



BROOKLYN BARRISTER

Judicial Profile of Hon. George J. Silver

By Shelly K. Werbel, Esq.

Judge Silver was thrilled to be asked to be interviewed by the Brooklyn Barrister, realizing he was one of a very few or possibly the first civil or supreme court judge, who is seated in a county other than Kings, to be profiled by this publication. However, this realization was also met with Judge Silver's usual wit, when he started the interview with "You can take the judge out of Brooklyn, but you can't take Brooklyn out of the judge."

This was a theme that kept repeating itself throughout the interview, along with how many ties his career and personal life have always had with Brooklyn and the fact that although now a judge, he wants to make sure he is always remains just "George" to his many friends and family.

Born and raised in the Bronx by two loving parents, who still reside in the same apartment as his youth, Judge Silver made his parents proud when he graduated with a Bachelor of Science in accounting and business management from New York University. He then continued his education when he attended Hofstra Law School, where he received his JD in 1983.

However, although he was then already an attorney and working full time as staff counsel for five private bus companies in Brooklyn and Queens, Judge Silver was not finished with his schooling, as he loved education and wanted to be able to broaden his experiences in both law and business. While working, Judge Silver went to graduate school and received an MBA in finance from NYU's Stern School of Business in 1992. He proudly admits that he was able to pay this tuition because he had picked up a side account,

which had him doing defense work at night in Small Claims Court in Brooklyn. Although holding down a full time job by day, litigating extra matters at night, while simultaneously doing post graduate studies, Judge Silver says it was all worth the effort. This business education has totally prepared him for all sorts of financial matters that now come before him; everything from reading and understanding the financial aspects of an intricate contract to being able to compare the benefits between structured settlements.

Once the MTA took over the private bus companies, Judge Silver's next job was for a small plaintiff's firm called Fields and Rosen. However, as time passed, that firm went through several partnership changes, until he finally became a partner and the firm ultimately became known as Silver and Santo. This was a diverse practice that did everything from plaintiff's personal injury to maritime law, real estate to elder law, with guardianships and social security/disability thrown into the mix. All of which, helped set the stage for George Silver to be able to pursue his true dream; a judgeship.

Judge Silver said that being a trial practitioner was very rewarding, however when he saw the chance to pursue this dream, he took it and being a Judge is the most satisfying way to give back to the community. It was early in this millennium that he began the application process, while he was living and working in Manhattan. Then, after being deemed qualified for a judgeship, he received a party nomination to run for judge, even although he was not involved in politics. And the rest is history. He was elected in November 2004, for a Civil Court seat in New York County. However, as fate would have it, although elected in Manhattan, he was assigned to Kings County, which he said seemed fitting as he always felt like a Brooklyn attorney. Most of his cases, as an attorney, were in Brooklyn. The first bar group he joined and was active in was the Brooklyn Bar Association and many of his friends are from Brooklyn. For him, that courthouse was like going home.

As a Judge in Civil Kings, he presided over all types of cases, being rotated in and out of parts while he was there. Then in April 2009, he was reassigned to Family Court in the Bronx, where he presided over juvenile delinquent cases. He spent 10 months there and found it a truly rewarding experience. Judge Silver was able to see immediately how his "decisions had an impact on someone, as he tried to change a child's life from going down the wrong path."

Then in January 2010, he was appointed as full Acting Supreme Court Judge and assigned back to New York County. There he presided over the Motor Vehicle Part, a part which then had one of the largest inventory of cases in New York County. So successful was he at reducing the caseload, that in April 2011, he was asked by Court Administration to preside over the county's Administrative Coordinating Part, which is their equivalent TAP and which was the part that Judge Gammerman had run for years.

Additionally, while Judge Silver sits in the trial assignment part, he is also still presiding over some hospital assignments and criminal arraignments. He is also the current President of the Civil Court Judges Association which is made up of the 120 Civil Court Judges elected in New York. He represents their interests at meetings with OCA and he helps plan education seminars for them. In some of his spare time, he is often asked to lecture at assorted bar associations in the State. All in all, this as a fairly meteoric rise in the judicial world, elected to Civil Court at the end of 2004 and by the beginning of 2011 being a full acting Supreme Court judge asked to preside over New York



Hon. George J. Silver

County's version of TAP.

Additionally, while his term as a Civil Court Judge does not expire until 2014, Judge Silver has been laying the ground work, so that he can seek a nomination for Supreme Court Justice when the time comes. Judge Silver loves how gratifying he finds this position. He truly feels it is an honor to serve the public and to be able to affect peoples lives daily. And, although he feels his proudest legal accomplishment is having won a judgeship, he also believes that his proudest personal accomplishment is and will always be, being respected

(Continued on page 3)

CALLING ALL WRITERS

ANNOUNCING THE FIRST ANNUAL BARRISTER FICTION WRITING CONTEST

RULES ARE AS FOLLOWS:

1. All submissions due no later than Thursday, December 1, 2011, at 5:00 pm by e-mail to Glenn Verchick, Editor-In-Chief, Brooklyn Barrister at werbel4law@aol.com in pdf format.
2. Submissions must be works of fiction. It can be a short story or a first chapter of a novel and cannot exceed 10,000 words.
3. Contest limited to lawyers, judges, court personnel, law firm employees and bar association employees, who hold said position in the State of New York at the time of submission. Not limited to Brooklyn Bar Association members.
4. Brooklyn Bar Association Editorial Board Members are excluded.
5. The winner will be judged by the BBA Editorial Board and winner will be recognized at the Association Annual Meeting. The winner will receive a plaque and will have his or her piece published in a 2012 issue of the Barrister.

Only two months left to show your creative talents!

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THE DOCKET

Included below are events which have been scheduled for the period
October 4, 2011 through November 3, 2011
Compiled by Louise Feldman

October 4, 2011	Tuesday	VLP CLE Foreclosure Auditorium 6:00 P.M.
October 6, 2011	Thursday	Nigerian Lawyers Association Auditorium 6:00 P.M.
October 10, 2011	Monday	In observance of Columbus Day, the Brooklyn Bar Association, Lawyer Referral Service and the Volunteer Lawyer Project will be closed.
October 11, 2011	Tuesday	CLE - Ethics: Estate Insurance & Investment Practices and Solutions Auditorium 6:00 P.M.
October 12, 2011	Wednesday	BBA Board Meetings Board Room 5:15 P.M.
October 17, 2011	Monday	Joint meeting of Judiciary Committee City Bar and BBA Auditorium 5:30 P.M.
October 18, 2011	Tuesday	18B Family Court Committee Rear Room 1:00 P.M.
		BWBA Board Meeting & CLE Program Board Room & Auditorium 5:00 P.M.
		Reception for Magistrate Judges Third Floor Atrium, Eastern District NY 5:00 P.M. Followed by CLE - Initial Criminal Proceedings in Federal Court; What Every Lawyer Needs to know; Central Jury Room 6:00 P.M.
October 20, 2011	Thursday	KCCBA Board Meeting Board Room 5:00 P.M.
		KCCBA Dinner Meeting & CLE Auditorium 6:00 P.M.
October 24, 2011	Monday	CLE The ABC's of Landlord/Tenant Law Auditorium 6:00 P.M.
October 25, 2011	Tuesday	American Inns of Court Auditorium 5:00 P.M.
October 26, 2011	Wednesday	VLP CLE CLARO Auditorium 6:00 P.M.
October 27, 2011	Thursday	VLP VLFD Training CLE Auditorium 12:00 P.M.
November 1, 2011	Tuesday	CLE Family Law - Same Sex Marriage Auditorium 6:00 P.M.
November 3, 2011	Thursday	CLE No Fault Evidence Auditorium 6:00 P.M.

IF YOU HAVE ITEMS FOR INCLUSION IN THE DOCKET, PLEASE MAIL OR FAX THEM TO LOUISE FELDMAN, BROOKLYN BAR ASSOCIATION, 123 REMSEN STREET, BROOKLYN, NEW YORK 11201.
FAX NO.: (718-797-1713)
E-mail: lfeldman@brooklynbar.org

LEGAL BRIEFS

Judicial Recognition

Congratulations to Brooklyn Bar Association member **Hon. Donald Scott Kurtz**, who will be presented with the Harlan Fiske Stone Memorial Award by the New York City Trial Lawyers Association at the 77th Annual Banquet on Wednesday, October 12, 2011. The cocktail and buffet reception will be held from 6-9 pm at the Tribeca Rooftop, 2 Desbrosses Street, New York, N.Y.

Congratulations to Brooklyn Bar Association member **Hon. Esther M. Morgenstern**, who will be presented with the Annual Award by the New York State Chapter of the Supervised Visitation Network at the annual conference on Friday, November 4, 2011. The presentation will be made at the Safe Horizon Conference Center, 50 Court Street, 8th Floor and will recognize **Justice Morgenstern's** work in the Integrated Domestic Violence Part of the Supreme Court, Kings County, as well as her support and advocacy of supervised visitation.

Kudos and Professional Recognition

Congratulations to Brooklyn Bar Association Volunteer Lawyers Project Executive Director **Jeannie Costello**, who in August was named as the Co-Chair of the Women's Bar Association of the State of New York's Access to Justice Issues Committee. In September, **Jeannie Costello** was named to

the Advisory Board of Legal Services NYC — Brooklyn Branch by **Fraidy Nachman**, the Acting Project Director. Earlier in the year **Jeannie Costello** was appointed by **Chief Judge Jonathan Lippman** to the New York State Chief Judge's Attorney Emeritus Advisory Committee.

