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COURT OF APPEALS

STATE OF NEW YORK

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FRANK PATERNO,

Appellant,

-against-

No. 186

LASER SPINE INSTITUTE, ET AL.,

Respondents.

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20 Eagle Street  
Albany, New York 12207  
October 15, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 186. Counsel. You  
2 want any rebuttal time, counsel?

3 MR. GRIFFIN: Just one minute, Your Honor.

4 CHIEF JUDGE LIPPMAN: One minute. Go  
5 ahead.

6 MR. GRIFFIN: May it please the court, my  
7 name is Timothy Griffin. I represent the appellant,  
8 Frank Paterno, in this case. Your Honors, as you  
9 know, this case is an issue of jurisdiction.

10 CHIEF JUDGE LIPPMAN: What did - - - what  
11 did this Florida outfit do in New York that makes  
12 them subject to our jurisdiction?

13 MR. GRIFFIN: They - - - in this particular  
14 case, they didn't do anything in New York, Your  
15 Honor. However, it - - - it was their actions prior  
16 to the surgery and after the surgery - - -

17 CHIEF JUDGE LIPPMAN: What - - - what  
18 actions prior to and after the surgery?

19 MR. GRIFFIN: Well, prior to the surgery  
20 they - - - they - - - I - - - I submit that they  
21 solicited to - - -

22 CHIEF JUDGE LIPPMAN: How did they solicit?

23 MR. GRIFFIN: Well, they - - - in May - - -  
24 in May of - - -

25 CHIEF JUDGE LIPPMAN: Wasn't it passive,

1 really? Wasn't - - -

2 MR. GRIFFIN: Well, the Web site is  
3 passive.

4 CHIEF JUDGE LIPPMAN: Yeah.

5 MR. GRIFFIN: I'll grant you that the Web  
6 site is passive.

7 CHIEF JUDGE LIPPMAN: So how did they  
8 actively solicit?

9 MR. GRIFFIN: But - - - but that's - - -  
10 that's, I think, one of the faults of the Second  
11 Department is that they put too much emphasis on the  
12 passive nature of the Web site. We - - -

13 CHIEF JUDGE LIPPMAN: So what's the active  
14 nature of the - - -

15 MR. GRIFFIN: The - - - well - - -

16 CHIEF JUDGE LIPPMAN: - - - of the  
17 solicitation?

18 MR. GRIFFIN: - - - the - - - the initial  
19 contact was in May of 2008. There, there was a  
20 discussion between the plaintiff and a patient  
21 advocate. In June of 2008, the plaintiff forwarded  
22 to Florida his patient recor - - - his patient  
23 records and - - - and various other - - -

24 CHIEF JUDGE LIPPMAN: Yeah, but the  
25 plaintiff is - - - is - - - is taking the initiative

1 in all of this, right? He's being proactive?

2 MR. GRIFFIN: Yeah, well, the - - - because  
3 he needs the surgery, Your Honor. But he contacted  
4 them and they - - - the - - - the defendant - - -

5 JUDGE RIVERA: Right, but - - - but - - -  
6 but then isn't that like any potential passive Web  
7 site? You - - - you read it; you say oh, I want some  
8 of that information to get more, and they send you  
9 the information?

10 MR. GRIFFIN: Right, Your - - - Your - - -  
11 Your Honor - - -

12 JUDGE RIVERA: Does that mean that - - -  
13 that we can pull all of them - - -

14 MR. GRIFFIN: - - - but I think this - - -

15 JUDGE RIVERA: - - - into New York for  
16 lawsuits?

17 MR. GRIFFIN: No, I think that this  
18 particular - - - the facts of this case are much more  
19 than a passive Web site.

20 JUDGE READ: Okay, what are those facts?  
21 Can you identify those facts?

22 MR. GRIFFIN: Well, Your Honor, I mean - - -  
23 - I - - - I believe that they are in both the brief  
24 and in the record. I mean there - - - there are,  
25 over the course of - - -

1 JUDGE READ: But can you just list them?

2 MR. GRIFFIN: - - - nine - - - nine months,  
3 there were consultations, the after - - - subsequent  
4 to the surgery the - - - the plaintiff was consulting  
5 with his own doctor in New York who had a  
6 consultation with the doctors in Florida. The  
7 doctors in Florida prescribed medication in New York.

8 CHIEF JUDGE LIPPMAN: So is that enough?  
9 You know, what - - - what cases do - - - tell us that  
10 when you prescribe medication that's enough?

11 MR. GRIFFIN: Well, Your Honor, it's the  
12 totality of the circumstances that - - -

13 JUDGE PIGOTT: So how - - - how do we get -  
14 - - how - - - how - - - are you asking us to make  
15 factual findings then? I mean you - - - you - - -  
16 you agree that the standard that was applied is the  
17 appropriate one, the totality of the circumstances,  
18 right?

