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CPLR 203(b): Preservation of a Medical Malpractice Cause of Action Under CPLR 203(b)

Louis J. Ragusa

Survey is *Connell v. Hayden,* a case in which the second department considered the unity-of-interest principle embodied in CPLR 203(b). The *Connell* court held that because a professional corporation is united in interest with its members, service upon the corporation will relate back to the date of service upon an individual member. Significantly, however, the court expressly declined to resolve the question whether the continuous treatment doctrine can apply in the context of such corporations so as to postpone accrual of a medical malpractice cause of action.

It is hoped that the cases treated in this installment of *The Survey* will keep the bar aware of the important developments in New York law.

CIVIL PRACTICE LAW AND RULES

Article 2—Limitations of Time

CPLR 203(b): Preservation of a medical malpractice cause of action under CPLR 203(b)

In New York, a medical malpractice cause of action is deemed to accrue at the time of an alleged act of malpractice,[1] irrespective of the plaintiff's knowledge of such negligent act.[2] Nevertheless, pursuant to the continuous treatment doctrine, the accrual date for statute of limitations purposes may be postponed until the termination of medical services.[3] Of course, regardless of when the

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[1] *E.g.,* Davis v. City of New York, 38 N.Y.2d 257, 259, 342 N.E.2d 516, 517, 379 N.Y.S.2d 721, 723 (1975); Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 217, 188 N.E.2d 142, 144, 237 N.Y.S.2d 714, 717-18, *modified,* 12 N.Y.2d 1073, 1073, 190 N.E.2d 142, 144, 239 N.Y.S.2d 896, 897, *cert. denied,* 374 U.S. 808 (1963); Brush v. Olivo, 81 App. Div. 2d 852, 853, 438 N.Y.S.2d 857, 859 (2d Dep't 1981); Conklin v. Draper, 229 App. Div. 227, 229, 241 N.Y.S. 529, 532 (1st Dep't), *aff'd,* 254 N.Y. 620, 173 N.E. 892 (1930). *But see* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 431, 248 N.E.2d 871, 873, 301 N.Y.S.2d 23, 27 (1969); CPLR 214-a (McKinney Supp. 1981-1982) (when a foreign object negligently has been left in a plaintiff-patient's body, the statute of limitations for a medical malpractice action will not commence until the plaintiff has discovered or reasonably should have discovered such object).

[2] Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 217, 188 N.E.2d 142, 144-45, 237 N.Y.S.2d 714, 717-18, *modified,* 12 N.Y.2d 1073, 1073, 190 N.E.2d 253, 253, 239 N.Y.S.2d 896, 897, *cert. denied,* 374 U.S. 808 (1963); Schiffman v. Hospital for Joint Diseases, 36 App. Div. 2d 31, 33, 319 N.Y.S.2d 674, 676 (2d Dep't 1971); SIEGEL § 42, at 44.

[3] *E.g.,* Borgia v. City of New York, 12 N.Y.2d 151, 155-56, 187 N.E.2d 777, 778-79, 237 N.Y.S.2d 319, 321-22 (1962); Muller v. Sturman, 79 App. Div. 2d 482, 484, 437 N.Y.S.2d 205, 207 (4th Dep't 1981); Fonda v. Paulsen, 46 App. Div. 2d 540, 543-44, 363 N.Y.S.2d 841, 845 (3d Dep't 1975); CPLR 214-a (McKinney Supp. 1981-1982) (codification of the continuous treatment doctrine). *Borgia,* the case which promulgated the continuous treatment doctrine,

malpractice cause of action is deemed to accrue, it will be time-barred unless interposed within the applicable statutory period.[4] CPLR 203(b), however, will toll such statute of limitations[5] as to a defendant who is "united in interest" with another timely served defendant.[6] Recently, in *Connell v. Hayden*,[7] the Appellate Divi-

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defined continuous treatment as "treatment for the same or related illness or injuries, continuing after the alleged acts of malpractice, not mere continuity of a general physician-patient relationship." 12 N.Y.2d at 157, 187 N.E.2d at 779, 237 N.Y.S.2d at 322. Continuous treatment is sufficient to extend the statute of limitations even when no further negligence occurs in the course of such continuous treatment. *See id.*; Brush v. Olivo, 81 App. Div. 2d 852, 853, 438 N.Y.S.2d 857, 859 (2d Dep't 1981); O'Laughlin v. Salamanca Hosp. Dist. Auth., 36 App. Div. 2d 51, 53-54, 319 N.Y.S.2d 128, 130-31 (4th Dep't 1971). Furthermore, courts have extended the continuous treatment doctrine to include other professionals. *See* Siegel v. Kranis, 29 App. Div. 2d 477, 480, 288 N.Y.S.2d 831, 834 (2d Dep't 1968) (attorney); County of Broome v. Vincent J. Smith, Inc., 78 Misc. 2d 889, 892-93, 358 N.Y.S.2d 998, 1003 (Sup. Ct. Broome County 1974) (architect); 1 WK&M ¶ 214.22a, at 2-311.

