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COURT OF APPEALS
STATE OF NEW YORK

LOHNAS,

Respondent,

-against-

LUZI,

No. 7

Appellant.

20 Eagle Street
Albany, New York
January 3, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Lohnas v. Luzi.
2 Counsel.

3 MS. HAGER: Good morning.

4 CHIEF JUDGE DIFIORE: Good morning.

5 MS. HAGER: Tamsin Hager for the defendants-
6 appellants, Dr. Luzi and Northtowns Orthopedics. Just as a
7 brief point to begin with, the - - -

8 CHIEF JUDGE DIFIORE: Counsel, may I interrupt
9 you for a second?

10 MS. HAGER: Sure.

11 CHIEF JUDGE DIFIORE: Would you like to reserve
12 some rebuttal time?

13 MS. HAGER: I - - - I'll reserve two minutes.

14 CHIEF JUDGE DIFIORE: Thank you.

15 MS. HAGER: Okay. As a brief point to begin with
16 the equitable estoppel doctrine is not before this court
17 today. The defendant prevailed at the Appellate Division
18 on the equitable estoppel doctrine. The Appellate Division
19 unanimously determined that the equitable estoppel doctrine
20 does not apply as a matter of law, and the plaintiff did
21 not seek - - - did not leave for - - - to appeal that - - -
22 that holding. So any of plaintiff's arguments in the brief
23 with the facts and the arguments of equitable estoppel and
24 any arguments made here today are simply not properly
25 before the court and have no place in argument today.



1 Then turning to the proper - - - the proper
2 subject of today's appeal, which is whether the continuous
3 treatment doctrine applies as a matter of law, our position
4 is that it does not apply as a matter of law.

5 JUDGE STEIN: In order to - - - for us to rule in
6 your favor, do we have to make a broad rule that any gap in
7 treatment exceeding the statute of limitations period is -
8 - - bars the application of the doctrine in all cases?

9 MS. HAGER: I think you could fall short of that
10 but I think the Curcio case is very instructive here. In -
11 - - in Curcio the Second Department, as was typical of the
12 Second Department, held that a gap in treatment exceeding
13 the statute of limitations was per se dispositive of a
14 break in continuity of treatment.

15 JUDGE GARCIA: But didn't we say something
16 opposite that in Crawford I believe the case is?

17 MS. HAGER: Oh, you know, I'm - - - I'm not
18 familiar with that right at this moment.

19 JUDGE FAHEY: Massie - - - Massie v. Crawford.

20 MS. HAGER: Oh, Massie.

21 JUDGE FAHEY: M-A-S-S-I-E v. Crawford. Yeah.

22 MS. HAGER: Well, when - - - if you don't mind if
23 I go back to Curcio, when it did come before the Court of
24 Appeals the Court of Appeals did agree that there was no
25 continuous treatment as a - - - there was no triable issue



1 of fact raised about continuous treatment but it was on a
2 different ground. It was because the plaintiff did not
3 instigate a timely return visit to the physician and it was
4 enough, quote "enough", for the Court of Appeals that
5 during a gap that did exceed - - - that happened to exceed
6 the length of the statute of limitations, a gap of thirty-
7 seven months, there was absolutely no contact whatsoever
8 between the plaintiff and the defendant. I do think that's
9 on point with what we're seeing here where we have a gap
10 that does happen to exceed - - - the statute of limitations
11 is thirty-two months, and during that time there was
12 absolutely no contact between the plaintiff and the
13 defendant.

14 JUDGE FAHEY: What - - - what you're arguing for,
15 though, is a per se rule. That - - - that's the way I
16 understand your argument. I understand your argument - - -
17 and you can correct me if you think I'm wrong. But I
18 understand it to - - - to say that whenever the gap in
19 treatment is more than the statute of limitations,
20 plaintiff's out. That's it.

21 MS. HAGER: I - - -

22 JUDGE FAHEY: And that - - - that's the way I
23 read the Second Department rule and that's not the way I
24 read Curcio and specifically not the way I read Massie v.
25 Crawford which says that: "The interval in visits is not a



1 per se dispositive of defendant's claim the statute has
2 run." But the burden shifts to the plaintiff which means
3 it's a question of fact.