19 MR. GRIFFIN: Yes, Your Honor.

20 JUDGE PIGOTT: So how do we then say the -  
21 - - what, that they overlooked facts or that they  
22 misapplied facts? I mean we don't find facts. You  
23 say - - -

24 MR. GRIFFIN: No, I understand that, Your  
25 Honor. But I think - - - I - - - I think at issue

1 here, you're dealing with whether or not there's  
2 fundamental due process. And that - - - that's the  
3 overall - - - that's the wet blanket, if you will. I  
4 mean, is there fundamental due process here? You  
5 have a - - - an alleged malpractice that occurred in  
6 Florida. However, subsequent to that, there was so  
7 much activity. They were - - - they were ordering  
8 MRIs, they ordered prescriptions, they - - - they had  
9 consultations with, not only the plaintiff, but also  
10 his doctor.

11 JUDGE ABDUS-SALAAM: Counsel, speaking of  
12 due process, after these briefs were submitted, the  
13 United States Supreme Court decided the Daimler case,  
14 right, Daimler v. - - -

15 MR. GRIFFIN: Yes, yes, yes.

16 JUDGE ABDUS-SALAAM: - - - v. Bauman.

17 MR. GRIFFIN: And I think that case is  
18 distinguishable, Your Honor.

19 JUDGE ABDUS-SALAAM: It is? How - - - how?

20 MR. GRIFFIN: If you look at the Daimler  
21 case, as I understand that case, that involved a suit  
22 against Daimler Mercedes Benz in California by  
23 certain people alleging human rights abuses in - - -  
24 I think it was Argentina. In that case, the - - -  
25 the individual plaintiffs had no connection with - -

1 - or the acts, I should say, the claimed acts - - -

2 JUDGE SMITH: Do you - - - well, you - - -

3 MR. GRIFFIN: - - - had no connection with  
4 California.

5 JUDGE SMITH: - - - you're saying Daimler  
6 was a general jurisdiction rather than a specific  
7 jurisdiction case?

8 MR. GRIFFIN: I believe so, Your Honor. I  
9 believe so. I mean I - - - I - - - I think in  
10 Daimler - - - I think it's distinguishable, because  
11 here you did have the acts within the state where in  
12 Daimler you didn't. They were - - -

13 JUDGE RIVERA: Okay, so - - - so can we  
14 talk about these acts again in this state? Pre the  
15 surgery, those - - - those are acts - - - well,  
16 you're initiating - - - your client initiated contact  
17 - - -

18 MR. GRIFFIN: That's correct. But then - -  
19 - but then the - - -

20 JUDGE RIVERA: - - - your client sought  
21 information and they're just providing information.

22 MR. GRIFFIN: No, there was more than Your  
23 Honor was - - -

24 JUDGE RIVERA: - - - and - - - and at that  
25 point - - - let me just - - - I'm going to just

1 finish off the thought. At that point it strikes me  
2 that there's no guarantee of any service, of anything  
3 that's going to go on, right? These doctors are not  
4 saying yes, we - - - we're absolutely going to pursue  
5 this surgical procedure.

6 MR. GRIFFIN: No, I mean, I think there was  
7 an evaluative period of time that took place after  
8 this - - - this initial contact. And - - -

9 JUDGE RIVERA: But doesn't - - - wasn't - -  
10 - doesn't that require that he go to Florida? Don't  
11 you need the physical evaluation and determination in  
12 Florida?

13 MR. GRIFFIN: Well, he did eventually go to  
14 Florida.

15 JUDGE RIVERA: No, I know that.

16 MR. GRIFFIN: You know on or about, I  
17 think, the 9th of - - - of June he had his surgery in  
18 2008. But - - -

19 JUDGE RIVERA: I understand. But - - - but  
20 when he - - - when he lands, he's not sure there's  
21 going to be surgery, right?

22 MR. GRIFFIN: Well, I believe he went down  
23 for the surgical procedure.

24 JUDGE RIVERA: Well, but the doctor could  
25 have decided upon - - - actually, physically, the

1 doctor's not seen him before then, correct?

2 MR. GRIFFIN: That's correct. No, he's  
3 only seen him in the - - -

4 JUDGE RIVERA: Could have decided that, you  
5 know what, I'm - - - I'm not going to go through with  
6 this surgery for the following reasons. Or couldn't  
7 your client have changed his mind?