[4] Until the adoption of CPLR 214-a, actions for medical malpractice were governed by CPLR 214, which provided for a 3-year statute of limitations. CPLR 214(6) (1972). CPLR 214-a, which is applicable to any act of malpractice accruing on or after July 1, 1975, provides that the action must be commenced within 2 years and 6 months of the alleged act of malpractice. CPLR 214-a (McKinney Supp. 1981-1982).

[5] CPLR 203(b) (1972). The effect of the CPLR provision is such that timely interposition of a claim against any codefendant permanently deprives all other codefendants who are "united in interest" of the statute of limitations defense. Morrison v. Foster, 80 App. Div. 2d 887, 888, 437 N.Y.S.2d 371, 372 (2d Dep't 1981); Zeitler v. City of Rochester, 32 App. Div. 2d 728, 728, 302 N.Y.S.2d 207, 208 (4th Dep't 1969); Gross v. Newburger, Loeb & Co., 103 Misc. 2d 417, 425, 426 N.Y.S.2d 667, 674 (Sup. Ct. Nassau County 1980); Modica v. Westchester Rockland Newspapers, Inc., 54 Misc. 2d 1086, 1087, 283 N.Y.S.2d 939, 940 (Sup. Ct. Westchester County 1967); 1 WK&M ¶ 203.05, at 2-67. Notably, the statute of limitations will not be tolled as to a defendant who was not served within the time limitation period and who was not named as a party defendant in the summons which was served upon the timely served codefendant. Shaw v. Cock, 78 N.Y. 194, 199 (1879); Miller v. Farina, 58 App. Div. 2d 731, 732, 395 N.Y.S.2d 867, 869 (4th Dep't 1977); McCabe v. Queensboro Farm Prods., Inc., 15 App. Div. 2d 553, 553, 223 N.Y.S.2d 21, 23 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 963, 183 N.E.2d 326, 229 N.Y.S.2d 11 (1962); Halucha v. Jockey Club, 31 Misc. 2d 186, 189, 220 N.Y.S.2d 567, 571 (Sup. Ct. N. Y. County 1961). *But see* Brock v. Bua, 83 App. Div. 2d 61, 67-68, 443 N.Y.S.2d 407, 411 (2d Dep't 1981) (requirement that a late-served defendant must be named as a party defendant in the timely interposed summons is obsolete and inordinately formalistic); note 19 *infra*.

[6] CPLR 203(b) (1972). The classic definition of "united in interest" was advanced by the Court of Appeals in Prudential Ins. Co. of Am. v. Stone, 270 N.Y. 154, 200 N.E. 679 (1936), wherein the Court stated, "[i]f the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other then they are 'otherwise united in interest.'" *Id.* at 159, 200 N.E. at 681; *see, e.g.*, Scher v. Kronman, 70 App. Div. 2d 354, 356, 420 N.Y.S.2d 714, 715 (1st Dep't 1979); Gross v. Newburger, Loeb & Co., 103 Misc. 2d 417, 425-26, 426 N.Y.S.2d 667, 674 (Sup. Ct. Nassau County 1980). The *Prudential* Court further stated that "the interests of the defendants in preventing the plaintiff from obtaining the relief sought [must be] so inseparably intertwined that the presumption is warranted that they will both be desirous of reaching the same result." 270 N.Y. at 161, 200 N.E. at 681. This formulation, while attempting to pro-

sion, Second Department, upon holding that service on one defendant cannot give a court in personam jurisdiction over another defendant,[8] noted two statute of limitations issues in dicta. The *Connell* court expressly reserved decision on whether continuous treatment of the same plaintiff-patient by different defendant-physicians postpones accrual of a medical malpractice cause of action,[9] but upon thoroughly discussing CPLR 203(b),[10] stated that a professional service corporation is sufficiently united in interest with its physician-employees to permit the tolling of the statute of limitations as to such corporation.[11]

In *Connell,* the plaintiffs attempted to commence a medical malpractice action against Drs. Hayden and Jonassen individually, and against the professional service corporation which employed them, by timely serving Dr. Hayden.[12] In opposing Dr. Jonassen's