Heard on the Street

For the third consecutive year, the Brooklyn Bar Association is teaming up with the Empire Mock Trial Association to recruit judges for their annual event scheduled for October 21, 22 and 23 at the Kings County Supreme Court, located at 320 Jay Street. To learn more about the competition or to register to judge view the website: <http://empiremocktrial.org/site/judge>.

Word has reached our Association that the Electronic Attorney Check-in Program is now mandatory for all attorneys appearing in New York City Family Court. FAQs and instructions for the use of the Electronic Attorney Check-in Program are posted at <http://www/nycourts.gov/familycourtcheckin/>.

Legal Briefs is compiled and written by Avery Eli Okin, Esq., CAE, the Executive Director of the Brooklyn Bar Association and it's Foundation. Items for inclusion in "Legal Briefs" should be sent to aokin@brooklynbar.org, faxed to 718-797-1713 or mailed to 123 Remsen Street, Brooklyn, New York 11201-4212.

NEW MEMBERS FOR SEPTEMBER 2011

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BROOKLYN BAR ASSOCIATION PRESIDENT

RESPECTFULLY SUBMITTED

**By Ethan B. Gerber, Esq
President**

By the time this issue appears in your mail, we once again will have completed another great Brooklyn Bar Association Volunteer Lawyers' Program Annual Liz Padilla 5k run in Prospect Park. The annual event, named after a wonderful member of the VLP staff who was taken from us at a tragically young age, is a highlight of our fall season and raises desperately needed revenue for the VLP. This organization provides pro bono counsel and advocacy for indigent members of our Brooklyn community. It represents our better selves and shows that the Brooklyn attorneys are as caring and charitable as they are effective and skillful.

The VLP helps those who cannot afford to pay for an attorney. The clients have household incomes below \$22,000.00 and typically range between household incomes of \$13,612.00 to \$21,789.00.

The need for the VLP is intense: Foreclosures are at record highs and collections on consumer debt both real and inflated are more aggressive than ever. Civil filings have increased 300% in five years; the calendar in Kings Civil Court is bursting with such consumer debt matters.

At the same time, the resources are scant. Because of low interest rates, the primary revenue source, interest generated from Interest on

Lawyer Account (IOLA) fund is a fraction of what it once was. This challenge, providing more services with fewer resources has been met by the VLP under the extraordinary leadership of Jeanie Costello, its executive Director.

In the last year the VLP handled to completion 3,237 cases and served 5,889 Brooklyn residents. Our participating attorneys recorded nearly 10,000 hours of dedicated time and expertise at no cost to the clients.



**President
Ethan B. Gerber**

The VLP works in partnership with the Brooklyn Bar Association and with several other organizations to create in depth programs that target specific needs. It is these partnerships which give the VLP its unique flexibility and depth of experience. In the last two years, Jeanie and her team developed resources and assistance on a panoply of issues including foreclosure intervention and prevention, Family Law, which includes custody, visitation child support and uncontested divorce matters, Bankruptcy (chapter

7) and Consumer Debt, Article 17-A Guardianships, Elder Law, and Haitian Immigration Services. The Foreclosure Intervention and Prevention Unit alone has provided assistance in over 250 matters in the last 2 years.

Amazingly, this office performs on a shoestring budget that only includes three full time staffers. These are the Executive Director, Jeanie Costello, Esq., Sidney Cherubin, Esq. the Director of Legal Services and Jessica Spiegel, the Pro Bono Coordinator. There are four part time staffers and some wonderful volunteers. I'm very proud to say my 16 year old daughter Arielle is but one of them.

Pro Bono service, although rewarding, is not for everyone — I, for one, believe that mandatory pro bono provides a disservice to both those who are forced to provide it and those forced to receive reluctant service from individuals who do not have the time, energy or sometimes even the expertise to handle their matters. I am proud that the Brooklyn Bar Association and its partner, the VLP is filled with dedicated professionals who give their time and expertise freely and lovingly to benefit the less fortunate among us.

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Judicial Profile of Hon. George J. Silver

(Continued from page 1)

as a judge. His true hope is that the attorneys who come before him realize that since he was a hardworking lawyer many years before he was a judge, he has true appreciation for what attorneys go through representing their clients in court. Judge Silver added that he "not only understands the practice of law, but he understands the business of a law practice" and although in the law, one party has to lose if one party wins, he tries his best to keep the playing fields even for the parties.

Judge Silver prides himself on the fact that he is aware of and respects attorneys scheduling problems, coupled with the expenses involved in bringing matters to trial. This is why, now that he sits in TAP, he is working diligently to settle as many cases as can be settled. He has instituted settlement days, which numerous carriers attend and he just started "Blockbuster" days with City cases that are over standards and goals. The first week out, he was able to resolve nine cases with the City in one day, under this new initiative. Judge Silver does say that running a courtroom has been challenging due to budg-

et cuts and loss of personnel, so he is trying to find creative methods, such as these, to "give justice."

Judge Silver added that he has the utmost respect for the lawyers who come before him, who are thoroughly prepared and know their cases; lawyers who are zealous advocates, yet manage to show cordiality between themselves while still arguing for their clients. But most importantly, he respects lawyers who show respect for court personnel. On the flipside, what annoys Judge Silver is a lawyer who shows disrespect, by being unprepared, especially on motion days. Judge Silver prides himself in the fact that he takes the bench at 9:30, reads all motions before taking the bench, and renders a decision in a timely manner. Last year over 1600 decisions came out of his Part. The Judge feels that if he "took the time to read your motion, you should know it too."

On a personal note, Judge Silver takes great pride in being the first openly gay man elected to a countywide Civil Court seat and he feels incredibly lucky to have been able to be one of the first judges in

New York State to join same sex couples in marriage. He never thought he would get to partake in such a historic event and he found it thrilling to be able to perform such a ceremony as a judge. When asked if he had any plans for himself in the future regarding a relationship, he quickly added that he was "still single...but looking."

When not immersed in the law, Judge Silver said he loves to travel, eat and read (mostly historical nonfiction). And, although he takes his role as judge very seriously, when it comes to his personal life, he is an unabashed contradiction, which was exemplified when he recited his all time three favorite books; "Anna Karenina" by Tolstoy, "The Fountainhead" by Ayn Rand and "Valley of the Dolls" by Jacqueline Susanne. He also added, with a big smile on his face, that his three favorite places he had traveled to, were Buenos Aires, Rome and Coney Island. You have to respect someone who loves sitting and eating gelato on the Piazza Navona in Rome, while gazing at a

Bernini fountain, as much as they enjoy eating a Nathan's hot dog on the Boardwalk in Coney Island. When asked to share his one guilty pleasure with us, he admitted that he "loves shopping at Bergdorf Goodman's," to which I replied "who doesn't?"

Lastly, when finally asked what does he find to be the least gratifying part of wearing the robe, Judge Silver was quick to respond that "it can be lonely job." His interaction with other attorneys is now different. "It can be very isolating" and he finds people sometimes treat him differently, though his hope when he became a judge was and still is, that he would always remain the same person. He insists that he hasn't changed and firmly believes that "the Robe did not come with a crown." He tries hard to remain true to himself and has told his friends that if his judgeship ever started defining him as a person, then they have his consent to hit him...." So far no one has. To his friends, and there are many, he is still just "George."



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THE STATE OF ESTATES

**By Hon. Bruce M. Balter
and Paul S. Forster, Esq.**

As you may have noticed, we have a new publishing home this month, and we look forward to a long and rewarding relationship in our new surroundings. While enjoying these crisp autumn days, we hope that you will benefit from the following discussion of some interesting cases, an Internal Revenue Service Notice, an Internal Revenue Service Revenue Procedure, and a New York State and Local Employees' Retirement System Administrative Ruling, we have compiled involving the circumstances under which a seller of "good will" or his new employer may accept the trade of a former client seeking wealth management and investment advice; a court-appointed guardian of the property of an infant distributee not having statutory priority to be appointed administrator over the Public Administrator; the ineffectiveness of a Predivorce Designation of the then spouse as beneficiary of a New York State Pension in light of E.P.T.L. §5-4.1; the statutory protections for undertakers and cemeteries who act reasonably and in good faith, even if they take instructions from persons who may not have the legal right to dispose of a decedent's remains; parents being allowed to disinter their deceased son who was improperly placed in a mausoleum by his former spouse; the disallowance of an attempted departure from the 'Kaiser' rule in the distribution of wrongful death proceeds; and guidance from the Internal Revenue Service with regard to the time and manner in which the executor of the estate of a decedent who died in 2010 elects to have the estate tax not apply and to have the carryover basis rules apply to property transferred as a result of the decedent's death.