8 MR. GRIFFIN: Absolutely. Absolutely he  
9 could have turned around and got back on the plane.

10 JUDGE RIVERA: Okay.

11 MR. GRIFFIN: But he went down there to,  
12 you know - - - for surgery because of the - - -

13 CHIEF JUDGE LIPPMAN: Yeah, but they didn't  
14 - - - they didn't actively recruit him. I mean all -  
15 - - all the - - -

16 MR. GRIFFIN: No, but they - - - once - - -  
17 once they did, Your Honor - - -

18 CHIEF JUDGE LIPPMAN: He found them. He  
19 had surgery there. And then the continuing contact  
20 is driven by him, no?

21 MR. GRIFFIN: Well, it's - - - it's - - -  
22 it's driven by, not only him, but also patient care.

23 JUDGE ABDUS-SALAAM: Well, counsel, could -  
24 - - could we go back to the general versus specific  
25 jurisdiction? Are you saying here that the long-arm

1 jurisdiction that we're talking about is specific  
2 jurisdiction not general jurisdiction?

3 MR. GRIFFIN: No, I don't believe so, Your  
4 Honor. I think that the - - -

5 JUDGE ABDUS-SALAAM: What is it you don't  
6 believe?

7 MR. GRIFFIN: I - - - I - - - I think that  
8 what we're - - - what we have here is we have  
9 jurisdiction over the respondents for the actions  
10 which were contemp - - - which were con - - -  
11 conducted by the respondents - - -

12 JUDGE ABDUS-SALAAM: And what do you say -  
13 - - what kind of jurisdiction do you say that is,  
14 specific or general?

15 MR. GRIFFIN: I think that's general  
16 jurisdiction, Your Honor.

17 JUDGE ABDUS-SALAAM: Right, so in the  
18 Daimler case they were talking about general  
19 jurisdiction of a foreign corporation that has an in-  
20 state - - -

21 MR. GRIFFIN: Right, right, and - - - and  
22 that - - - that - - -

23 JUDGE ABDUS-SALAAM: - - - an in-state  
24 subsidiary. And we don't even - - - in this case  
25 there's no in-state subsidiary to this Florida

1 institution is there? Or Florida - - -

2 MR. GRIFFIN: No.

3 JUDGE ABDUS-SALAAM: - - - Laser Surgery  
4 Institute?

5 MR. GRIFFIN: No, at the time - - - at the  
6 time of this surgery there was no in-state  
7 subsidiary. That's best of my knowledge.

8 JUDGE SMITH: But the - - - but I'm a  
9 little confused when you say you think it's general.  
10 The - - - the - - - this claim did ari - - - I mean  
11 whatever the context that you rely on, the New York  
12 context or context out of which this claim arose,  
13 right?

14 MR. GRIFFIN: Yes, that's - - - that's the  
15 basis for the jurisdiction. It's the context - - -  
16 it's the pre - - - it's the - - - it's the telephone.  
17 Again, each act standing alone, Your Honor, I don't  
18 think would be sufficient to con - - - convey  
19 jurisdiction. But the totality - - -

20 JUDGE RIVERA: Where is - - - where is the  
21 injury that's the basis of the claim?

22 MR. GRIFFIN: The injury?

23 JUDGE RIVERA: Yes.

24 MR. GRIFFIN: The injury took place - - -  
25 the malpractice took place in Florida, we allege.

1 JUDGE RIVERA: So the injury is based on  
2 the surgeries, correct?

3 MR. GRIFFIN: Yes.

4 JUDGE RIVERA: It's not based on any claim  
5 of some diagnosis or some recommendation of treatment  
6 over the phone or by e-mail for him while he's in New  
7 York. Is that correct?

8 MR. GRIFFIN: Correct.

9 JUDGE RIVERA: Okay.

10 MR. GRIFFIN: He initially had one surgical  
11 procedure, which the plaintiff claims - - -

12 JUDGE RIVERA: Yes.

13 MR. GRIFFIN: - - - went awry. He went - -  
14 - he went to - - - back to - - - come back to New  
15 York to his home, and then he went back down. They  
16 flew him back down to fix it, so to speak.

17 JUDGE RIVERA: I want to follow up on that.

18 JUDGE GRAFFEO: I'm trying to - - -

19 JUDGE RIVERA: I'm going to ask your  
20 adversary about that. So I just want to clarify,  
21 LSI, the defendants, actually paid the - - - the  
22 plane ticket for your client?

23 MR. GRIFFIN: Yes, Your Honor.

24 JUDGE RIVERA: How many times? One round  
25 trip?

1 MR. GRIFFIN: Once.

2 JUDGE RIVERA: What - - - is that the first  
3 surgery or subsequent surgery?

4 MR. GRIFFIN: The second. The - - - the -  
5 - - the - - - the surgical procedure when they were  
6 going to - - - there's a term in - - - that - - -  
7 that they used. I think re - - - well, to revisit,  
8 to fix the surgery.