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vide the criterion for assessing unity of interest, has proved to be nebulous. *See* 1 WK&M ¶ 203.06, at 2-68. Certain generalizations, however, have emerged. First, to be united in interest, it is not necessary that the parties be joint contractors or have a joint interest. *E.g.,* 270 N.Y. at 159, 200 N.E. at 680; Trane Co. v. N. Robinson Constr., Inc., 61 App. Div. 2d 360, 364, 402 N.Y.S.2d 454, 456 (3d Dep't 1978). Second, the mere fact that the defendants are coemployees or joint tortfeasors does not imply that they are united in interest. *See* Scher v. Kronman, 70 App. Div. 2d 354, 356, 420 N.Y.S.2d 714, 715 (1st Dep't 1979); Marchetti v. Linn, 197 Misc. 658, 660, 99 N.Y.S.2d 124, 126 (Sup. Ct. Ulster County 1950). Third, when one party is vicariously liable for another, the two parties are considered to be united in interest. *E.g.,* Hatch v. Cherry-Burrell Corp., 274 App. Div. 234, 241, 82 N.Y.S.2d 322, 328 (4th Dep't 1948); Diver v. Jewish Hosp. of Brooklyn, 18 Misc. 2d 231, 233, 188 N.Y.S.2d 1003, 1005 (Sup. Ct. Kings County 1959); Pandolfo v. Ansbro, 10 Misc. 2d 51, 52, 174 N.Y.S.2d 764, 765 (Sup. Ct. Kings County 1958). Finally, when one party may have a defense which is not available to the other party, they will not be in unity of interest. *See* Stevens v. Young, 272 App. Div. 784, 785, 69 N.Y.S.2d 636, 637-38 (2d Dep't 1947); Gross v. Newburger, Loeb & Co., 103 Misc. 2d 417, 425-26, 426 N.Y.S.2d 667, 675 (Sup. Ct. Nassau County 1980); Halucha v. Jockey Club, 31 Misc. 2d 186, 189, 220 N.Y.S.2d 567, 570 (Sup. Ct. N. Y. County 1961).

[7] 83 App. Div. 2d 30, 443 N.Y.S.2d 383 (2d Dep't 1981).

[8] *Id.* at 35, 443 N.Y.S.2d at 389.

[9] *Id.* at 39, 443 N.Y.S.2d at 391. Interestingly, in Paciello v. Patel, 83 App. Div. 2d 73, 443 N.Y.S.2d 403 (2d Dep't 1981), Presiding Justice Damiani had an opportunity to address whether claim accrual against multiple physicians, who work for the same professional service corporation may be postponed under the continuous treatment doctrine. *Id.* at 75, 443 N.Y.S.2d at 405. As he did in *Connell,* however, Presiding Justice Damiani reserved ruling on the issue. *Id.* Due to the difficulty that courts have been experiencing with the continuous treatment exception to the medical malpractice statute of limitations, *see* CPLR 214-a, commentary at 148 (McKinney Supp. 1981-1982), it is understandable that the *Paciello* and *Connell* courts were reluctant to address the issue.

[10] 83 App. Div. 2d at 40-45, 443 N.Y.S.2d at 392-94.

[11] *Id.* at 49, 443 N.Y.S.2d at 396.

[12] *Id.* at 32, 35, 443 N.Y.S.2d at 387, 389. The summons and complaint merely named the doctors individually as defendants and did not allege that they practiced either as a professional service corporation or as a partnership. *Id.* Additionally, the plaintiffs at-

ensuant motion for summary judgment, the plaintiffs claimed that Drs. Hayden and Jonassen practiced medicine as a partnership.[13] Stressing that Dr. Hayden was timely served, the plaintiffs asserted that such service also was timely as to the partnership and as to Dr. Hayden's partner, Dr. Jonassen.[14] Although the doctors proved that they practiced medicine as a professional service corporation, and not as a partnership,[15] the Supreme Court, Nassau County, denied Dr. Jonassen's motion for summary judgment, holding that because the defendants were "united in interest," timely service upon Dr. Hayden tolled the statute of limitations as to the defendant Dr. Jonassen and the defendant professional service corporation.[16]

On appeal, the Appellate Division, Second Department, reversed.[17] Writing for a unanimous court,[18] Presiding Justice Damiani held that since neither the corporation nor Dr. Jonassen had been served properly, the court lacked jurisdiction over these parties.[19] Although noting that the court did not have to address such

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tempted to effect service upon Dr. Jonassen by delivering his copy of the summons and complaint to Dr. Hayden and by mailing an additional copy to Dr. Jonassen's principal place of business. *Id.* at 34, 443 N.Y.S.2d at 388; *see* note 19 *infra.* Furthermore, while it was conceded that the acts of malpractice by Dr. Jonassen were committed 5 years prior to the commencement of the action, even though the effective statute of limitations was 3 years, the plaintiff maintained that Dr. Hayden subsequently had continued treating the patient within the 3-year statutory period. 83 App. Div. 2d at 38-39, 443 N.Y.S.2d at 390-91.