4 MS. HAGER: Correct. And - - - and I - - -

5 JUDGE FAHEY: That's the way I read it. Am I
6 missing something?

7 MS. HAGER: And I think to clarify, I realize the
8 Court of Appeals is probably not inclined to make a per se
9 rule that the statute of limitations - - -

10 JUDGE FAHEY: Well, let me ask you this. Would
11 you say that the Second Department rule is a per se rule?

12 MS. HAGER: I think the Second Department has
13 shown in a string of cases that they have adopted that
14 rule.

15 JUDGE FAHEY: They seem to. I agree with you.
16 It seems to be going that way. But the Fourth Department
17 seems to be saying it's a question of fact in this
18 circumstance, and you got to look at each circumstance
19 separately.

20 MS. HAGER: Well, I think each - - - each case
21 presents its own unique facts.

22 JUDGE FAHEY: So let's take it a step further
23 then. So - - - so if it's a question of fact analysis,
24 should we be dealing with this at all then? If it's not a
25 per se rule, then - - - which is a legal question for the



1 Court of Appeals. If it's just a question of fact
2 analysis, should - - - should this Court be addressing it
3 or - - - or is it really an Appellate Division question?

4 MS. HAGER: Well, I think that there are some
5 questions of law involved here because of the fact that the
6 plaintiff did not return - - - or sorry, excuse me. She
7 was directed to return as needed. So that - - - that as
8 needed does not rise to the level of explicit future
9 treatment that's anticipated. It does not rise to the
10 level of a future appointment at some future date.

11 JUDGE FEINMAN: But didn't he tell her this is
12 going to be chronic, this is going to be with you so you're
13 going to have to come back as needed? It's not just, oh,
14 come back if you have a problem. I mean he specifically
15 told her that - - - that this is - - - you're going to have
16 this lifetime problem.

17 MS. HAGER: The fact that the problems were
18 chronic or long-standing does not mean that there was
19 always a course of treatment for those problems. And I
20 would just point the Court's attention to the case of the
21 Peykarian case in the Second Department. In that case,
22 there was treatment over a period of seventeen years for a
23 chronic and long-standing condition that was recurrent
24 bladder tumors. And in that case, there were gaps in
25 treatment that exceeded this - - - the length of the



1 statute of limitations. We can just call them lengthy
2 gaps. And because of those temporal gaps, that were long
3 and that the plaintiff did not seek a course of treatment
4 during those gaps, the court found that any continuity in
5 treatment could be deemed to - - -

6 JUDGE STEIN: Well, isn't the question of whether
7 the plaintiff - - - whether there was an intent on the part
8 of the plaintiff and the doctor that the plaintiff would
9 return to this doctor?

10 MS. HAGER: Right, right. You have to have the
11 intent on both sides. And when you have an instruction - -
12 - let me go back to the - - - the office visit of September
13 5th, 2003, and that's a very isolated office visit. There
14 was a seventeen-month break before that. She returns only
15 because she's been pushed up against a wall. We have a
16 very discrete and complete visit there and she's supposed
17 to return as needed. She disappears from care and
18 treatment for thirty-two - - - thirty-two months during
19 that time with no contacts whatsoever between the plaintiff
20 and the defendant, no office visits, no correspondence,
21 nothing occurs between them. This is very distinguishable
22 from the types of cases - - -

23 JUDGE RIVERA: But, look, isn't this a case where
24 you have a patient, plaintiff here, who has a major, severe
25 shoulder condition, goes to defendant doctor to treat that



1 and that's what she's been going to visit this doctor for
2 since day one. That's the first reason she went to him.
3 His response to that is we've got to do surgery, and - - -
4 and the surgery she argues is handled in a negligent manner
5 and results in all these other terrible consequences for
6 her, she alleges.

7 Isn't - - - isn't that sort of a question for the
8 jury? Isn't there a factual question as to whether or not
9 over the course of all that time she's not just
10 sporadically going to see this doctor but she continues to
11 see this doctor to treat the injury, the shoulder
12 condition, that's been - - - in her - - - in her view
13 exacerbated by this surgery that's the negligence?

14 MS. HAGER: I think that the case - - -

15 JUDGE RIVERA: And - - - well, let's finish off.

16 MS. HAGER: Oh, I'm sorry.

17 JUDGE RIVERA: And if that - - - again, why isn't
18 that a triable, factual question for the jury that
19 forecloses summary judgment?

20 MS. HAGER: I think that because the facts
21 presented here, the undisputable facts, that there's law -
22 - - there's law out there that is in our favor, which I
23 would point to the Aulita case in the Third Department
24 where - - -

25 JUDGE RIVERA: What's the undisputed fact that



1 you say does - - -

2 MS. HAGER: If she was to - - -

3 JUDGE RIVERA: - - - not foreclose summary
4 judgment here?

5 MS. HAGER: If she was to return as needed, and
6 an as needed instruction does not provide for continuous
7 treatment.

8 JUDGE RIVERA: Even - - - even when the doctor
9 acknowledges that treatment is always needed because it's
10 chronic because she'll need another surgery?