9 JUDGE RIVERA: And did they pay for his  
10 lodging, also?

11 MR. GRIFFIN: I don't know the answer to  
12 that, Your Honor.

13 JUDGE GRAFFEO: I'm trying to understand  
14 the ramifications, getting away from the facts of  
15 this case, for the medical profession because we've  
16 got a lot of New York residents that live part of the  
17 year in New York, part of the year in Florida. Does  
18 mean that New Yorkers who have a doctor - - - if they  
19 spend the winters in Florida, they're back in New  
20 York, their doctor - - - they call their doctor for  
21 something. They're prescribed something that all  
22 these - - - if there happens to be an instance of  
23 malpractice while they're in Florida, all these  
24 Florida physicians are subject to lawsuit in New  
25 York?

1 MR. GRIFFIN: No, I don't - - - I think,  
2 again, Your Honor - - -

3 JUDGE GRAFFEO: I mean what makes this case  
4 so different to cross that line?

5 MR. GRIFFIN: I think what makes this case  
6 different is, with your example, if there's a phone  
7 call filling a prescription, I don't think that's  
8 sufficient for it. But this case involved much more  
9 than that. This case involved pre - - - the pre-  
10 activity, the surgery, the - - - the re - - - the re  
11 - - - the surgical procedure - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but the - - -  
13 but the arrangement between them is still the same.  
14 He's - - - he's proactively seeking their medical  
15 attention. They're responding to his complaints  
16 about what happened there.

17 MR. GRIFFIN: Um-hum.

18 CHIEF JUDGE LIPPMAN: He finds them. What  
19 is it specifically - - - you're saying it - - - we  
20 under the - - - the context, but I don't think you've  
21 woven together enough that really, you know,  
22 obviously would grab us and say gee, it's the right  
23 thing - - -

24 MR. GRIFFIN: Well, you - - -

25 CHIEF JUDGE LIPPMAN: - - - that this

1 Florida outfit should be responsible. Why is it the  
2 right thing, other than you're saying well, it's - -  
3 - there are lots of things. It - - - it went on for  
4 a while. But it's still all in the same - - - the  
5 nature of their relationship remains the same during  
6 this whole process.

7 MR. GRIFFIN: Well, I think the nature of  
8 the relationship is between a patient and a doctor.  
9 And there was a problem. And so there was an attempt  
10 to correct that problem. And that problem - - -

11 CHIEF JUDGE LIPPMAN: In Florida.

12 MR. GRIFFIN: No, well, actually, the - - -  
13 you know, the - - - the problem was created in  
14 Florida. He came back here. He - - - he had - - -  
15 he continued to have the pain.

16 CHIEF JUDGE LIPPMAN: He went back there.

17 MR. GRIFFIN: He went back down for the - -  
18 - for the revision surgery, that's what they were - -  
19 - and then he came back. And then they still  
20 determined that there was additional problems here.  
21 And he had ultimately had that fixed here in New  
22 York.

23 JUDGE GRAFFEO: I think what we're  
24 grappling with is what's the rule so that people will  
25 know when there's long-arm jurisdiction in a medical

1 practice situation and - - - and when there's not.

2 MR. GRIFFIN: Well, again, I get back not  
3 to the - - -

4 JUDGE GRAFFEO: And I know - - - I know the  
5 cases are factually intensive.

6 MR. GRIFFIN: Right.

7 JUDGE GRAFFEO: But there has to be some  
8 overarching principle here?

9 MR. GRIFFIN: Well, I think if you look - -  
10 - I mean it's, again - - -

11 JUDGE GRAFFEO: Which has to be more than  
12 just phone calls and prescribing.

13 MR. GRIFFIN: But, you know, he - - - do  
14 they take advantage of - - - of the opportunities in  
15 the - - - in New - - - in the State of New York? And  
16 I would submit to Your Honor that this physician - -  
17 - he could have had his pat - - - the patient, the  
18 plaintiff come back to Florida and had an MRI in  
19 Florida. He didn't. He had the - - - he - - - he -  
20 - -

21 JUDGE GRAFFEO: That was going to be my  
22 question. At what point in this chronology do you  
23 think the long-arm jurisdiction was?

24 MR. GRIFFIN: I think the long-arm  
25 jurisdiction - - -

1 JUDGE GRAFFEO: Because the - - - the few  
2 initial contacts certainly wouldn't - - -

3 MR. GRIFFIN: I don't think that's  
4 sufficient, no.

5 JUDGE GRAFFEO: - - - wouldn't - - -  
6 wouldn't be enough.

7 MR. GRIFFIN: I - - - I - - - I actually,  
8 if - - - if ever - - -

9 JUDGE GRAFFEO: Is it when they started to  
10 consult with his doctor in New York?

11 MR. GRIFFIN: I think - - - I would submit,  
12 Your Honor, that the - - - the initial activity  
13 leading up to the surgery would not be sufficient to  
14 convey jurisdiction.

