodgates,” as the Court sought to protect professionals and restrict personal jurisdiction to those who can be fairly reached.

## VII. THE PROSPECTIVE OUTLOOK OF CPLR 302(A)(1) AND THE IMPLICATIONS OF THE *PATERNO* DECISION

### A. *The Future Reach of CPLR 302(a)(1)*

Many New Yorkers and other Americans travel to foreign states seeking medical attention.<sup>244</sup> Is it fair for these New Yorkers who

<sup>241</sup> See *Paterno*, 23 N.E.3d at 990 (naming the parties in the case).

<sup>242</sup> See, e.g., Mary Brophy Marcus, *Doctors Detail High Costs of Fighting Malpractice Claims*, U.S. News (Apr. 4, 2012, 5:00 PM), <http://health.usnews.com/health-news/news/articles/2012/04/04/doctors-detail-high-costs-of-fighting-malpractice-claims> (stating the average malpractice claim costs \$23,000 in legal defense fees).

<sup>243</sup> See generally RULES OF PROF'L CONDUCT r. 3.4 (N.Y. UNIFIED CT. SYS. 2013) (showing the relevant considerations when trying to secure a witness to appear in court). There are many statistics that focus on malpractice claims in New York. See, e.g., ARTHUR BEST & DAVID W. BARNES, *BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS* 6 (2d ed. 2007) (“The Harvard Medical Practice Study found that in New York State ‘eight times as many patients suffer an injury from medical negligence as there are malpractice claims. Because only about half the claimants receive compensation, there are about sixteen times as many patients who suffer an injury from negligence as there are persons who receive compensation through the tort system.’”)

Although trials are the legal system’s iconographic center, they also are its chief aberration. Fewer than ten cases in one hundred proceed to trial. The great majority are resolved through negotiated settlements. . . . Out of 10,000 actionable negligent injuries, approximately 9600 disappeared when injury victims did not pursue a claim. Half of those that were presented to attorney never became filed lawsuits. Of the 200 cases filed (2% of those negligently injured), 170 will be settled, paying most plaintiffs less than their actual losses. Trials will commence for about thirty of these cases. Of the 1,000,000 patients who were not negligently injured, an estimated 2400 will mistakenly regard their injuries as resulting from negligence, and about one third of those become filed lawsuits. . . .”)

<sup>244</sup> See Gardner, *supra* note 235; Robert Pear, *Medical Boards Draft Plan to Ease Path to Out-of-State and Online Treatment*, N.Y. TIMES (June 29, 2014), <http://www.nytimes.com/2014/06/30/us/medical-boards-draft-plan-to-ease-path-to-out-of-state->

live in New York and pay New York taxes not to seek justice for medical malpractice in their own state, simply because they chose to seek out-of-state medical treatment? What if these New Yorkers chose to obtain medical treatment outside of New York for the simple reason that they could not afford medical treatment in New York State? Shouldn't New Yorkers, who pay New York taxes, own property in New York and serve jury duty in New York, have access to New York courts? People travel to a foreign states (and even foreign countries)<sup>245</sup> for procedures that their health insurance plans do not cover.<sup>246</sup> In addition, patients travel because such procedures may be less expensive out of New York State.<sup>247</sup>

According to data, patients should shop around for their medical treatment.<sup>248</sup> Hospitals can charge up to over *four times* the amount of their counterparts in other states.<sup>249</sup> Medicare data shows that facilities nationwide submitted divergent bills for the same treatment.<sup>250</sup> If a person travels out of state for medical treatment that they would be unable to afford in the state of New York, it does not seem convenient or fair, nor does it appear to be in the interest of justice to prevent harmed New Yorkers from litigating in New York courts. The judicial system should protect New York residents by allowing them to have their day in court and litigate malpractice claims in their home state.

---

and-online-treatment.html?\_r=1 ("Officials representing state medical boards across the country have drafted a model law that would make it much easier for doctors licensed in one state to treat patients in other states, whether in person, by videoconference or online.").

<sup>245</sup> See Gardner, *supra* note 235 (stating that approximately six million Americans travel abroad each year for medical treatment and medical surgeries).

<sup>246</sup> See Gardner, *supra* note 235 (describing how some patients even travel internationally for medical treatment, where the cost of health care is less, combined with the fact that the US has a shortage of physicians and nurses); Rosenthal, *supra* note 235.