11 MS. HAGER: He's acknowledged in a sort of
12 amorphous way that she may need a treatment - - - a surgery
13 down the road.

14 JUDGE RIVERA: Not so amorphous. Isn't this what
15 - - - what he said to the insurance people so there - - -
16 there'd be payment?

17 MS. HAGER: He said she may - - - may possibly
18 need surgery in the future but it's - - - no particular
19 date was determined. It was not even determined that he
20 would be the doctor that would perform that surgery,
21 either.

22 CHIEF JUDGE DIFIIORE: Thank you, counsel.

23 MS. HAGER: Thank you.

24 CHIEF JUDGE DIFIIORE: Counsel.

25 MR. FITZGERALD: May it please the court, I'm



1 Brian Fitzgerald. I represent Darlene Lohnas. The defense
2 argues essentially that you have to take the visit in
3 September of '03 and look at it in a vacuum.

4 JUDGE STEIN: But aren't you - - - aren't you
5 essentially arguing that anytime a patient sees a doctor
6 for a particular condition which is chronic that unless and
7 until that patient actually goes to a different doctor, it
8 is presumed that there is an - - - continuous treatment,
9 that - - - that the same doctor is continuously treating
10 that patient even though there may be - - - whether it's a
11 gap in time of twenty months or thirty months or fifty
12 months? Isn't that what your - - -

13 MR. FITZGERALD: I don't think we really argue
14 that in the context of this case where she has had a
15 surgery by the doctor, sees the doctor over a period of
16 time thirteen times bringing us to April of '02 where at
17 that visit the doctor is describing the condition as
18 chronic where she continues to have the problems of the
19 deteriorating glenoid, the deteriorating rotator cuff, the
20 pressure on her acromion bone, all because the implant's
21 put in at a wrong angle, it's riding high, it's oversized.
22 It - - -

23 JUDGE STEIN: I understand that, but - - - but
24 isn't the purpose of the continuous treatment doctrine to
25 not force a patient who is in the midst of treatment to



1 have to challenge her doctor until it's completed? But
2 here, you know, she herself says I didn't really think he
3 was even going to help me but I had nowhere else to go
4 basically. So how - - - I don't understand how in - - - in
5 this - - - based on the undisputed facts we have here the
6 policy implications of the continuous treatment doctrine
7 are - - - are applicable in any way or - - -

8 MR. FITZGERALD: Well, the basis for the
9 doctrine, we would submit, is to look at whether on the
10 date of the last treatment whether there's evidence that
11 both patient and doctor expected continuing treatment. In
12 the context of - - -

13 JUDGE STEIN: But - - - but continuing treatment
14 with this particular doctor, right?

15 MR. FITZGERALD: There's no question this - - -
16 Darlene Lohnas over the course of four or five years
17 leading up to '03 saw six or seven or eight doctors for
18 various other problems and ailments. She even saw an
19 orthopedist for a carpal tunnel surgery on her wrist. So
20 she had even seen another orthopedist but did not bring her
21 shoulder problem to that orthopedist. As she clearly
22 testified, or the evidence in the record clearly indicates,
23 she put her trust and confidence in Dr. Luzi. Dr. Luzi was
24 her problem - - - was her doctor for this problem and she -
25 - - and that's who she had and that's who she was going to



1 rely on.

2 JUDGE FAHEY: Listen - - -

3 MR. FITZGERALD: And that's why she continued to
4 go back to him.

5 JUDGE FAHEY: Clarify for me what facts actually
6 you say are in dispute? Summary judgment motion - - - we
7 have to accept the plaintiff's version of the facts. What
8 facts are you saying that - - - that are in dispute that -
9 - - that the Appellate Division is really relying on here?

10 MR. FITZGERALD: That the visit of September 2003
11 was continuing treatment for the same condition or
12 conditions and what are the facts that it was, which at
13 least raise issues of fact as to whether patient and doctor
14 intended continued treatment. You can't look at September
15 '03 in a vacuum. We go back and we look at April of '02.
16 Periodic symptoms due to her degenerative - - - degenerated
17 rotator cuff. He - - - Dr. Luzi describes the problem as
18 long-standing and chronic, that she will most likely need
19 further surgery, and that she would need a shoulder
20 replacement. Now in April '02 - - -

21 JUDGE FAHEY: Did - - -

22 MR. FITZGERALD: - - - after that visit - - -

23 JUDGE FAHEY: Mr. Fitzgerald, hold on a second.

24 The - - - the dissent, Judge Carni at the Appellate
25 Division pointed out a couple of things and I'd like you to



1 address them. One was the - - - that he would dismiss
2 because this was a patient-initiated appointment and - - -
3 and then you were told to come back only quote "as needed"
4 unquote or PRN I think they put it.