15 JUDGE GRAFFEO: Okay, so let's go past  
16 that.

17 MR. GRIFFIN: We - - - so now we go past  
18 that. You have - - - you have the - - - the contact  
19 between himself and his doctors in New York, the  
20 decision on the part of the respondents to fly the  
21 plaintiff back down to - - - to fix the problem. He  
22 goes back and then the continual - - -

23 JUDGE SMITH: Is it - - -

24 MR. GRIFFIN: - - - dialogue back and forth  
25 between - - -

1                   JUDGE SMITH: Is it a problem that at that  
2 point his claim was already in existence? That is  
3 the malpractice that you're suing for had already  
4 occurred? I mean how can - - - how can - - - how can  
5 the claim arise out of something that - - - that  
6 hadn't happened yet?

7                   MR. GRIFFIN: The - - - how can  
8 jurisdiction be obtained after the surgery was done?

9                   JUDGE SMITH: Yeah, how can - - - how can  
10 events that occur after the cause of action arises  
11 create jurisdiction?

12                  MR. GRIFFIN: Well, Your Honor, I would  
13 have to go back to the continuous treatment-type argu  
14 - - - analysis of that. I mean in the sense that the  
15 surgery was what caused the injury and, you know - -  
16 - and - - - and it was only discovered after the  
17 fact. And you can't look at just the - - -

18                  CHIEF JUDGE LIPPMAN: Yeah, but exactly in  
19 your scenario, so what's the rule? You have surgery  
20 somewhere else. It gets screwed up, comes back for  
21 another surgery. They try to help him long distance,  
22 give him a drug or whatever it is. In that situation  
23 we're now going to say that in every case that  
24 happens long-arm jurisdiction on a - - - on a medical  
25 entity outside the State of New York?

1 MR. GRIFFIN: Isn't just the prescribed - -  
2 -

3 CHIEF JUDGE LIPPMAN: What's unique about  
4 this case that would - - -

5 MR. GRIFFIN: What's unique about it - - -

6 CHIEF JUDGE LIPPMAN: - - - that - - - that  
7 - - - that would contradict some of our cases that  
8 certainly seem to say this is not enough.

9 MR. GRIFFIN: Yeah, Your Honor, what is  
10 unique about this case is the length of time, the - -  
11 - the chronology which is in the record when - - -

12 CHIEF JUDGE LIPPMAN: Okay, so you're  
13 saying, though, if it drags on for a certain period  
14 of time you can get long-arm under some kind of  
15 continuous treatment credo?

16 MR. GRIFFIN: I - - - I think that, you  
17 know, that an initial discussion that in - - - in and  
18 of itself would not be sufficient. But if it goes on  
19 and the - - -

20 CHIEF JUDGE LIPPMAN: Okay.

21 MR. GRIFFIN: - - - revision surgery - - -

22 CHIEF JUDGE LIPPMAN: All right, counselor.

23 MR. GRIFFIN: Thank you.

24 CHIEF JUDGE LIPPMAN: Let's hear from your  
25 adversary and then you'll have rebuttal.

1 MR. COHEN: Good afternoon, Your Honors.  
2 My name is Joshua Cohen. I'm here for the  
3 respondent. I have Amanda Tate, who assisted me with  
4 the brief, on - - - sitting with me.

5 I think the court clearly gets the issues  
6 on the case. LSI did not reach into New York to find  
7 Mr. Paterno. He - - -

8 CHIEF JUDGE LIPPMAN: But - - - but he's -  
9 - - but LSI is following this guy.

10 MR. COHEN: Yeah, they're following him but  
11 - - -

12 CHIEF JUDGE LIPPMAN: They do - - - they do  
13 - - - they do surgery.

14 MR. COHEN: In Florida.

15 CHIEF JUDGE LIPPMAN: It goes wrong. They  
16 bring him back. And then they're treating him from  
17 Florida. They're - - - they're prescribing drugs.  
18 They're talking to his doctors. They're doing all  
19 kinds of things. Why - - - what's wrong with that?  
20 Why - - - why shouldn't we hold them responsible?

21 MR. COHEN: Because - - -

22 CHIEF JUDGE LIPPMAN: It looks like they're  
23 practicing medicine here.

24 MR. COHEN: Because in the case of Etra,  
25 which this court decided, it said that a doctor in

1 Boston, who was following with a patient who was in  
2 New York - - - prescribing medication, actually  
3 sending the medication from Boston to New York,  
4 communicating with the family and the doctors in New  
5 York, and sending letter to the doctor and the family  
6 in New York - - - was not enough to confer personal  
7 jurisdiction. Another case called O'Brien, which was  
8 a First Department case, they said that that was not  
9 enough to confer personal jurisdiction.