The Circumstances Under Which a Seller of "Good Will" or his New Employer May Accept the Trade of a Former Client Seeking Wealth Management and Investment Advice— Plaintiff Trust company was a privately owned wealth management and investment advisory firm. It provided services to high net worth individuals, families, and institutional clients. Defendant was an investment portfolio manager who had worked at an investment management firm advising high net worth clients. Defendant was a principal at the firm and served as its Chief Executive Officer. The shareholders of the investment management firm sold the assets of their firm, including client accounts and related good will, to the Trust company for more than \$75 million. The defendant, along with the seven other principals of the investment management firm, came to work at the Trust company. The Purchase Agreement imposed no express restrictive covenants on the former principals of the investment management firm. They were at will employees of the Trust company with no ownership interest in the newly formed firm. The Purchase Agreement further provided that only \$50 million of the purchase price was payable up front. The defendant, the largest shareholder of the investment management firm, received more than \$9.1 million of this amount. The remainder of the purchase price was conditional. If the principals of the investment management firm were able to achieve certain thresholds related to client retention, revenue enhancement, and reduction of expenses, they were eligible to receive the remainder of the purchase price in four subsequent installments. The principals, having met designated benchmarks, qualified for the first

two contingency payments. In total, the defendant received over \$15 million for the sale of his interest in the investment management firm. The defendant and the rest of the principals were ineligible for the remaining two contingency payments. The defendant soon became unhappy with his role at the Trust company. He disliked the fact that the Trust company management had reduced his responsibilities and excluded him from key management meetings. As a result, the defendant started to explore different opportunities. The defendant periodically met with the President and Chief Executive Officer of another wealth management firm to discuss the possibility of his employment. The two discussed the defendant's desired level of compensation and how such compensation would be structured. The new firm was aware that the Trust company had recently acquired the investment management firm and understood from these conversations that if the defendant were to join it, he could not actively solicit his clients to transfer their accounts from the Trust company. Less than two years after the Trust company acquired the investment management firm, the defendant resigned from the Trust company and took employment at the new firm. The defendant did not notify his existing clients about his decision to resign from the Trust company and join the new firm. The Trust company instructed the defendant to prepare a list of his clients with the pertinent account holder information so that the Trust company could transition these accounts to other investment advisors. The defendant complied with this directive. Shortly after reviewing the list of the defendant's accounts, the Trust company mailed letters to the defendant's clients, informing them that the defendant was leaving to pursue other career opportunities. Once the defendant joined the new firm, some of his former clients at the Trust company contacted him. Many of these clients asked the defendant why he had left the Trust company. The defendant's standard response to these inquiries was that the new firm was far more appropriate for him, that its method of dealing with clients whereby portfolio managers managed the client portfolios and interacted directly with the clients was more appropriate for his training and experience of 30 years in the business. Several of the defendant's clients elected to transfer their accounts to the new firm in the ensuing months. One particular family, the defendant's largest client at the Trust company, were among those who followed the defendant to the new firm. The family first developed a relationship with the defendant at the investment management firm approximately 20 years before, when the defendant served as the junior investment advisor on the account. Eventually, the defendant was elevated to lead advisor on the account and he and the head of the family became friends. Despite this friendship, the defendant refrained from informing the family of his decision to work at the new firm. The family first learned that the defendant had left the Trust company when an employee of the Trust company telephoned. The Trust company employee advised the family that the defendant was not permitted to contact them, and the defendant had accepted an offer with a different firm, but did not disclose the name of the new firm. The news that the defendant was no longer with the Trust company alarmed the family. Although the family knew the employee at the Trust company, the family's primary and virtually exclusive contact at the Trust company was the defen-

dant. A family member called the defendant at his home. During this conversation, the defendant disclosed that he had joined the new firm and, on the advice of counsel, was told not to solicit his former clients at the Trust company. At the conclusion of the telephone call, the family member indicated that his family would need time to consider their options and hinted that they would more than likely solicit or investigate both the Trust company and the new firm. As a follow-up, the family member sent the defendant a letter seeking to organize a preliminary meeting in order to discuss how their accounts would be handled within his new firm. The family member also sought information on the background of the organization and the continuity of account management that could be provided. The family then had meetings on the same day with both the Trust company and the new firm. Once the defendant received the letter from the family member, he requested guidance from the new firm in determining who should represent it in the upcoming meeting with the family. One week prior to the new firm's presentation to the family a strategy meeting was held during which the defendant described to other personnel at the new firm the family's investment philosophy and other background information related to his longstanding client. On the day of the meeting with the family at the new firm the defendant was present. He introduced the family to the executives of the new firm. From there, a family member conducted the meeting, directing questions toward the firm's representatives. The defendant essentially played no role in this meeting and would only occasionally amplify a point that the others were making. The family member did not inquire about the fee structure at the new firm. After his meetings with both firms, the family member's instinct was to transfer the family's accounts to the new firm. Since the family member's first meeting with the new firm was introductory in nature, the family member wanted a formal proposal from the defendant. The family member invited the defendant to his home state of Ohio to discuss the specifics. The defendant obliged. The defendant explained that he would be the lead investment advisor on the account and that the new firm's president would serve as the backup advisor to the account. The defendant also confirmed that the new firm would charge the same fees that the Trust company was currently charging the family. Thereafter the family along with a number of the defendant's other former clients moved their accounts to the new firm. The Trust company then brought the action alleging that the defendant had breached his duty of loyalty to the Trust company under the theory that the defendant improperly solicited his former clients to join him at the new firm, thereby impairing the good will that the defendant had sold to the Trust company in connection with The Trust company's acquisition of the investment management firm. A trial was conducted as to the defendant's liability on the Trust company's claims. The Federal District Court found that the defendant improperly induced the family to leave the Trust company and that this inducement in fact caused the family account to leave the Trust company and join the new firm in violation of New York law. With respect to the other accounts that transferred from the Trust company to the new firm, however, District Court found that the Trust company did not meet its burden of proving that the defendant had violated New York law. On the issue of damages

District Court conducted a second trial and awarded the Trust company over \$1.2 million in damages and prejudgment interest. The parties appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit certified a question to the New York Court of Appeals, seeking guidance in determining what actions under New York law constituted improper solicitation.

HOLDING — The Court opined that under New York common law, a seller has an implied covenant or duty to refrain from soliciting former customers, which arises upon the sale of the 'good will' of an established business. The Court set forth as the rationale for the rule that a man may not derogate from his own grant, that the vendor is not at liberty to destroy or depreciate the thing which he has sold, that there is an implied covenant, on the sale of good will, that the vendor does not solicit the custom which he has parted with, that it would be a fraud on the contract to do so, that it is not right to profess and to purport to sell that which you do not mean the purchaser to have, and that it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own. The Court stated that a seller's implied covenant not to solicit his former customers is a permanent one that is not subject to divestiture upon the passage of a reasonable period of time. In the Court's view, upon the sale of good will, a purchaser acquires the right to expect that firm's established customers will continue to patronize the business, because the essence of these types of transactions is, in effect, an attempt to transfer the loyalties of the business' customers from the seller, who cultivated and created them, to the new proprietor. The Court recognized however that notwithstanding the implied covenant, a buyer assumes certain risks when he purchases an existing business and attempts to transfer the loyalties or good will of that business as his own. The Court noted that the customers of the acquired business, as a consequence of the change in ownership may choose to take their patronage elsewhere, and that the occurrence of a certain amount of attrition is one of the risks that the purchaser must assume when he acquires an established business. The Court stated that the seller of a business is free to subsequently compete with the purchaser and even accept the trade of his former customers, provided that he does not actively solicit such trade. The Court pointed out that to militate against these risks, which extend beyond the limited scope of a seller's implied covenant, a purchaser is free to negotiate an express covenant, reasonably restricting, for instance, a seller's right to compete in a particular geographical area or field of endeavor. The Court concluded that since the seller of good will, absent a restrictive covenant, may compete with a purchaser, certain activity within a new employer's firm must be permissible. The Court declined to set down a hard and fast rule to determine whether a seller of good will had improperly solicited his former clients, but held that, in addition to refraining from disparaging the purchaser of his business, New York law provides that (1) while a seller may not contact his former clients directly, he may, in response to inquiries made on a former client's own initiative, answer factual questions; (2) under the circumstances where a client exercising due diligence requests further information, a seller may assist his new

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COMMITTEES & SECTIONS 2011-2012

(Continued from page 10)

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THE STATE OF ESTATES

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employer in the active development of a plan to respond to that client's inquiries; (3) should that plan result in a meeting with a client, a seller's largely passive role at such meeting does not constitute improper solicitation in violation of the implied covenant; and (3) as such, a seller or his new employer may then accept the trade of a former client. *Bessemer Trust v Branin*, 16 N.Y.3d 549 (2011)

Court-Appointed Guardian of the Property of an Infant Distributee Does Not Have Statutory Priority to Be Appointed Administrator over the Public Administrator- The decedent died intestate survived by three minor children. At the time of his death, the decedent owned a pharmacy, shares in a cooperative apartment unit, and a home. The petitioner to be appointed administrator of the decedent's estate and to revoke the letters of temporary administration previously issued to the Kings County Public Administrator, was the mother of two of the decedent's children and the court-appointed guardian of their property. She resided in the cooperative apartment unit owned by the decedent's estate. The objectant was the mother of the third child, and resided in the home owned by the decedent's estate. She objected, contending, inter alia, that the petitioner was unqualified and unfit to serve in light of hostility between the objectant and the petitioner. The Surrogate's Court denied the motion and issued permanent letters of administration to the Public Administrator. The mother of the two children appealed. **HOLDING** — The Surrogate was affirmed. The Appellate Division disagreed with the petitioner that as the court-appointed guardian of the property of two infant distributees of the decedent's estate, she had priority to be appointed administrator. In the Court's view, the Surrogate's Court had broad discretion to determine to whom it should issue letters of administration, based on the best interests of the estate. The Appellate Division ruled that the Surrogate providently exercised her discretion in denying the petitioner's motion to revoke the temporary letters of administration previously issued to the Public Administrator and issue letters of administration to the petitioner, as the record demonstrated that appointing the petitioner as the administrator would not be in the best interests of the decedent's estate. Further, the Appellate Division found that based on the hostility between the petitioner and the objectant, appointing the petitioner as the administrator of the decedent's estate would jeopardize the interests of the beneficiaries and the proper administration of the estate. Accordingly, the Appellate Division held that the Surrogate's Court properly had denied the petitioner's motion and issued permanent letters of administration to the Public Administrator. *Matter of Beharrie*, 84 A.D.3d 1227 (2d Dept., 2011)