5 MR. FITZGERALD: Well - - -

6 JUDGE FAHEY: Respond to that.

7 MR. FITZGERALD: The dissent said two things,
8 that, number one, the - - - she was only told to return as
9 needed, no specific future appointment was made. But I
10 don't believe that means he didn't expect to see her again.
11 He said return as needed, and there's no question given her
12 history up until 2003 she was going to be back. And those
13 same problems with the rotator cuff, the glenoid, the
14 acromion, they were persisting.

15 JUDGE FEINMAN: So would it have been different -
16 - -

17 MR. FITZGERALD: So she clearly believed she
18 would be back.

19 JUDGE FEINMAN: - - - if he had said, you know
20 what, I don't know what to tell you, I can't do anything
21 more for you?

22 MR. FITZGERALD: I'm sorry, didn't catch - - -

23 JUDGE FEINMAN: When she goes back in September
24 2003, if the doctor had said I don't know what to tell you,
25 there's nothing more I can do for you, would that have



1 broken the chain?

2 MR. FITZGERALD: Well, in the Curcio case which
3 involves a nose surgery in 1974 and a subsequent follow-up
4 visit where the doctor says you're discharged and then
5 there's a gap of I think thirty-seven months, the court
6 doesn't decide the case on the fact that the gap exceeded
7 the statute. The - - - the Court of Appeals decided the
8 case on the fact that there was a discharge from care. And
9 your question raises well, what if he discharged her? We
10 agree. If he discharged her on September 3, 2003, that
11 would have been - - -

12 JUDGE FEINMAN: So if the doctor also intend - -
13 - because it's both the - - - what the patient and the
14 doctor intend, he needed to say, from your point of view,
15 there's nothing more I can do for you - - -

16 MR. FITZGERALD: Or - - -

17 JUDGE FEINMAN: - - - don't come back as needed?

18 MR. FITZGERALD: Yes. Or as found in some cases,
19 the patient goes to a completely different doctor and ends
20 the care herself, and after 2006 when she last saw Dr.
21 Luzi, she went to another, Dr. Paterson, and obviously as
22 of 2006 ended the care.

23 JUDGE STEIN: Well, what about the requirement of
24 a timely return visit? What does that mean? Here we have
25 her saying this has been killing - - - bothering me the



1 whole time.

2 MR. FITZGERALD: This - - - this - the New York
3 Court of Appeals has looked at cases which raise that
4 issue, what is a timely return visit. They've never said
5 it has to be within two-and-a-half years, the statute of
6 limitations. So - - -

7 JUDGE STEIN: Well, I'm asking you what - - -
8 what is timely? Is it - - -

9 MR. FITZGERALD: So in the context of this case
10 where she has these continuing problems and thirty-one
11 months goes by, okay, what's happening in that thirty-one
12 months? Well, in May of '02 after the April visit, she's
13 in so much pain she needs a TENS unit. She testifies that
14 after the 2003 visit she is in constant pain, she's
15 terrible - - - okay, but she's still young, and she may not
16 be going back to Dr. Luzi sooner because these shoulder
17 replacements only last ten or fifteen years and she's in
18 her forties. She's going to try to put off that shoulder
19 surgery for some period of time.

20 JUDGE RIVERA: And isn't this - - -

21 MR. FITZGERALD: And in fact - - -

22 JUDGE RIVERA: - - - the whole point that this is
23 the - - - these are the kinds of matters that should be
24 going to the jury and that's why summary judgment is not
25 appropriate here?



1 MR. FITZGERALD: Yes, and in the context of all
2 of those facts, there are questions of fact, then, which we
3 believe a jury should - - - should be able to decide on
4 this case.

5 I'd like to just comment on - - - on the
6 equitable estoppel issue. I'm kind of in a catch-22 on
7 that. We could have sought leave from the Fourth
8 Department to appeal on the equitable estoppel issue. But
9 we make a judgment call. We won in the Fourth Department
10 on the continuous treatment issue, so let's not do that.
11 We were concerned that if we did move for leave and it was
12 granted on the equitable estoppel issue then the - - - the
13 continuous treatment issue would come up and we had won on
14 that. So we're in a catch-22. What should we do?