10 JUDGE PIGOTT: Pennsylvania and Maine is  
11 kind of like it.

12 MR. COHEN: Sorry. Well, if you want to  
13 talk about the Henderson case and the Bond case that  
14 was brought up by the dissent, those cases were  
15 distinguishable easily from this case in Florida.  
16 Those were federal district court cases. The Bond  
17 case in Pennsylvania, LSI did have a presence in  
18 Pennsylvania at the time of the care of the patient.

19 JUDGE READ: Physical presence or - - -

20 MR. COHEN: Physical presence, including a  
21 director there, an office, a contact for where  
22 patients could get in touch with them and a medical  
23 director.

24 JUDGE RIVERA: Okay, well, he says - - - he  
25 says your clients came to New York and held these

1 seminars that appear to be solicitation seminars. Is  
2 that not true?

3 MR. COHEN: That is true, but two years  
4 after the care initially in the case.

5 JUDGE RIVERA: So none of them occurred  
6 either during this time or pre?

7 MR. COHEN: Absolutely not. That's not in  
8 dispute. That - - -

9 CHIEF JUDGE LIPPMAN: Do you agree that the  
10 - - - if - - - if - - - if you had done these  
11 seminars and that's how this - - - this plaintiff  
12 found out about you and your operation, that then - -  
13 - then we would have jurisdiction over here? If he  
14 went to a seminar that you proactively held in New  
15 York and then he booked you for the surgery and then  
16 all this stuff happened, that's enough?

17 MR. COHEN: Well, that's not what happened  
18 here but - - -

19 CHIEF JUDGE LIPPMAN: But - - - but would  
20 that be enough?

21 MR. COHEN: - - - if that - - - if that did  
22 happen in the case in the future, I'm not sure that  
23 the answer would be yes to that based upon the  
24 O'Brien case and some of the other case law where  
25 O'Brien - - -

1 CHIEF JUDGE LIPPMAN: You can come into New  
2 York. You can lure people into some kind of medical  
3 relationship with you, and we can't hold you in - - -  
4 in New York for - - -

5 MR. COHEN: Well, in - - - in O'Brien it  
6 was a New Jersey doctor that was being referred  
7 patients from New York, treating them in New Jersey,  
8 and then sending them back to New York, where the  
9 doctor was also licensed, and having them treated for  
10 chemotherapy in New York for weeks or months on end  
11 under - - -

12 JUDGE SMITH: Yeah, but you - - - you would  
13 admit that if - - - if - - - if - - - if your clients  
14 or employees of your client actually physically got  
15 on a plane flown to New York for the purpose of  
16 stirring up business, and this was some of the  
17 business they stirred up, it would be a much stronger  
18 case?

19 MR. COHEN: Under the totality of  
20 circumstances, yes, it would - - -

21 JUDGE READ: That would look a lot more  
22 like - - -

23 MR. COHEN: - - - be a stronger case, but -  
24 - - but that didn't happen here.

25 JUDGE READ: That - - - it would look a lot

1 more like the Pennsylvania case then.

2 MR. COHEN: What?

3 JUDGE READ: He would look a lot more like  
4 it was the Pennsylvania case?

5 MR. COHEN: Well, the Pennsylvania case,  
6 they didn't just go there for seminars. They  
7 actually had a physical presence there, which we  
8 don't have here.

9 JUDGE READ: Close - - - we'd be closer.

10 MR. COHEN: You'd be closer.

11 JUDGE GRAFFEO: You know, I - - - I can  
12 understand that these things perhaps, when viewed as  
13 individual instances, would not be enough to support  
14 long-arm jurisdiction. But when you look at the  
15 totality of this relationship over the months that  
16 they were dealing with him, they did - - - you know,  
17 they did ask him to come back. They gave him an  
18 airline ticket to go back. They prescribed him  
19 drugs. They had him get an MRI. They were talking  
20 to his New York doctor. I mean there was quite a bit  
21 of contact here.

22 MR. COHEN: There - - - there was contact.

23 JUDGE GRAFFEO: Why - - - why should that  
24 not be the basis for long-arm jurisdiction?

25 MR. COHEN: Because it doesn't fit with the

1 - - -

2 JUDGE GRAFFEO: I mean we've got some cases  
3 that have a lot less business contact and we've said  
4 it's sufficient.

5 MR. COHEN: Because, in this case, it  
6 doesn't fit with 302-a(1) and due process. 302-a(1)  
7 states that the defendant has to purposefully avail  
8 itself of the benefits and privileges of conducting  
9 business in New York. The - - -

10 JUDGE GRAFFEO: You know why - - - why  
11 isn't this the medical equivalent of our - - - I  
12 think it's called Fris - - - Frisbarg (ph.), maybe  
13 I'm not pronouncing it right, the case about the  
14 attorney-client relationship that was basically  
15 telephone calls?