Pre Divorce Designation of Then Spouse as Beneficiary of New York State Pension Not Given Effect After Death in Light of E.P.T.L §5-4.1- The decedent, a member of the NYS Retirement System, died on October 20, 2009. The decedent's former spouse was named as the beneficiary of his death benefit, and applied for the benefit. The former spouse and the decedent were divorced on May 28, 2004. The decedent's parents were named as alternate beneficiaries of his death benefits, but both parents predeceased him. The Retirement System informed the former spouse that the amended Estate Powers and Trust Law (EPTL) §5-1.4, effective July 7, 2008, automatically had revoked her designation

as beneficiary of the death benefits. The executrix of the decedent's estate notified the Retirement System that the estate was making a claim on the death benefits. The executrix agreed with the Retirement System's determination that the beneficiary designation of the former spouse was revoked pursuant to EPTL §5-1.4 by reason of the divorce. The former spouse alleged that she was entitled to the benefits by reason of the beneficiary designation notwithstanding EPTL §5-1.4. The Separation Agreement that was incorporated into the Divorce Decree between the former spouse and the decedent eliminated any right the former spouse had to any property, real or personal of the decedent. No documentation was produced by the former spouse indicating that she and the decedent had revived their interest in each other's pensions by an agreement signed after the Separation Agreement became effective and before the decedent's death. A hearing was held before an Administrative Law Judge (ALJ). **HOLDING-** The application by the former spouse for the death benefit was denied. The ALJ opined that under the State Administrative Procedure Act the burden of proof was on the former spouse to establish that she was entitled to the decedent's death benefits. The ALJ acknowledged that prior to the 2008 amendment to EPTL §5-1.4 the claim of the former spouse that she was entitled to the death benefits of her ex-husband would have been valid. However, the ALJ ruled that a clear reading of the current EPTL §5-1.4 lead to the conclusion that the former spouse was not entitled to the decedent's death benefits. The ALJ found that the Separation Agreement clearly nullified the right of the former spouse to any of the Member's property including death benefits, and that the Separation Agreement as merged into the Divorce Decree was controlling. The ALJ gave great weight to the fact that under their Separation Agreement, the parties specifically had waived all rights to the other's pensions, including survivor benefits. Consequently, the ALJ held that the decedent's pension was his sole possession and would have passed to the alternate beneficiaries, the decedent's parents. Since they predeceased, the ALJ determined that the death benefits passed to the decedent's estate. The ALJ also rejected the former spouse's position that the EPTL provision is unconstitutional, on the grounds that she did not have that authority, and that constitutional questions were unsuited to resolution in administrative hearing procedures. Accordingly the ALJ denied the application of the decedent's former spouse for the decedent's death benefits. *Matter of McCauley (Ely)*, New York State and Local Retirement System, Reg. No. 3009006-2, HC No. 10-0361 (ALJ Johnson, 6/2/11)

Undertakers and Cemeteries Who Act Reasonably and in Good Faith are Statutorily Protected by Public Health Law §4201, Even if They Take Instructions From Persons Who May Not Have the Legal Right to Direct the Disposition of a Decedent's Remains- The defendant cemetery disposed of a decedent's remains in accordance with the wishes of the decedent's apparent widow, before learning that the decedent may have instead been married to someone else at the time of his death. The decedent died in 2008 at the defendant hospital. A Certificate of Death was issued in the normal course of the hospital's business that, inter alia, identified the defendant Brown as the decedent's surviving spouse. The purported spouse, using her married name, signed an authorization for cremation,

identifying herself as both the decedent's surviving spouse, and executor of his estate. The authorization recited that the decedent left no written instructions for the disposal of his cremated body, and that no relative or other person expressed any objection to the cremation of the decedent's body. The decedent's body was released by the hospital to the defendant funeral home. The following day, the funeral home delivered the decedent's body to the cemetery where, pursuant to the authorization, it was cremated. About a month later, the plaintiffs commenced the action, alleging that plaintiff Mack was the decedent's surviving spouse, and that the decedent was a practicing Catholic with a burial plot provided by his union's benefit fund. The additional named plaintiffs were the decedent's issue. The plaintiffs alleged in their complaint that because Mack was the lawful wife of the decedent, the defendants had no authority to transfer his body from the hospital to the funeral home, and then to the cemetery for cremation. The plaintiffs sought to recover damages for emotional distress resulting from the defendants' allegedly willful, wanton, wrongful, negligent, reckless, and careless conduct. In the course of extensive motion practice there was produced a Certificate of Marriage Registration evidencing a marriage ceremony between the decedent and Mack in 1980, and a Certificate of Marriage evidencing a marriage ceremony between the decedent and Brown in 2007. The crematory manager stated in an affidavit that for a body to be cremated, a funeral home must obtain an authorization from the decedent's family, and must also obtain permission for the cremation from the New York City Board of Health. An authorization for the cremation was executed by Brown, who provided a Certificate of Marriage identifying her as the decedent's spouse. The plaintiffs argued that the marriage between the decedent and Brown was bigamous and void ab initio, thereby negating Brown's authority to act in controlling the disposition of the decedent's remains and, by extension, negating the authority of the cemetery to perform the cremation. The Supreme Court granted the hospital's motion for summary judgment, and denied the motions of the plaintiffs, the funeral home, and the cemetery for summary judgment. The Supreme Court denied the plaintiffs' motion for summary judgment on the issue of liability on the ground that they failed to make a prima facie showing that Mack was the decedent's surviving spouse or that the remaining defendants were negligent in the disposition of the decedent's body. The Supreme Court denied the motions of the cemetery and funeral home for summary judgment dismissing the complaint insofar as asserted against them, concluding, among other things, that neither the funeral home nor the cemetery made a prima facie showing that they acted reasonably or in good faith in the handling of the decedent's body. The Supreme Court granted the hospital's motion for summary judgment dismissing the complaint insofar as asserted against it, noting that the hospital was not liable by virtue of section 205.19 of the New York City Health Code. In denying the motions of the plaintiffs, the funeral home, and the cemetery, the Supreme Court nonetheless determined that the denials were with leave to renew all dispositive motions upon the completion of appropriate discovery on the issue of whether Mack or Brown was the decedent's surviving spouse. Only the cemetery appealed. **HOLDING** — The Appellate Division reversed, granting the cemetery's motion

for summary judgment dismissing the complaint insofar as asserted against it, and, upon searching the record, also awarded summary judgment dismissing the complaint insofar as asserted against the funeral home as well.

The Court opined that the common-law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial or other disposition of the remains, and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body. The Court stated that if a violation of the right of sepulcher is established, the next of kin may be compensated for the emotional suffering and mental anguish which they experienced as a result. The Court noted that in order to recover for such emotional injuries, the family members must show that the injuries were the natural and proximate consequence of some wrongful act or neglect on the part of the one sought to be charged. The Court pointed to Public Health Law § 4201 as addressing who shall have the right to control the disposition of a decedent's remains, and determining the liability of others in carrying out the directions of a person who represents that he or she is entitled to control the disposition of remains. The Court stated that under the statute, in the absence of a written instrument executed by the decedent designating a person authorized to dispose of his remains, disposal is to be in the manner directed by the following persons in descending order: the surviving spouse or surviving domestic partner, any of the decedent's surviving children 18 years of age or older, either of the decedent's parents, any of the decedent's surviving siblings 18 years of age or older, a court-appointed guardian, a person 18 years of age or older entitled to share in the estate with the person closest in relationship having the highest priority, a duly-appointed fiduciary of the estate, a close friend or other relative of the decedent reasonably familiar with the decedent's wishes, and a chief fiscal officer of a county or duly-appointed public administrator. The Court added that if an enumerated individual is not reasonably available, is unwilling, or not competent to serve, and is not expected to become reasonably available, willing, or competent, then those persons of equal priority or, if there be none, those persons of the next succeeding priority have the right to control the disposition of the decedent's remains. The Court also stated that the statute confers legal protection against civil liability upon a person either identifying the decedent, representing himself or herself as authorized to control the decedent's remains, or disposing of the remains, provided that the person acted reasonably and in good faith.

The Court noted that to be entitled to the protection of the statute, the cemetery organization, crematory, or funeral firm must also establish that it requested and received a written statement that the decedent's agent was designated by a will or written instrument executed pursuant to the statute or, alternatively, that the designee had no knowledge of a will or written instrument directing the disposition of the decedent's remains and that such person possessed statutory priority to control the decedent's remains. The Appellate Division found that the cemetery made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence demonstrating that it did not violate the plaintiffs' alleged right of sepulcher, as its actions concerning the dece-

(Continued on page 14)

Roll Call

The Following Attorneys Were Disbarred By Order Of The Appellate Division, Second Judicial Department:

Vincent L. Leibell, III (June 7, 2011)

On December 6, 2010, the respondent pleaded guilty, in the United States District Court for the Southern District of New York, to one count each of obstruction of justice and subscribing to false and fraudulent U.S. individual income tax returns. As a result of his guilty plea, the respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against any disciplinary proceeding that might result from his conviction of the above two serious crimes.

Fred E. Rosenberg, admitted as Fred Eric Rosenberg (June 7, 2011)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations that he misappropriated funds entrusted to him as a fiduciary.

Ganiu Owolabi Ajose, a suspended attorney (June 14, 2011)

The respondent was disbarred, on default, upon a finding that he was guilty of failing to cooperate with the Grievance Committee, failing to satisfy a judgment entered against him incident to his practice of law, neglecting legal matters entrusted to him, failing to refund an unearned fee after withdrawing from a legal matter, improperly withdrawing from a legal matter entrusted to him, engaging in a pattern and practice of improperly sharing legal fees with a non-lawyer, and engaging in a pattern and practice of improperly accepting compensation for legal services from someone other than his client.