<sup>247</sup> See, e.g., *10 Most Expensive Hospitals in the U.S.*, MED. BILLING DEGREE, <http://www.medicalbillingdegree.org/10-most-expensive-hospitals-in-the-u-s/> (last visited Apr. 5, 2016) ("In the New York City area, a knee joint replacement may cost anywhere from \$15,000 to \$155,000.").

<sup>248</sup> See *id.* (stating how data shows every hospital charges a different amount for various procedures so consumers should shop around before making a decision); see generally Julie Creswell et al., *New Jersey Hospital has Highest Billing Rates in the Nation*, N.Y. TIMES (May 16, 2013), [http://www.nytimes.com/2013/05/17/business/bayonne-medical-center-has-highest-us-billing-rates.html?hp&\\_r=1&%3Cbr%20%3E](http://www.nytimes.com/2013/05/17/business/bayonne-medical-center-has-highest-us-billing-rates.html?hp&_r=1&%3Cbr%20%3E) (showing how one hospital charges more than any other hospital in America).

<sup>249</sup> *Id.*

<sup>250</sup> Matthew Bloch et al., *How Much Hospitals Charge for the Same Procedures*, N.Y. TIMES (May 8, 2013), <http://www.nytimes.com/interactive/2013/05/08/business/how-much-hospitals-charge.html?ref=business>.

### B. *Did the Paterno Court get it Wrong?*

We also need to look at the flipside of the argument. Other than financial reasons, is it fair to confine New Yorker's to medical treatment only provided in this state? Take for example Cancer Centers of America, with locations in Georgia, Illinois, Pennsylvania, Arizona, and Oklahoma.<sup>251</sup> For New Yorker's seeking extensive treatment, shouldn't they be allowed to obtain this service free of worrying about whether or not New York will provide them a judicial remedy if required? Shouldn't states look out for the overall health and well-being of their citizens?

The Court seems to be drawing lines in the sand with their decision in *Paterno*.<sup>252</sup> The *Paterno* Court was faced with the potential issue of opening up the floodgates, but at the same time, a court must balance the interests of the residents within the State of New York that need protection and scrutinize the true quality and nature of the contacts between the patient and doctors or medical facilities, as well.

## VIII. CONCLUSION

The New York State Court of Appeals decision in *Paterno v. Laser Spine Inc.* failed to properly apply the correct statutory criteria in its "totality of circumstances" analysis to determine if the "transaction of business" clause in CPLR section 302(a)(1) had been satisfied. The *Paterno* record clearly demonstrates the defendants had an excessive quantity of contacts with New York State and that the "quality and nature" of those contacts had a substantial relationship to the plaintiff's cause of action.<sup>253</sup> Also, the record clearly shows the plaintiff's claims arose from the defendant's contacts because there was an articulable nexus between those contacts and the plaintiff's cause of action.<sup>254</sup> The policy rational of

---

<sup>251</sup> See, e.g., *Our Hospitals, CANCER TREATMENT CTRS. AM.*, <http://www.cancercenter.com/doctors-and-hospitals/> (last visited Apr. 5, 2016) (showing locations in Georgia, Illinois, Pennsylvania, Arizona, and Oklahoma).

<sup>252</sup> See *Paterno v. Laser Spine Inst.*, 23 N.E.3d 988, 995 (N.Y. 2014). There have been recent cases citing *Paterno*. See, e.g., *Wang v. LSUC, et al.*, No. 653250/13, 2016 WL 902292, at \*1 (N.Y. App. Div. Mar. 10, 2016) (dismissing the plaintiff's complaint for lack of personal jurisdiction and relying on *Paterno*); *Stern v. Four Points by Sheraton Ann Arbor Hotel*, 19 N.Y.S.3d 289, 290 (N.Y. App. Div. 2015); *Carrs v. Avco Corp.*, 2 N.Y.S.3d 533, 533 (N.Y. App. Div. 2015); *Minella v. Restifo*, 3 N.Y.S.3d 322, 323 (N.Y. App. Div. 2015).

<sup>253</sup> See, e.g., Brief for Appellant at 12–13, *Paterno v. Laser Spine Inst.*, 23 N.E.3d 988 (2014) (showing an example of the defendant's contacts in the forum state).

<sup>254</sup> See *id.* at 23.

preventing the opening of floodgates of medical malpractice litigation by New Yorkers against doctors throughout the world makes some sense but, as with every legal half-truth, it has its limits. When non-domiciliary defendants have the number of contacts committed by the defendants in *Paterno* and their claims arise from those contacts, citizens of the Empire State should not be deprived of access to our courts because of unnecessary fears of opening the litigation flood gates by a logically expansive application of the Empire States' long-arm statute.