16 MR. COHEN: Yes, but that was where the  
17 attorney was in New York for the benefit of the - - -  
18 the attorney - - - the defendant in New York. The  
19 benefit of the airline ticket wasn't for LSI. The  
20 benefit of the airline was for the appellant. So  
21 therefore, LSI didn't receive any benefit in New York  
22 or prot - - - protection in New York.

23 JUDGE RIVERA: But the - - -

24 JUDGE GRAFFEO: Well, if they - - - if they  
25 had - - - if they had improperly conducted his

1 surgery, certainly they wanted to bring him back and  
2 try to correct it. Otherwise they would have been  
3 open to a lawsuit whether in Florida or New York.

4 MR. COHEN: But that's still not trying - -  
5 - conducting business in New York as required by the  
6 statute and the case law that goes along with it that  
7 says you have to look at other things in the totality  
8 of the circumstances such as do they have an office  
9 in New York, a telephone number in New York,  
10 employees in New York, a mailing address, bank  
11 accounts, direct solicitation of patients in New  
12 York? All of that is not here. It's not present.

13 JUDGE RIVERA: But didn't - - - didn't - -  
14 - didn't - - -

15 MR. COHEN: And that's what - - -

16 JUDGE RIVERA: - - - you offer a discount  
17 if he came because he had some - - - your client had  
18 some time?

19 MR. COHEN: That was claimed in an  
20 affirmation - - - or an affidavit submitted by the  
21 plaintiff in opposition to the motion. But it's  
22 undisputed that there was no such transaction done in  
23 New York. This - - - it was written back to him in  
24 the e-mails that the fee would be set once the  
25 patient comes to Florida, is evaluated, and they

1           decide whether there's a proper - - -

2                   JUDGE RIVERA:  And so the - - - the - - -  
3           the airplane ticket, you say the difference is it's -  
4           - - it's after the surgery?

5                   MR. COHEN:  It was after the surgery.  
6           After the first two surgeries that it's - - -

7                   JUDGE RIVERA:  Even though it's to get him  
8           to come back?

9                   MR. COHEN:  What?

10                  JUDGE RIVERA:  Even though it's to get him  
11           to come back?  Didn't your - - -

12                  MR. COHEN:  It's to assist him to come back  
13           - - -

14                  JUDGE RIVERA:  Did your client get paid for  
15           that second surgery or not?

16                  MR. COHEN:  I assume for the fact they got  
17           paid in Florida for that.

18                  JUDGE RIVERA:  Um-hum.

19                  MR. COHEN:  But that's not transacting  
20           business in New York.  And back to what I heard  
21           before said that this was more than a passive Web  
22           site, just to be clear on it, the majority opinion -  
23           - - and even the dissenting opinion from the Second  
24           Department of Paterno said without question this was  
25           a passive Web site.

1                   JUDGE SMITH: Going back for a minute to  
2 those Pennsylvania and Maine cases, do you also rely  
3 on the fact that those are broader long-arm statutes  
4 than we have in New York?

5                   MR. COHEN: Absolutely, Your Honor. In  
6 fact, there is the Ehrenfeld case, decided by this  
7 court, that talked about long-arm statute in  
8 jurisdiction is coextensive in the federal due  
9 process with the federal court cases and that New  
10 York has a more stringent requirement under 3201.

11                   JUDGE READ: What - - -

12                   JUDGE GRAFFEO: I know you had a facility  
13 in Pennsylvania but how does this case differ from  
14 the Maine case?

15                   MR. COHEN: Well, the Maine case was a  
16 federal court case. So therefore, it had coextensive  
17 federal due process where New York legislature, as  
18 stated in the Ehrenfeld case, that was decided by  
19 this court, said that 32-a(1) is going to be more  
20 stringent and not coexistent with the federal due  
21 process standards.

22                   CHIEF JUDGE LIPPMAN: Okay, counselor,  
23 anything else?

24                   MR. COHEN: Yes, I'd go back to, quickly,  
25 your point on the effect of patients. New York

1 patients go to outside facilities like the Mayo  
2 Clinic. Now this is going to stifle the Mayo Clinic.  
3 Why would they take those patients, if they  
4 communicate with them by e-mail and telephone calls  
5 and call in a prescription for them are now being  
6 subject to New York courts, being hauled into various  
7 venues here in New York? They're going to say no,  
8 we're not going to take that. One last really - - -  
9 you know, the - - -

10 JUDGE RIVERA: So you're saying it's sort  
11 of the nature now of the kind of world we live in - -  
12 -

13 MR. COHEN: I think - - -

14 JUDGE RIVERA: - - - that people do cross  
15 state borders to get - - - at least with respect to -  
16 - - to medical services, these kind of medical  
17 services, and we don't want to discourage that. Is  
18 that what you're saying?