[13] 83 App. Div. 2d at 33, 443 N.Y.S.2d at 387.

[14] *Id.*

[15] *Id.*, 443 N.Y.S.2d at 388.

[16] *Id.*

[17] *Id.* at 60, 443 N.Y.S.2d at 403.

[18] Presiding Justice Damiani authored an opinion in which Justices Cohalan, Lazer and Thompson concurred.

[19] 83 App. Div. 2d at 34-35, 37, 443 N.Y.S.2d at 388, 390. In effecting service upon Dr. Jonassen, the plaintiffs had mailed a copy of the summons and complaint to Dr. Jonassen's place of business, *id.* at 34, 443 N.Y.S.2d at 338, instead of his last known residence as is required by CPLR 308(2) (1972 & McKinney Supp. 1981-1982). *See* Glikman v. Horowitz, 66 App. Div. 2d 814, 814, 411 N.Y.S.2d 365, 366 (2d Dep't 1978); Chalk v. Catholic Medical Center of Brooklyn & Queens, Inc., 58 App. Div. 2d 822, 823-24, 396 N.Y.S.2d 864, 866 (2d Dep't 1977). Additionally, Presiding Justice Damiani concluded that the court could not exercise jurisdiction over the professional service corporation because it was not named as a party defendant. 83 App. Div. 2d at 37, 443 N.Y.S.2d at 390. Interestingly, in Brock v. Bau, 83 App. Div. 2d 61, 63, 443 N.Y.S.2d 407, 409 (2d Dep't 1981), decided on the same day as *Connell,* Presiding Justice Damiani was presented with the issue of whether a claim asserted against a new party in an amended pleading should relate back to the date upon which the plaintiff's claim previously was interposed against the originally named defendant. Relying on Rule 15(c) of the Federal Rules of Civil Procedure, the court stipulated a three-pronged test to determine whether the amended pleading should relate back. *Id.* at 68-71, 443 N.Y.S.2d at 412-13. Pursuant to the test, relation back will occur when: (1) both claims arise

statute of limitations issues as continuous treatment and unity of interest,[20] Presiding Justice Damiani discussed the latter issue in dicta.[21] The court first noted that the mere possibility that one defendant may have a defense which is not available to the other will preclude a finding of unity of interest.[22] Hence, reasoned the court, only when one defendant is vicariously liable for the acts of the other will their interests be united, since only then will the defenses available to the defendants be identical.[23] Notably, the court further determined that the presence of a unity of interest is not dependent upon whether the tortfeasor or the vicariously liable party was timely served.[24] The court concluded, therefore, that since the relationship between an employee and his professional-service-corporation employer confers vicarious liability upon the employer, the employee and employer are united in interest.[25] Conversely, the court also concluded that coemployees of a professional service corporation, because they are not vicariously liable for each other's negligent acts, are not united in interest.[26]

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out of the same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant; (3) the new party should have realized that but for an excusable error by the plaintiff as to the identities of the proper parties, the action also would have been brought against him. *Id.* Applying this test to the instant case, it appears that an amendment of the original summons, naming the defendant professional service corporation would relate back to the original complaint. *See* 83 App. Div. 2d at 37, 443 N.Y.S.2d at 390. *But see* note 32 and accompanying text *infra* (vicariously liable party who is not timely served should not be deemed to be in unity of interest with timely served tortfeasor).

[20] 83 App. Div. 2d at 38, 443 N.Y.S.2d at 390.

[21] *Id.* at 38-59, 443 N.Y.S.2d at 390-402.

[22] *Id.* at 41-42, 443 N.Y.S.2d at 392.