15 It's a little disappointing in that the Fourth
16 Department when they certified the question, they do it in
17 a simple way, was the order properly made. Well, the order
18 includes a ruling on the equitable estoppel issue. So now
19 we say that issue is before the court too. And it's a
20 critical - - - this case is not a - - - like a lot of other
21 cases that involve the continuous treatment. This case is
22 a case where a subsequent treating surgeon found that the
23 humeral head implant wasn't just a little off, a few
24 degrees off. It should have been in at 30 degrees and it
25 was in at 80 to 110 degrees. That should have been seen by



1 Dr. Luzi with his naked eye in the 1999 surgery that he
2 did, and then when he opened up her shoulder again in 2002
3 he should have seen it. Now he says I didn't know. This
4 is a - - - this is a self-serving statement by Dr. Luzi
5 that he didn't know it was in wrong. Who's kidding who?

6 He - - - and you get the equitable estoppel
7 argument in these cases not just by proving there's an
8 outright lie but also you can establish it by showing
9 intentional concealment. Dr. Luzi to determine the
10 position of that humeral head implant over the years could
11 have done a CT scan which shows the upper condyles of the
12 elbow in a certain position. And you can - - - you can
13 find out on CT scan whether the humeral head is - - - is in
14 the correct position. He never orders one. That suggests
15 to me that he doesn't want to order one because it will
16 show he put it in wrong, very wrong.

17 Dr. Paterson testified that when he saw it in the
18 revision surgery in '06, to - - - it was ninety degrees, at
19 a ninety-degree angle but it - - - but it could have been
20 anywhere from 80 to 110 degrees. If it's 110 degrees, it's
21 80 degrees off. It should have been obvious. Dr. Paterson
22 when he first saw her due to an x-ray and retroversion,
23 malpositioning was suggested in the x-ray the first time he
24 saw her. We believe that there was intentional concealment
25 of the wrongly positioned humeral head implant for years



1 until she finally saw another doctor. And the equitable
2 estoppel claim should be reinstated and she should be
3 allowed to proceed on her fraud cause as well.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 MR. FITZGERALD: Thank you.

6 CHIEF JUDGE DIFIORE: Ms. Hager.

7 MS. HAGER: I would just reiterate again that
8 the equitable estoppel doctrine is not properly before this
9 court. It was not appealed by the plaintiff, and his
10 comments are actually prejudicial and out of place today at
11 our oral argument. And then going back to the continuous
12 treatment doctrine, I think I want - - - another case
13 that's very instructive is the Devadas case in the First
14 Department which involved a thirty-three-month gap in
15 treatment, and the First Department held that there was a
16 question of fact regarding the continuous treatment
17 doctrine.

18 Why it's instructive is in the distinct ways the
19 facts are different from what we see here. In that case,
20 the defendant ophthalmologist performed a LASIK surgery on
21 the plaintiff, and he said to her I am your ophthalmologist
22 for life. I guarantee the result of this surgery for life.
23 In that - - - in those circumstances, the court found a
24 triable issue of fact regarding the continuous treatment
25 doctrine. Here - - -



1 JUDGE RIVERA: Does the doctor have to go that
2 far to say for life I'm your doctor? Of course, that's
3 obviously not true because the patient could choose never
4 to return to that doctor.

5 MS. HAGER: It was that the - - - the patient and
6 the doctor - - - it was that going back to both reasonably
7 intending the reliance on that doctor's care and treatment,
8 concern, and responsibility for overall progress. With
9 that - - -

10 JUDGE RIVERA: All I'm saying is the fact that
11 this doctor didn't say that doesn't mean that other things
12 that were said and done don't raise a triable question of
13 fact for the jury to decide whether or not nevertheless
14 that was his intention.

15 MS. HAGER: Right, but this - - - this doctor
16 also said come back as needed, and that's very distinct
17 from the kind of cases where you have periodic and repeated
18 visits while doctor may be attempting to treat the
19 underlying symptoms and complaints relating to the
20 underlying or the initial treatment. We don't have that
21 here either. We don't have a situation where you're
22 monitoring somebody at regular intervals to see if they
23 develop cancer or to see if they have metastatic cancer
24 developing. It's very distinct from the cases where the
25 courts find a continuous treatment doctrine or - - - or



1 question of fact as to continuous treatment.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MS. HAGER: Okay. Thank you.

4 (Court is adjourned)

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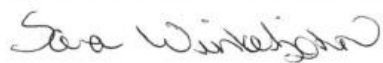
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Lohnas v. Luzi, No. 7 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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