Eric S. Finger, admitted as Eric Stuart Finger (June 14, 2011)

On November 16, 2010, the respondent was convicted, upon his plea of guilty in the County Court, Nassau County, of grand larceny in the third degree, a class D felony, and scheme to defraud in the first degree, a class D felony. By virtue of his felony conviction, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4)(b) as of November 16, 2010.

George O. Guldi, admitted as George O'Connor Guldi (June 14, 2011)

On February 16, 2011, the respondent was convicted, after trial, in the County Court, Suffolk County, of grand larceny in the second degree, a class C felony, and insurance fraud in the third degree, a class D felony. By virtue of his felony conviction, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4)(a) as of February 16, 2011.

Mark E. Gold, a suspended attorney (June 21, 2011)

By order of the Supreme Court of New Jersey filed March 10, 2010, the respondent was disbarred, upon his default, from the practice of law in that State. Upon the Grievance Committee's application for reciprocal discipline pursuant to 22 NYCRR 691.3, the respondent was disbarred in New York.

Roman Mavashev (June 21, 2011)

On March 11, 2010, the respondent was found guilty, after a jury trial, in the United States District Court for the Eastern District of New York, of conspiracy to commit bank fraud, a class B felony; conspiracy to commit wire fraud, a class B felony; and bank fraud, a class B felony.

By virtue of his federal felony convictions, at least one of which is cognizable as a state felony, the respondent was automatically disbarred in New York on March 11, 2011, pursuant to Judiciary Law §90(4)(a).

Ronald J. Chisena, a suspended attorney (June 28, 2011)

The respondent was disbarred following a disciplinary hearing, upon a finding that he was guilty of practicing law while suspended.

Richard F. Gluszk, a suspended attorney (June 28, 2011)

The respondent was disbarred on default based upon his obstruction of the legitimate function of the Grievance Committee in its investigation of four complaints filed against him.

Stephen R. Hill, admitted as Stephen Richard Hill (July 26, 2011)

On July 7, 2010, the respondent pleaded guilty, in the Supreme Court, Nassau County, to attempted grand larceny in the fourth degree, a class A misdemeanor, in full satisfaction of a one count indictment charging him with grand larceny in the third degree. In exchange for pleading to the reduced charge, the respondent tendered his resignation as an attorney.

Jonathan Mason-Kinsey, admitted as Jonathan G. Mason-Kinsey, a suspended attorney (August 2, 2011)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations that he engaged in the unauthorized practice of law during his suspension and failed to cooperate with the Grievance Committee.

Deirdre A. Przygoda, admitted as Deirdre A. McArdle (August 2, 2011)

By order of the Supreme Court of New Jersey dated December 6, 2010, the respondent was disbarred, on consent, from the practice of law in that State. Thereafter, the respondent tendered a resignation in New York wherein she acknowledged that she is subject to reciprocal discipline pursuant to 22 NYCRR 691.3, based upon her disbarment in New Jersey, and that she would be unable to successfully defend herself on the merits against allegations that she failed to re-register as an attorney with the Office of Court Administration ("OCA") for three consecutive registration periods and failed to cooperate with the lawful demands of the Grievance Committee relative thereto.

The Following Attorneys Were Suspended By Order Of The Appellate Division, Second Judicial Department:

Adam Ira Skolnik (June 7, 2011)

By order of the Supreme Court of Florida dated October 6, 2010, the respondent was suspended from the practice of law in that State for 90 days, effective 30 days from the date of the order, for neglecting legal matters. Upon the Grievance Committee's application for reciprocal discipline pursuant to 22 NYCRR 691.3, the respondent was suspended from the practice of law in New York for a period of six months, commencing July 7, 2011.

James G. Fitzsimons (June 14, 2011)

Following a disciplinary hearing, the respondent was suspended from the practice of law in New York for a period of six months, commencing July 14, 2011, upon a finding that he was guilty of engaging in a pattern and practice of failing to timely reregister as an attorney with OCA and

failing to cooperate with the Grievance Committee's lawful demands.

Joseph Foglia, admitted as Joseph A. Foglia, a suspended attorney (June 28, 2011)

On November 27, 2007, the respondent pleaded guilty, in the United States District Court, District of New Jersey, to one count of tax evasion and one count of making false statements. He was suspended from the practice of law for a period of three years, commencing immediately, with credit for a period of interim suspension.

Ronald A. Graziano (June 28, 2011)

By order of the Supreme Court of New Jersey dated July 23, 2008, the respondent was suspended from the practice of law for one year upon a finding that he participated in prohibited fee-sharing with non-lawyer employees; that he failed to disclose material facts in testimony before a tribunal of the New Jersey Department of Labor, Division of Wage and Hour Compliance, creating a misapprehension of facts as to the foregoing fee-sharing, and failed to take action to correct the tribunal's misapprehension; and that he failed to exercise appropriate oversight over firm finances, resulting in a misappropriation of more than two million dollars of fiduciary funds by a non-lawyer employee. Although the New Jersey suspension was suspended, the respondent was suspended from the practice of law in New York for a period of one year, nunc pro tunc to August 10, 2010 (the date upon which the New Jersey disciplinary action was discovered).

Wilmer Hill Grier (June 28, 2011)

The respondent was suspended from

the practice of law for a period of five years, commencing July 28, 2011, following a disciplinary hearing wherein she was found to have misappropriated funds entrusted to her as a fiduciary, commingled funds with personal funds and failed to maintain required bookkeeping records for her attorney escrow account. The respondent has a prior disciplinary history.

Andrea J. Robinson (July 19, 2011)

Following a disciplinary hearing, the respondent was suspended from the practice of law in New York for a period of two and a half years commencing August 22, 2011, upon a finding that she converted funds entrusted to her as a fiduciary and neglected legal matters. The respondent had no prior disciplinary history. Other mitigating factors included the absence of harm to any clients; the return of all funds prior to the Grievance Committee's investigation; and the respondent's ongoing responsibility for her ailing mother.

The Following Attorneys Were Publicly Censured By Order Of The Appellate Division, Second Judicial Department:

Jeffrey S. Feinerman, admitted as Jeffrey Steven Feinerman (June 7, 2011)

By order of the Supreme Court of New Jersey filed May 19, 2010, the respondent was reprimanded for failing to safeguard client funds, negligent misappropriation of client funds, practicing law while ineligible and engaging in conduct involving dishonesty, deceit or misrepresentation. Upon the Grievance Committee's application for reciprocal discipline pursuant to 22 NYCRR 691.3, the respondent was censured.

(Continued on page 16)

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(Continued from page 12)

dent's cremation were taken reasonably and in good faith and in compliance with the statute. The Court noted that Brown had provided a Certificate of Marriage identifying her as the decedent's spouse, and executed an authorization for the cremation which on its face satisfied the requirements of the statute in that it recited that Brown was the decedent's surviving spouse and executor, that the decedent left no written instructions for the disposal of his cremated body, and that the decedent's near relatives had been informed of the proposed cremation but had expressed no objection to it. The Court adjudged that the cemetery had no reason to question Brown's authority to act as the decedent's surviving spouse, particularly as the relevant documents were facially sufficient. The Court was not persuaded that the plaintiffs had raised an issue of fact. The Court noted that where two competing putative spouses come forward with proof of their respective marriages, there is a presumption that the second marriage is valid and that the prior marriage was dissolved by death, divorce, or annulment. The Court opined that when the presumption is successfully rebutted, the second marriage is void ab initio and is not ratified or validated by a subsequent dissolution of the first marriage. Accordingly, the Court acknowledged, if, as the plaintiffs alleged, the documented marriage of the decedent to Mack still was valid and ongoing at the time of the decedent's later marriage to Brown, then Brown was not a surviving spouse authorized to control the disposition of the decedent's remains. However, the Court pointed out in this regard that Mack failed to tender any evidence that her 1980 marriage to the decedent had not been dissolved, which could have been addressed by a search of court records showing that no divorce action had been commenced and concluded, and that the plaintiffs' verified complaint alleging Mack's status as surviving spouse, which ordinarily might be used as an affidavit, was verified by someone other than Mack, without any showing that such person had personal, non hearsay knowledge of Mack's marital status. Nonetheless, the Court ruled that it did not need to determine whether the marriage between the decedent and Brown was void, because the cemetery's liability did not depend upon whether Brown's marriage was void, but instead depended upon whether its own actions were taken reasonably and in good faith under the circumstances. In the Court's view, the clear intent of the statute is to shield cemeteries, crematories, and funeral firms from civil liability, so long as they reasonably rely in good faith upon the directions of persons with apparent authority to control the disposition of human remains, and obtain the documentation set forth in the statute. According to the Court, the Legislature, in enacting the statute could not have intended for cemeteries, crematories, and funeral firms possessed of duly-executed authorizations, death certificates, and related documentation, to cross-examine grieving widows or widowers, children, parents, siblings, or others to confirm the validity of the familial or personal status claimed under the Public Health Law, or to conduct independent investigations of such persons to protect themselves from potential liability. The Court acknowledged that if a cemetery, crematory, or funeral firm received incomplete or suspicious documents or other information that would cast doubt upon an individual's authority to control a decedent's remains, further inquiry would be indicated. However, the Court found that the plaintiffs had proffered no evidence in admissible form to

suggest that the cemetery had any reason not to rely upon Brown's seemingly valid authorization and marriage certificate naming her as the decedent's surviving spouse. The Court opined that to require the cemetery to conduct further examination or investigation of Brown's marital status would render meaningless the civil liability protections now afforded to it by the statute. Consequently, the Appellate Division ruled that the Supreme Court should have granted the cemetery's motion for summary judgment dismissing the complaint insofar as asserted against it. Using its authority to search the record and award summary judgment to a non appealing party with respect to an issue that was the subject of the motions before the Supreme Court, the Court held that the documentary basis for the award of summary judgment in favor of the cemetery was the same as that argued by the funeral home in its motion, and accordingly in the interest of judicial economy, the Appellate Division also awarded summary judgment in favor of the funeral home. *Mack v. Brown*, 82 A.D.3d 133 (2nd Dept., 2011)