[23] *Id.* at 45, 443 N.Y.S.2d at 394. Presiding Justice Damiani undertook an examination of the policy upon which statutes of limitations are based, namely, to relieve a defendant from the necessity of investigation and preparing a defense for "stale" claims. *Id.* at 41, 443 N.Y.S.2d at 392; *see* 2 CARMODY & WAIT, CYCLOPEDIA OF NEW YORK PRACTICE § 13.1 (2d ed. 1965). Unity of interest serves as a valid exception to the statute of limitations, the court concluded, since timely service upon one of the united defendants will still permit the investigation of all the defenses which are available to all the defendants within the period of time limitation. 83 App. Div. 2d at 41, 443 N.Y.S.2d at 392. The court concluded, therefore, that in an action for malpractice the defenses available to a defendant will be identical to those available to another defendant only when the former is vicariously liable for the acts of the latter. *See id.* at 45, 443 N.Y.S.2d at 394.

[24] 83 App. Div. 2d at 48, 443 N.Y.S.2d at 396.

[25] *Id.* at 47-49, 443 N.Y.S.2d at 395-96; *see* Szajna v. Rand, 75 App. Div. 2d 617, 618, 427 N.Y.S.2d 57, 58 (2d Dep't 1980); Hatch v. Cherry-Burrell Corp., 274 App. Div. 234, 241, 82 N.Y.S.2d 322, 328 (4th Dep't 1948); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 70, at 460 (4th ed. 1971).

[26] 83 App. Div. 2d at 59, 443 N.Y.S.2d at 402. The court noted that coemployees would be vicariously liable for the negligent acts of each other if they participated in a joint enterprise. *Id.* at 57, 443 N.Y.S.2d at 401. Presiding Justice Damiani explained, however, that a

The *Connell* court's use of a vicarious liability test to determine whether a unity of interest exists between a professional service corporation and one of its employees is a logical extension of prior cases employing such a test to assess the presence or absence of a unity of interest in other types of business organizations.[27] Nevertheless, it is suggested that such a test is remiss because it is not grounded upon the requirement that no party have a unique defense, a well-settled precondition to the employment of the unity of interest doctrine.[28] Of course, the *Connell* court's finding of a unity of interest upon a mere showing of vicarious liability is consistent with the majority of cases construing section 203(b).[29] It is submitted, however, that the majority has failed to address adequately the fundamental strictures of the unity of interest doctrine in fashioning such a vicarious liability test.[30] Concededly, since the

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joint enterprise is deemed to exist only if the acts of the coemployees were committed outside the course of employment, such as in a private business venture. *Id.* (relying on McCormack v. Nassau Elec. R.R., 18 App. Div. 333, 334, 46 N.Y.S. 230, 230-31 (2d Dep't 1897)).

[27] *See, e.g.*, Szajna v. Rand, 75 App. Div. 2d 617, 618, 427 N.Y.S.2d 57, 58 (2d Dep't 1980) ("as with any other corporation, professional corporations are liable for the actions of their members or officers when acting in these capacities"); Modica v. Westchester Rockland Newspapers, Inc., 54 Misc. 2d 1086, 1087, 283 N.Y.S.2d 939, 940 (Sup. Ct. Westchester County 1967) (an employee-employer relationship results in the two parties being united in interest); Diver v. Jewish Hosp. of Brooklyn, 18 Misc. 2d 231, 233, 188 N.Y.S.2d 1003, 1005 (Sup. Ct. Kings County 1959) (service on hospital "commenced the action" against its employee for malpractice); Pandolfo v. Ansbro, 10 Misc. 2d 51, 52, 174 N.Y.S.2d 764, 765 (Sup. Ct. Kings County 1958) (physicians who are named as defendants "individually and as copartners" are united in interest); N.Y. BUS. CORP. LAW § 1505(a) (McKinney Supp. 1981-1982); note 6 *supra*.

[28] *See, e.g.*, Prudential Ins. Co. of Am. v. Stone, 270 N.Y. 154, 159, 200 N.E. 679, 680 (1936) (the parties are united in interest if "the interest of the parties in the subject matter is such that they stand or fall together"); Gross v. Newburger, Loeb & Co., 103 Misc. 2d 417, 425, 426 N.Y.S.2d 667, 675 (Sup. Ct. Nassau County 1980) ("courts have held that unity of interest does not exist where defenses available to one defendant are unavailable to another"); Halucha v. Jockey Club, 31 Misc. 2d 186, 189, 220 N.Y.S.2d 567, 570 (Sup. Ct. N. Y. County 1961) ("[t]here can be no 'unity of interest' if one defendant has defenses unavailable to the other; nor can there be 'unity of interest' if the defendant that is served could be determined to be liable without a like finding as to the other defendant" (citation omitted)); notes 5 & 6 *supra*.