19 MR. COHEN: Yes, looking at the totality of  
20 the circumstances, why discourage that as opposed to,  
21 you know, a company - - - if this was a different set  
22 of facts, as you suggested, where they had a presence  
23 in New York, they had a telephone number in New York,  
24 they had a medical director in New York, they had  
25 other indicia that - - -

1 JUDGE RIVERA: But people don't need to run  
2 business that way anymore. Shouldn't we be up to  
3 date with what's going on in the world?

4 MR. COHEN: But it's not a reasonable  
5 expectation of - - -

6 JUDGE RIVERA: I mean you run your business  
7 on your phone now.

8 MR. COHEN: Yeah, but - - -

9 JUDGE RIVERA: Even the Supreme Court knows  
10 that.

11 MR. COHEN: - - - six doctors - - - six  
12 doctors in Florida shouldn't be fearing that they're  
13 going to be hauled into New York court because they  
14 sent an e-mail, had telephone conversations - - -

15 JUDGE RIVERA: But they didn't just send an  
16 e-mail. That's his point.

17 MR. COHEN: Why - - -

18 JUDGE RIVERA: He agrees with you. If  
19 that's all they did - - -

20 MR. COHEN: They were still not - - -

21 JUDGE RIVERA: - - - that he would not be  
22 here, you would not be here. But he says you did  
23 more.

24 MR. COHEN: But we didn't do - - - we were  
25 - - - our e-mails were responsive to him reaching

1           into Florida to contact us. And we responded to  
2           that.

3                         JUDGE RIVERA: And you're - - - you're  
4           saying you did not at all - - - once - - - once he  
5           made that contact, you're saying that your client did  
6           not view the opportunity to encourage and facilitate  
7           business with his client?

8                         MR. COHEN: Well, as part of having the  
9           treatment they gave him the materials for him to come  
10          to Florida for further evaluation.

11                        JUDGE RIVERA: And answer every question he  
12          had?

13                        MR. COHEN: And answer - - - and do a  
14          physical exam and decide there whether he's a  
15          surgical candidate and there decide what the fees  
16          will be.

17                        JUDGE RIVERA: In Florida. But I'm saying  
18          in New York didn't they try to answer every question  
19          he had? Don't - - - you see - - - you would not see  
20          that, at least in some way, as trying to solicit and  
21          encourage his client to stay with - - - with the  
22          services or to continue to seek out your services - -  
23          -

24                        MR. COHEN: Well, if somebody - - -

25                        JUDGE RIVERA: - - - your client's

1 services?

2 MR. COHEN: Well, if somebody contacted the  
3 Mayo Clinic because they saw their passive Web site  
4 and said we want to go there for heart surgery and  
5 they said send us your records and then there was e-  
6 mails back and forth, are we now going to start  
7 opening it up so these - - - all these other  
8 facilities are going to say why would I start taking  
9 New York patients? And what happens if other  
10 jurisdictions say what if we adopt New York's rules  
11 and, therefore, we're not going to take New York  
12 patients. So New York doctors are going to be hauled  
13 into other courts, as well.

14 My last point and it was not addressed in  
15 there - - -

16 CHIEF JUDGE LIPPMAN: Very quickly,  
17 counselor.

18 MR. COHEN: I'll be very quickly. The lack  
19 of service on the defendant's being proper. We've  
20 argued that in our papers. It's not been addressed  
21 in this brief. But there's no affidavit of service  
22 showing Laser Spine was served properly. And the  
23 affidavits of service as to the individual doctors  
24 clearly are not legal.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 MR. COHEN: Thank you, Your Honor.

2 CHIEF JUDGE LIPPMAN: Thank you.

3 Counselor, rebuttal?

4 MR. GRIFFIN: Yes, very briefly, Your  
5 Honors. Just to clarify a few things that Mr. Cohen  
6 said. The second surgery took place after the plane  
7 ticket was issued. They flew him back down for the  
8 second surgery. And at no time did I say that the  
9 AOL Web site was a - - - a nonpassive Web site. I -  
10 - - I consented it is, standing alone, a passive Web  
11 site.

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. GRIFFIN: Thank you, Your Honors.  
14 Thank you.

15 CHIEF JUDGE LIPPMAN: Thank you both.  
16 Appreciate it.

17 (Court is adjourned)

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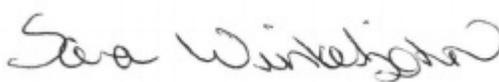
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Frank Paterno v. Laser Spine Institute, No. 186 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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