Parents Allowed to Disinter Their Deceased Son Who Was Improperly Placed In a Mausoleum By His Former Spouse- Petitioners' son died suddenly in January, 2010. Respondent was the decedent's former spouse from whom he had been divorced for more than three years prior to his death. There was one child of the marriage, born in 2001. The decedent died without a surviving spouse and no other children. At the time of the decedent's death, the former spouse stated that she was in possession of the decedent's will and that the will named her executrix of the estate. The former spouse proffered a copy of an unexecuted will, but a fully-executed version was not produced. Petitioner parents alleged that the former spouse knew the will was not valid and that her actions after the decedent's death were calculated to deceive them. Nevertheless, at the time of the decedent's death, the parties operated under the assumption that he had empowered his former spouse to determine his final resting place. She chose to have him interred in a mausoleum. Upon learning that the former spouse was not entitled to determine the decedent's burial site, the petitioners contacted the cemetery for authorization to remove the decedent's remains, but were informed that it required a Court order before it would acquiesce to the body's disinterment. The former spouse was the crypt owner and so petitioners also requested her consent to remove the decedent's remains, but she refused. Petitioners then brought the proceeding to disinter the decedent's remains and transfer them to the family plot located at another cemetery. Petitioners argued that since the decedent died intestate, Public Health Law § 4201 (2) (a) provided the controlling rule for the right to administer the disposition of his remains. The statute, in pertinent part, states that: "[t]he following persons in descending priority shall have the right to control the disposition of the remains of such decedent:

"(i) the person designated in a written instrument executed pursuant to the provisions of this section;

"(ii) the decedent's surviving spouse;

"(ii-a) the decedent's surviving domestic partner;

"(investment management firm) any of the decedent's surviving children eighteen years of age or older;

"(iv) either of the decedent's surviving parents . . ."

Since the decedent died without having designated a representative pursuant to a validly executed written instrument, with-

out a surviving spouse and with a child under 18 years of age, petitioner surviving parents asserted that they are the only people permitted by law to control the disposition of the decedent's remains. The former spouse alleged that the decedent had told her he did not want to be buried underground and that he wanted to be laid to rest specifically in the at the cemetery she chose. Petitioners maintained that while attending his uncle's funeral at the family cemetery, the decedent advised his brother that he wished to be buried there. The former spouse contended that their son derived immense comfort from the fact that he could view his father's burial site from the back porch of his house. The former spouse submitted an affidavit from the son's psychologist in which the psychologist expressed his opinion that moving the decedent's remains "would be detrimental" to the son and would cause him "emotional turmoil and trauma."

HOLDING- The Court permitted the disinterment. The Court stated that although Public Health Law § 4201 (2) (a) sets forth a hierarchy of priority of the right to control a decedent's remains, N-PCL 1510 (e) was the statute which governed the requirements for disinterment of a body because the cemetery where the decedent was interred was a not for profit corporation. That statute provides that "[a] body interred in a lot in a cemetery owned or operated by a corporation incorporated by or under a general or special law may be removed therefrom, with the consent of the corporation, and the written consent of the owners of the lot, and of the surviving wife, husband, children, if of full age, and parents of the deceased. If the consent of any such person or of the corporation cannot be obtained, permission by the county court of the county, or by the supreme court in the district, where the cemetery is situated, shall be sufficient." The Court stated that a court charged with determining whether a body should be disinterred must employ a benevolent discretion, giving heed to all those promptings and emotions that men and women hold sacred in the disposition of their dead, must render judgment as it appraises the worth of the competing forces. The Court added that the quiet of the grave, the repose of the dead, are not lightly to be disturbed, and that good and substantial reasons must be shown before disinterment is to be sanctioned. The Court ruled however that while the repose of the dead should not lightly be disturbed, where there is a controlling public reason or a superior private right, the court should not hesitate to permit a disinterment. The Court found that Public Health Law § 4201 (2) (a) propounded a superior private right to control the decedent's remains which unequivocally belonged to the decedent's parents. While expressing sympathy for the grief that the decedent's son might experience should the decedent's remains be moved, the Court stated that the former spouse had failed to adduce evidence sufficient to defeat the superior right that petitioners had to control their son's remains. The Court found the psychologist's affidavit to be conclusory and rife with vague allegations which ultimately served to contradict its thesis that the daily viewing of his father's burial site was beneficial for the decedent's son. Whether petitioners' right to control the disposition of their son's remains was taken from them by innocent or deceptive actions on the part of the former spouse, the court opined that it had the power to afford them their rights accorded under New York State law, to wit: the ability to have their son buried in the very cemetery where they planned to be buried and where members of their

family rested. Accordingly, the Court granted the petition and authorized the parents to control the remains of their deceased son. *Bochnik v. Gate of Heaven Cemetery*, 32 Misc.3d 269 (Sup. Ct., Westchester Co., Justice Liebowitz, 5/10/11) [Author's note: at the time of the decedent's death it does not appear that E.P.T.L. §5-1.4, pertaining to the revocatory effect of dissolution of marriage, was considered in connection with the purported appointment of the former spouse as executrix.]

Attempted Departure from the 'Kaiser' Rule in the Distribution of Wrongful Death Proceeds Disallowed-

The Administrator sought to judicially account for the proceeds of causes of action settled after trial in the Supreme Court and a no-fault death benefit. The decedent died intestate when he was struck by a school bus while a pedestrian. The decedent's distributees were a spouse and six children, all of whom were under the age of 21 on the date of the decedent's death, and four of whom still were infants at the time of the accounting. The adult distributees, the New York City Department of Social Services, and alleged medical care providers were served with process and defaulted. Under the circumstances presented, including the consent of the New York State Department of Taxation and Finance, and the lack of any unsatisfied debts or claims presented, the Court granted the request to allocate the entire settlement proceeds to the wrongful death cause of action. The accounting petitioner calculated the distribution of the settlement proceeds using an 18-year period of dependency instead of the customary 21 years under the so-called 'Kaiser' rule. The guardian ad litem for the four children who still were infants objected. The petitioner claimed that her calculation was appropriate given that the youngest three infants resided in Ecuador and that it was unlikely that the law of their domicile obligated parents to support their children until the age of 21. The guardian ad litem alleged that that one of her wards already resided in Bronx County and that there were plans for her other three wards to come to the United States in the future. **HOLDING-** The Surrogate's Court ruled that considering all of the circumstances, although the 'Kaiser' formula may be modified in an appropriate case, the case did not warrant departure from the customary 21-year dependency standard. *Matter of Guasco-Guaman*, 2011 N.Y. Slip Op. 51371 (Surr. Ct., Bronx Co., Surr. Holzman, 7/22/11)

Brief briefs: The Internal Revenue Service issued a notice with regard to the time and manner in which the executor of the estate of a decedent who died in 2010 elects to have the estate tax not apply and to have the carryover basis rules apply to property transferred as a result of the decedent's death. Notice 2011-66, Internal Revenue Service Bulletin, August 29, 2011, 2011-35 I.R.B. page 184. It also issued a Revenue Procedure providing optional safe harbor guidance in determining a recipient's basis where the executor of the estate of a decedent who died in 2010 elects to have the estate tax not apply and to have the carryover basis rules apply to property transferred as a result of the decedent's death. Revenue Procedure 2011-41, Internal Revenue Service Bulletin, August 29, 2011, 2011-35 I.R.B. page 188.

Compiled by Hon. Bruce M. Balter, Justice of the Supreme Court, State of New York, and Chair, Brooklyn Bar Association, Surrogate's Court Committee, and Paul S. Forster, Esq., Chair, Brooklyn Bar Association, Decedent's Estates Section.

Summary of Decisions in Medical Malpractice Cases

The following summary of Second Department decisions in medical malpractice cases decided between February 1, 2011 and March 31, 2011 was prepared by Brooklyn Bar Association Medical Malpractice Committee Chairman John Bonina.

1. *Stukas v. Streiter*, 83 A.D.3d 18 (2d Dept. 2011).

Summary Judgment Procedure -

When a medical malpractice defendant moves for Summary Judgment solely on the issue of departure from good and accepted medical practice, plaintiff must raise a triable issue of fact only on the issues of departure, and need not do so with respect to causation.

In this important decision, the Second Department clarified prior case law, some of which indicated that a plaintiff must make a prima facie showing on all issues. The Court specifically stated that "no such requirement exists."

Stukas was a failure to diagnose breast cancer case. Following completion of discovery, defendants moved for Summary Judgment, submitting an Expert's Affidavit to the effect that defendant did not depart from the applicable standard of care in his reading or interpretation of the CT scans in question. Plaintiff opposed, submitting a Physician's Affidavit stating that "Streiter departed from good and accepted standards of radiological practice and that these departures are the proximate cause and direct cause of the delay in diagnosis of [the decedent's] breast cancer."

Supreme Court granted Summary Judgment, holding that plaintiff failed to raise a triable issue of fact as to proximate cause. Plaintiff appealed.