[29] *E.g.*, Jordan v. Westhill Cent. School Dist., 42 App. Div. 2d 1043, 1043, 348 N.Y.S.2d 620, 621 (4th Dep't 1973); Zeitler v. City of Rochester, 32 App. Div. 2d 728, 728, 302 N.Y.S.2d 207, 208 (4th Dep't 1969); Hatch v. Cherry-Burrell Corp., 274 App. Div. 234, 241, 82 N.Y.S.2d 322, 328 (4th Dep't 1948); Pandolfo v. Ansbro, 10 Misc. 2d 51, 52, 174 N.Y.S.2d 764, 765 (Sup. Ct. Kings County 1958).

[30] Generally, in determining that unity of interest exists where there is a vicarious liability relationship, courts have not examined the issue whether the vicariously liable party may assert a unique defense unavailable to the tortfeasor. *E.g.*, Zeitler v. City of Rochester, 32 App. Div. 2d 728, 728, 302 N.Y.S.2d 207, 208 (4th Dep't 1969); Plumitallo v. 1407 Broad-

untimely served primarily liable employee cannot, in investigating his defenses, be prejudiced by the timely served vicariously liable corporation's unique defense, the courts' invocation of the unity of interest doctrine against such employee may be proper.[31] Nevertheless, application of the doctrine to an untimely served vicariously liable corporation would be inappropriate since such corporation, possessed of a unique defense, may be prejudiced in asserting that defense.[32]

Surely, circumstances may arise wherein a medical malpractice

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way Realty Corp., 279 App. Div. 1019, 1019, 111 N.Y.S.2d 720, 721 (2d Dep't 1952); Modica v. Westchester Rockland Newspapers, Inc., 54 Misc. 2d 1086, 1087, 283 N.Y.S.2d 939, 940 (Sup. Ct. Westchester County 1967). The *Zeitler* opinion is particularly illustrative of the fact that courts have failed to undertake extended discussion regarding the rationale of the unity of interest rule as applied to the vicarious liability test. Indeed, the *Zeitler* court, without further explanation, simply concluded that "[t]he defendants are clearly 'united in interest' by reason of the city's alleged vicarious liability based on an employer-employee relationship." 32 App. Div. at 728, 302 N.Y.S.2d at 208 (citation omitted).

[31] Since the primarily liable party cannot assert any unique defenses, he will not be deprived of the opportunity to investigate his defenses. *See* 83 App. Div. 2d at 47, 443 N.Y.S. at 395.

[32] *See* Halucha v. Jockey Club, 31 Misc. 2d 186, 189, 220 N.Y.S.2d 567, 570 (Sup. Ct. N.Y. County 1961). In *Halucha,* the plaintiff timely commenced an action against the employee. *Id.* Thereafter, the plaintiff claimed that since a unity of interest exists between an employee and his employer, the statute of limitations as to an employer should be tolled by timely service upon his employee. *Id.* The court summarily rejected the plaintiff's contention, succinctly stating, "[t]he plaintiff misinterprets and misapplies the [unity of interest] statute." *Id.* Reasoning that there could be no unity of interest if one defendant has defenses unavailable to the other or if the defendant that is served could be determined liable without a similar finding as to the other defendant, the *Halucha* court concluded that timely service upon the defendant would not be valid against a late-served employer since such employer may assert defenses which would be unavailable to its employee. *Id.*

Notably, the underlying rationale of statutes of limitations also suggests that application of the unity of interest doctrine to an untimely-served vicariously-liable corporation would be prejudicial to such corporation. Indeed, statutes of limitations are enacted "to afford protection to defendants against defending stale claims after a reasonable period of time had elapsed during which a person of ordinary diligence would bring an action." Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 429, 248 N.E.2d 871, 872, 301 N.Y.S.2d 23, 25 (1969). As posited by the *Connell* court:

> the primary purpose of Statutes of Limitation is to relieve defendants of the necessity of investigating and preparing a defense where the action is commenced against them after the expiration of the statutory period because the law presumes that by that time "evidence has been lost, memories have faded, and witnesses have disappeared."

83 App. Div. 2d 30, 41, 443 N.Y.S.2d 383, 392 (2d Dep't 1981) (quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944)); *see* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974); Meyer v. Frank, 550 F.2d 726, 730 (2d Cir.), *cert. denied,* 434 U.S. 830 (1977). Thus, the late service of a summons upon a vicariously liable party may deprive him of his ability to investigate additional defenses within the statutory period, thereby undermining the entire rationale of the statute of limitations.

claimant who timely interposed a cause of action against one doctor employed by a professional service corporation may wish to toll or postpone the running of the statute of limitations not as to the corporation itself, but rather, as to other physicians employed by such corporation. It is suggested that section 203(b), although of limited applicability, may successfully be employed in such circumstances. Indeed, it appears that this section properly may be used to toll the running of the statute of limitations as to a physician who is under the supervision of another physician who was timely served. In support of such view, it is noted that section 1505(a) of the Business Corporation Law provides that an employee of a professional service corporation shall be personally liable for the negligent acts committed by persons under his direct supervision.[33] It is submitted that this statute was intended to alter, from coagent to principal, the traditional view of the status of an employee-supervisor.[34] Surely, given such status, a supervisor in a professional service corporation is vicariously liable for the misconduct of his immediate subordinates. Since the supervisor-subordinate relationship is analogous to the employer-employee relationship, it appears that CPLR 203(b) may be used to toll the running of the statute of limitations as to a subordinate-employee whose immediate supervisor was timely served.

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[33] N.Y. BUS. CORP. LAW § 1505(a) (McKinney Supp. 1981-1982) provides:

> Each shareholder, employee or agent of a professional service corporation shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation.

Id.

[34] State Senator Gioffre, who sponsored section 1505 of the Business Corporation Law, stated that:

> As applied to professional service corporations, the bill would modify the general rule that shareholders of a corporation do not have personal liability [in that] a shareholder of a professional service corporation would be personally responsible for any negligent or wrongful act or misconduct committed *by any person under his direct supervision and control,* as well as for his own acts, while rendering professional services on behalf of such corporation.

Memorandum of Sen. Gioffre, *reprinted in* [1970] N.Y. LEGIS. ANN. 130 (emphasis added); *see* McDonald, *Business Associations, 1970 Survey of New York Law,* 22 SYRACUSE L. REV. 249, 252 (1970); Zahn, *The New York Professional Corporation Law Statutory Requirements and Examination of Factors to Determine Whether or not to Incorporate,* 42 N.Y. ST. B.J. 408, 409 (1970); Note, *Professional Incorporation: The New York View,* 37 BROOKLYN L. REV. 159, 167 (1970). Many other states also have professional service corporation statutes similar to the New York statute. *E.g.,* FLA. STAT. ANN. § 621.07 (West 1977 & Supp. 1981); ILL. ANN. STAT. ch. 32, § 415-8 (Smith-Hurd 1970); *see* OHIO REV. CODE ANN. § 1785.04 (Baldwin 1981); TENN. CODE ANN. § 48-2007 (1979).

Generally, no unity of interest may be found between two physicians who are mere coemployees of a professional service corporation, for neither is vicariously liable for the misconduct of the other.[35] Nevertheless, it is submitted that the continuous treatment doctrine offers a fitting alternative in such event, serving to postpone the accrual of a medical malpractice cause of action, and hence the running of the statute of limitations, as to any of the physicians employed by a professional service corporation. Undoubtedly, doctors working for the same professional service corporation will maintain common records on their patients. Moreover, the manner of treatment of a patient by a physician within a professional service corporation probably will be determined by a co-physician's prior diagnosis and treatment. Additionally, because a patient's trust in one physician would tend to influence his decision to be treated by an associate of such physician,[36] it would ap-

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[35] *Cf.* G. RAY, INCORPORATING THE PROFESSIONAL PRACTICE 24-25 (2d ed. 1978) (when one of the shareholders of a professional service corporation commits malpractice, this will not involve his fellow shareholders, except to the extent of their interest in the corporate assets); S. RIEMER, SERVICING THE PROFESSIONAL CORPORATION: A COMPLETE MANUAL AND GUIDE 2-3 (1976) (the professional in a professional service corporation is not personally liable for the acts committed by other professionals in the corporation); Rotgin, *The Professional Corporation for Lawyers,* 52 N.Y. St. B.J. 634, 634-35 (1980) (under New York law the shareholder of a professional corporation is not personally liable for the malpractice of other shareholders, unless he is also involved).