Citing the landmark Court of Appeals decision in *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986), the Court held that in opposition to a defendant's prima facie showing of entitlement to judgment as a matter of law, plaintiff need only rebut the moving defendant's prima facie showing. The Court went on to state that:

This formulation of the applicable standard makes it evident that the nonmoving party is required only to "rebut" the moving party's prima facie showing. That is to defeat summary judgment, the nonmoving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing. When the standard is articulated in this manner, it is clear that where a defendant physician, in support of a motion for summary judgment, demonstrates only that he or she did not depart from the relevant standard of care, there is no requirement that the plaintiff address the element of proximate cause in addition to the element of departure.

The Court further stated that:

[W]here the moving party makes a prima facie showing of entitlement to judgment as a matter of law on a single element or theory, there is no good reason to require the opposing party to rebut or address any element or theory other than that raised by the moving party.

2. *Argudo v. New York City Health & Hosps. Corp.*, 81 A.D.3d 575 (2d Dept. 2011).

Case dismissed for failure to properly serve a Notice of Claim. Plaintiff initially failed to serve a Notice of Claim within the 90 day time period set forth in General Municipal Law 50-e. Thereafter, plaintiff's

motion for leave to serve a Late Notice of Claim was granted. However, they did not request that the Court deem the Notice of Claim previously served to have been properly and timely served on a nunc pro tunc basis. Further, when their motion was granted, Supreme Court directed plaintiffs to serve a Notice of Claim within 30 days from the date of entry of the Order, but plaintiffs failed to do so. Accordingly, plaintiffs' claims were dismissed.

3. *Young v. State of New York*, 82 A.D.3d 972 (2d Dept. 2011).

Plaintiff's claims for conscious pain and suffering were dismissed for failure to comply with Court of Claims Act §11(b). Claimant failed to sufficiently particularize the nature of her claim with respect to decedent's alleged conscious pain and suffering, which constituted a jurisdictional defect mandating dismissal.

4. *Stewart v. Cohen*, 82 A.D.3d 874 (2d Dept. 2011).

Continuous Treatment Doctrine Does Not Apply to Delayed Diagnosis of Lung Cancer Case

Generally, a cause of action alleging medical malpractice accrues on the date of the allegedly wrongful act or omission, and the statute of limitations begins running on that date. In instances, however, when the patient is undergoing a continuous course of treatment with a doctor with respect to the same condition or complaint that gives rise to the lawsuit, the statute of limitations will not begin to run until the end of the course of treatment. The doctrine relies on the premise that a patient should not be required to choose between, on the one hand, maintaining the doctor-patient relationship with the physician treating the condition, and, on the other, compromising or ending that relationship by interposing a lawsuit in order to satisfy the statute of limitations. Further, the doctrine assumes that the original doctor is in the best position to identify and correct his or her own malpractice. In order to establish that the doctrine applies, the plaintiff is required to demonstrate that there was a course of treatment, that is was continuous, and that it was in respect to the same condition or complaint underlying the claim of malpractice. In the absence of continuing efforts by a doctor to treat a particular condition, the policy underlying the continuous treatment doctrine does not justify tolling the statute of limitations.

Here, the record established that [the decedent] and the defendant doctor had a continuing doctor-patient relationship, but the plaintiff failed to raise a triable issue of fact as to whether [decedent's] discrete ailments over the course of that relationship were viewed by both the defendant doctor and Green as a continuing course of treatment regarding the condition that was eventually diagnosed as a lung cancer.

5. *Udell v. Naghavi*, 82 A.D.3d 960 (2d Dept. 2011).

Continuous Treatment Toll Does Not Apply in Failure to Diagnose Prostate Cancer Case

Facts: In July 2005 plaintiff had blood studies done at defendant's office, which revealed a prostate specific antigen (PSA) level of 3.84. Thereafter, plaintiff returned to the office in May 2006, but PSA levels were not drawn. In 2007 another physician diagnosed plaintiff with advanced prostate cancer, and on May 27, 2008 plaintiff filed a Summons and Complaint.

Defendants moved to dismiss all claims occurring prior to November 27, 2005 on Statute of Limitations grounds. The Court granted the motion, holding that:

[T]he plaintiffs failed to demon-

strate that there was a triable issue of fact as to whether the continuous treatment doctrine tolled the statute of limitations. In order to receive the benefit of that doctrine, a plaintiff is required to demonstrate that there was a course of treatment, that it was continuous, and the treatment was for the condition or complaint underlying the claim of malpractice. In the absence of continuing efforts by a doctor to treat a particular condition, the policy underlying the continuous treatment doctrine does not justify tolling the statute of limitations.

Here the record established that plaintiff and the defendants had a continuing doctor-patient relationship, but the plaintiffs failed to raise a triable issue of fact as to whether it concerned ongoing efforts to treat the condition that eventually was eventually [sic] diagnosed as prostate cancer.

6. *Giannetto v. Knee*, 82 A.D.3d 1043 (2d Dept. 2011).

Statute of Limitations - Fraudulent Concealment of Malpractice

Defendants' motion to dismiss on Statute of Limitations grounds was denied, even though the action was commenced approximately five and a half years after the alleged dental malpractice. Plaintiff raised a triable issue of fact as to whether defendant should be equitably estopped from raising the defense of Statute of Limitations, based on fraudulent concealment. The Court specifically noted that:

'Equitable estoppel is appropriate where the plaintiff is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant.' Whether equitable estoppel applies is generally a question of fact, and a mere failure to disclose malpractice or diagnose a condition does not give rise to equitable estoppel. Here plaintiff's sworn allegations raised a triable issue of fact as to whether [defendant] concealed his malpractice by knowingly misrepresenting her condition and by bonding tooth number 21, a procedure that the plaintiff alleges he knew was not effective.

7. *Wigand v. Modlin*, 82 A.D.3d 1213 (2d Dept. 2011).

No Defense Medical Exam (DME) Permitted on the Eve of Trial

On the eve of trial defendant moved to direct plaintiff to appear for a defense medical examination. The Trial Court granted the motion, but the Appellate Division reversed, noting that "defendant failed to offer evidence of unusual or unanticipated circumstances that developed subsequent to the filing of the note of issue and certificate of readiness to justify relieving him of the consequences of his failure to conduct a timely medical examination of the plaintiff."

8. *Aronson v. Im*, 81 A.D.3d 577 (2d Dept. 2011).

Plaintiff's Motion for a Deposition of an Additional Physician on Behalf of Defendant Hospital Granted

Plaintiff demonstrated that the doctors and nurses who had already been deposed were insufficiently knowledgeable with respect to the issues in the case, and that the proposed additional witness was in a position to offer material and necessary information. Accordingly, plaintiff's motion for a deposition of this additional physician on behalf of defendant hospital was granted, with the Court stating:

While a corporate entity has the right to designate in the first instance the employ-

ee who shall be examined, a further deposition may be allowed where it is demonstrated that the employee who had already been deposed had insufficient knowledge, or was otherwise inadequate, and that the employee proposed to be deposed can offer information that is material and necessary to the prosecution of the case.

9. *Aznara v. Strauss*, 81 A.D.3d 578 (2d Dept. 2011).

Discovery of Alcohol and Drug Abuse Records Permitted

The Court granted defendant's motion for discovery of plaintiff's alcohol and drug abuse records, as they were material and necessary to the plaintiff's claim for damages, including plaintiff's claim for loss of enjoyment of life.

10. *Johnson v. Staten Island Med. Group*, 82 A.D.3d 708 (2d Dept. 2011).

Summary Judgment Granted on Informed Consent Claim

[D]efendants . . . established their prima facie entitlement to judgment as a matter of law dismissing the cause of action based upon an alleged lack of informed consent insofar as asserted against the defendant Lance Jung by demonstrating that the plaintiff signed a consent form which stated, inter alia, that she had been informed about the proposed surgical procedure, and the alternatives thereto, as well as the reasonably foreseeable risks and benefits. In addition, Jung testified at his deposition that he informed the plaintiff regarding these issues during a preoperative discussion with her. Furthermore, the defendants demonstrated that, in any event, a reasonably prudent person in the plaintiff's position would not have declined to undergo the surgery, and that any lack of informed consent did not proximately cause any injury.

11. *Nunez v. Long Island Jewish Med. Ctr. - Schneider Children's Hosp.*, 82 A.D.3d 724 (2d Dept. 2011).

Summary Judgment Granted, Despite Plaintiff's Claims That Additional Discovery Was Needed

Plaintiffs opposed defendants' motion solely by arguing that depositions of the defendants were needed. However "plaintiffs made no showing that any facts necessary to oppose summary judgment were exclusively within the defendants' knowledge . . ."

Note: This case was venued in Queens County, and plaintiff had already filed in a Note of Issue despite the fact that there was outstanding discovery, pursuant to the "Queens rules."

12. *Covert v. Walker*, 82 A.D.3d 822 (2d Dept. 2011).

Covert v. Walker, 82 A.D.3d 824 (2d Dept. 2011).

Covert v. Walker, 82 A.D.3d 825 (2d Dept. 2011).

In three separate decisions in this failure to diagnose lung cancer case, the Second Department granted Summary Judgment as to the radiology defendants, and denied Summary Judgment as to the treating physician.

Facts: On April 26, 2005 defendant radiologist Elizabeth Ramirez interpreted a CT scan as showing the existence of adenopathy (enlarged lymph nodes) of uncertain etiology, and recommended correlation with decedent's clinical history. Thereafter on July 20, 2005 defendant radiologist Michael White interpreted a CT scan as showing, amongst other things, the existence of probable hilar adenopathy which was "equivocal between reactive and neoplastic [cancerous] adenopathy . . ." Each of these studies were ordered by defendant pulmonologist Dr. Walker.

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Summary of Decisions in Medical Malpractice Cases

(Continued from page 15)

After the first test, Walker considered ordering a biopsy of the decedent's lung tissue, but elected not to do so due to her atrial fibrillation. Walker ordered no further studies after the second CT scan.

Separate motions for Summary Judgment by the two radiologist were granted, with the Court noting that they established their prima facie entitlement to judgment as a matter of law by demonstrating that they fulfilled their duty of care by noting the existence of adenopathy in their radiology report. In opposition, plaintiff failed to raise a triable issue of fact as to the liability of either defendant radiologist.

However, the Court denied defendant pulmonologist Richard Walker's motion for Summary Judgment, noting that plaintiff submitted an Expert Affidavit in opposition to defendant's motion which raised triable issues of fact as to whether Walker's failure to conduct any investigation into decedent's condition, such as a biopsy or a further CT scan with contrast was a proximate cause of decedent's death.

13. Olgun v. Cipolla, 82 A.D.3d 1186 (2d Dept. 2011).

Defendant's Summary Judgment motion denied, based on an adequate Expert Affidavit from plaintiff.

14. Poplawski v. Gross, 81 A.d.3d 801 (2d Dept. 2011).

Defendant's Summary Judgment motion denied, based on an adequate Expert Affidavit from plaintiff.

15. Berger v. Hale, 81 A.D.3d 766 (2d Dept. 2011).

Defendant's Summary Judgment motion denied, based on an adequate Expert Affidavit from plaintiff.

16. Guzzi v. Gewirtz, 82 A.D.3d 838 (2d Dept. 2011).

Defendant's Summary Judgment motion denied, based on an adequate Expert Affidavit from plaintiff.

17. Andreoni v. Richmond, 82 A.D.3d 1139 (2d Dept. 2011).

Summary Judgment granted, as plaintiff's Physician's Affidavit was conclusory on the issue of proximate cause.

18. Muzio v. Anthony R. Napolitano, M.D., P.C., 82 A.D.3d 947 (2d Dept. 2011).

Evidence - Defendant Precluded from Calling Plaintiff's Treating Physician

Defendants conducted an interview of

the plaintiff's treating physician without obtaining a valid HIPAA authorization. Defendants were required to obtain an authorization expressly permitting an interview prior to conducting the interview, and accordingly they were precluded from calling the treating physician at trial.

19. Montano v. Spagnuolo, 81 A.D.3d 906 (2d Dept. 2011).

CPLR 4401 Dismissal Reversed

After granting defendant's motion for a mistrial pursuant to CPLR 4402, Supreme Court then granted defendant's motion for judgment as a matter of law dismissing the complaint pursuant to CPLR 4401. The grant of judgment pursuant to CPLR 4401 was reversed, and the matter remanded for a new trial, based on the fact that 1) Supreme Court had previously granted defendant's motion for a mistrial, and 2) defendant's motion pursuant to CPLR 4401 was made before the close of plaintiff's evidence, thus the motion should not have been entertained in the first instance.

20. Reilly v. Ninia, 81 A.D.3d 913 (2d Dept. 2011).

Verdict and judgment in favor of defendant hospital reversed, as the jury could not have reached this determination on a fair interpretation of the evidence. Verdict and judgment in favor of defendant OB/GYN doctor Ninia affirmed, as the jury could have reached this determination based on a fair interpretation of the evidence.

Plaintiff's expert had testified as to seven departures on the part of defendant hospital's labor and delivery nurse, including 1) failure to notify Dr. Ninia that an intrauterine pressure catheter was not working from 8 p.m. to 8:27 p.m., 2) failure to notify Ninia of fetal heart rate decelerations between 8:04 p.m. and 8:45 p.m., 3) failure to reapply an external monitor when the IUPC stopped working, 4) failure to reposition plaintiff on her left side at any time after 8:05 p.m., 5) failure to timely provide oxygen to plaintiff starting at 8:05 p.m., 6) failure to give plaintiff extra fluids starting at 8:05 p.m., and 7) failure to discontinue Pitocin after 8 p.m. It was undisputed that plaintiff suffered a uterine rupture and that her child was born with severe cerebral palsy. Further, both plaintiff's Danni Ann Reilly and Frank Reilly testified that when the labor and delivery nurse left to get Dr. Ninia, he returned

with the nurse within one to three minutes.

On cross-examination defendant hospital's expert "testified that he 'would have to think about' whether the administration of Pitocin should have been discontinued" at the time of a three-minute fetal heart rate deceleration, and "responded 'maybe' to a similar question about whether Pitocin should have been discontinued." Thus, the hospital's own expert provided credible expert testimony against their position.

In finding that the verdict and judgment in favor of defendant hospital was against the weight of the evidence, the Court stated:

Where the plaintiffs and defendants present expert testimony in support of their respective positions, it is the province of the jury to determine the experts' credibility. A court must not interfere with a jury's fact-finding process merely because it disagrees with its findings or would have evaluated the witnesses' credibility differently and reached a contrary determination. Only where the evidence so preponderates in favor of the unsuccessful litigant that the verdict could not be reached on any fair interpretation of the evidence should a motion to set aside a jury verdict as contrary to the weight of the evidence be granted.

As the hospital's case was premised upon opinion evidence which, in turn, was based on factual allegations which were not supported by the trial record, the Court held that "the evidence preponderated in favor of the plaintiffs, and that their evidentiary position was particularly strong compared to that of the hospital," and thus set aside the jury verdict as against the weight of the evidence with respect to defendant hospital.

However, with respect to the defendants' verdict against the OB/GYN doctor Ninia, the Court held that the jury could have reached this verdict upon a fair interpretation of the evidence, and affirmed the judgment in Dr. Ninia's favor.

21. Walter v. Matano, 81 A.D.3d 636 (2d Dept. 2011).

Judgment for Defendant Affirmed

"[T]he jury's determination that Dr. Matano did not depart from good and accepted medical practice by failing to diagnose and appropriately treat an alleged post operative infection was based upon a fair interpretation of the evidence presented at trial and, thus, should not be disturbed."

22. Allen v. Uh, 82 A.D.3d 1025 (2d Dept. 2011).

Verdict and Judgment for Defendant Affirmed

In affirming a verdict and judgment for the defendant, the Court held that defendant's reference to plaintiff's smoking, and the effects of plaintiff's smoking on her injuries was based on facts in the record and was appropriate.

Further, denial of a causation charge to the effect that defendant's negligence deprived plaintiff of a substantial chance for a cure was appropriate in this situation, as "no rational interpretation of the evidence suggested that defendant doctor's negligence deprived the plaintiff of a substantial chance for a cure. Accordingly, the Trial Court did not err in declining to so charge the jury."

23. Madkins v. State of New York, 82 A.D.3d 1174 (2d Dept. 2011).

Adverse Inference Charge for Lost Fetal Monitor Strips

Plaintiff moved to strike defendant's Answer based on spoliation of evidence, as defendant had lost the fetal heart monitoring strips in question. The Second Department denied plaintiff's application to strike defendant's Answer, but held that an adverse inference charge should be given at trial.

The Court noted that:

The claimant failed to demonstrate that the defendant's loss of the fetal monitoring strips in this case left her prejudicially bereft of evidence to prosecute her malpractice claim. Rather, the medical record, which includes progress notes, some references to the fetal heart rate at certain points in the mother's brief labor, and other relevant evidence, established that the claimant's ability to pursue her claim was not fatally compromised so as to warrant the drastic sanction of striking the defendant's answer. However, the defendant's failure to preserve the fetal monitoring strips as required by regulation (see 10 NYCRR 405.10[a][4]) and the resulting prejudice to the claimant, warrants the imposition of the lesser sanction of an adverse inference charge to be given at trial.

24. Ferreira v. Wyckoff Heights Med. Ctr., 81 A.D.3d 587 (2d Dept. 2011).

One Million Dollar Judgment in Favor of Plaintiff's Mother for Injuries as a Result of Medical Negligence Leading to Stillbirth

In arriving at its decision the Court held that the doctrine of judicial estoppel did not bar plaintiff from arguing at trial that the decedent was stillborn. Plaintiff had initially commenced an action for wrongful death on behalf of the child/fetus, but thereafter took the position that the child was stillborn following the Court of Appeals Decision in Broadnax. Judicial estoppel did not apply because, although plaintiff previously argued that the decedent was born alive, she never obtained a judgment in her favor by adopting that position. Further, the jury's finding that plaintiff was negligent, but that this negligence was not a substantial factor in bringing about the premature delivery and death of plaintiff's baby, was held to be not against the weight of the evidence.

Roll Call

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Division, Second Judicial Department:

Bill Tsoumpelis (June 21, 2011)

The respondent was censured following a disciplinary hearing upon a finding that he was guilty of failing to comply with legitimate demands of the Grievance Committee made in connection with an investigation into his professional misconduct.

Wynman Chang, a suspended attorney (June 28, 2011)

The respondent was reinstated to the practice of law and censured for failing to re-register as an attorney and failing to cooperate with the Grievance Committee.

The Following Suspended Or Disbarred Attorneys Were Reinstated As Attorneys And Counselors-At-Law By Order Of The Appellate

Stafford Henderson Byers, a suspended attorney (June 7, 2011)

Robert M. Fuster, admitted as Robert Michael Fuster, a suspended attorney (June 7, 2011)

Ray E. Shain, admitted as Ray Elliot Shain, a disbarred attorney (June 7, 2011)

Richard M. Strauss, admitted as Richard Mark Strauss, a disbarred attorney (August 2, 2011)

This edition of "Roll Call" was compiled by Elena A. Popova, Esq., Senior Court Attorney, Kings County Civil Court.

Committee and Section

Roster for 2011–2012

See pages 5–11.