[36] *See* Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1099 (N.D.N.Y. 1977) (applying New York law); County of Broome v. Vincent J. Smith, Inc., 78 Misc. 2d 889, 891, 358 N.Y.S.2d 998, 1001 (Sup. Ct. Broome County 1974). In *Vincent J. Smith, Inc.,* the court stressed the inherent fairness of the continuous treatment doctrine in the context of the doctor-patient relationship. The court eloquently posited, "[t]his relationship is basically one of trust and confidence and in most cases the patient has little or no knowledge of medicine. He, therefore, must depend exclusively on his physician and must have absolute trust in his judgment." 78 Misc. 2d at 891, 358 N.Y.S.2d at 1001; *see* Mortensen v. United States, 509 F. Supp. 23, 29 (S.D.N.Y. 1980); *cf.* Greene v. Greene, 80 App. Div. 2d 55, 58, 437 N.Y.S.2d 339, 341 (1st Dep't 1981) (so long as relationship of trust and confidence exists between attorney and client, client could not be expected to bring action against attorney). The *Holdridge* court, employing the same rationale as espoused in *Vincent J. Smith, Inc.,* drastically extended the continuous treatment doctrine to cover manufacturers of medical devices, holding that the continuous treatment by an attendant physician should be imputed to the manufacturer of medical devices where such devices were used as an integral part of the continuous treatment. 440 F. Supp. at 1099. The rationale of the *Holdridge* court was that a patient invariably relies upon his physician's judgment in the use of medical devices and medications, thus he could not be expected to bring an action against the manufacturer of such products until the physician's treatment had terminated. *Id.* Although there was no legal relationship between the parties, the court thought it appropriate to impute the continuous treatment of the physician to the manufacturer to toll the statute of limitations. *Id.* It is submitted that where the closeness of the relationship among physicians in a professional service corporation is evident, *see* Weiner v. Weiner, 88 Misc. 2d 920, 924, 390

pear illogical not to find a continuity of treatment between two treating physicians.[37] Therefore, it is submitted that the accrual of a medical malpractice cause of action against any of a succession of treating doctors, all of whom are employed by the same medical professional service corporation, should not be deemed to occur until the cessation of the plaintiff-patient's treatment.

Louis J. Ragusa

Article 30—Remedies and Pleading

CPLR 3017: Postverdict motion to amend ad damnum clause should be granted in the absence of prejudice to defendant

CPLR 3017(a) empowers a court to grant any form of relief that is appropriate to the proof, irrespective of whether the relief to be granted was sought by the plaintiff.[38] Despite the broad language of this provision, the courts repeatedly have declined to exercise their authority to award money damages in excess of the amount requested in the plaintiff's relief[39] or "ad damnum" clause.[40] While the courts have granted preverdict motions to

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N.Y.S.2d 359, 362 (Sup. Ct. N.Y. County 1976), imputation from one doctor to another is more appropriate. Otherwise, a physician aware of his negligence might pursue futile corrective action or refer his patient to a fellow physician of the professional service corporation in order to circumvent the statute of limitations. *See* County of Broome v. Vincent J. Smith, Inc., 78 Misc. 2d at 891, 358 N.Y.S.2d at 1001.

[37] Notably, the underlying rationale of the continuous treatment doctrine, as promulgated in *Borgia*, is that "[i]t would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent." Borgia v. City of New York, 12 N.Y.2d 151, 156, 187 N.E.2d 777, 779, 237 N.Y.S.2d 319, 321-22 (1962); *see* Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1099 (N.D.N.Y. 1977); Fonda v. Paulsen, 46 App. Div. 2d 540, 544, 363 N.Y.S.2d 841, 845 (3d Dep't 1975); 1 WK&M ¶ 214-a.03, at 2-319.

[38] CPLR 3017(a) provides in part that "[e]xcept as provided in section 3215, the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just." CPLR 3017(a) (McKinney Supp. 1980-1981). CPLR 3017(a) requires the pleader to set forth the relief which he seeks. It does not require the pleader to state the exact amount of damages sought, although this has become standard practice. *See* Silvestris v. Silvestris, 24 App. Div. 2d 247, 250, 265 N.Y.S.2d 173, 178 (1st Dep't 1965); CPLR 3017(a), commentary at 11 (1974).

[39] The claim for money damages contained in a complaint popularly is referred to as the "ad damnum" clause. Vincent v. Mutual Reserve Fund Life Ass'n, 75 Conn. 650, 55 A. 177, 179 (1903), *rev'd on other grounds*, 77 Conn. 281, 58 A. 963 (1904); *see* SIEGEL § 217.

[40] *E.g.*, Sponholz v. Stanislaus, 410 F. Supp. 286, 288 (S.D.N.Y. 1976); Michalowski v. Ey, 7 N.Y.2d 71, 75, 163 N.E.2d 863, 865, 195 N.Y.S.2d 633, 636 (1959); Litcom Div., Litton Sys. Inc. v. Suffolk Roofing Co., 52 App. Div. 2d 593, 593-94, 382 N.Y.S.2d 115, 117 (2d