

## UPDATE



**Phil Russotti recently obtained a \$10.7 million verdict for a 70-year-old Queens woman who fell down a flight of stairs at work and then was the victim of delayed treatment at a hospital.** While working in a pharmacy, she descended a flight of stairs which led to the basement. As she attempted to take her first step down, she lost her balance and began to fall down the stairs. Upon losing her balance, she

attempted to grab onto a handrail, but her hand missed the handrail entirely. Phil was prepared to prove that the handrail was mounted higher than allowed by the NYC Building Code, and that the stairs did not conform to the Building Code, in that the top step was too high, causing her to misstep.

Although she hit her head, she was alert and oriented when she was taken by ambulance to the emergency room of New York Hospital Medical Center of Queens. Within five minutes, she was triaged and then seen by a P.A. (Physician's Assistant) at 1:05 PM, who ordered a CT-Scan of the plaintiff's head to be performed STAT, i.e., immediately. The CT-scan was not performed until 3:30. At 3:15 P.M. she was examined by the ER staff again and this time she was only alert and oriented times 1 rather than times 3, as before, indicating a deteriorating condition. Upon realizing that the CT-Scan had not been performed, the ER staff took her for the CT-Scan at approximately 3:30 P.M. The CT-Scan revealed a bleed in brain tissue and an uncal herniation of the brain stem. At 4:00 P.M., the plaintiff lapsed into a coma, had to be resuscitated and rushed into surgery at 5:30 to evacuate the bleed. The brain stem herniation damaged the motor pathway passing through the brain stem and paralyzed the right side of her body.

The case against the building owner hinged on whether the Building Code provision which addressed the handrail and stair configuration applied to these stairs. There was case law arguably holding it did not. The case against the hospital was that the CT scan should have been done "stat" i.e., immediately and not 2½ hours later, and that the delay caused swelling in plaintiff's brain which caused the left side of her brain to swell into the right side, herniating her brain stem.

Because of the potential problem with the case against the building owner, Phil began the trial by introducing evidence against the



## NEWSLETTER FALL 2010

### **DELAYED TREATMENT IN HOSPITAL LEADS TO PARALYSIS... AND \$10.7M VERDICT**

hospital, while negotiating with the building owner. Phil got the P.A. to admit on the witness stand that he was negligent in not getting the

CT scan performed within one hour after he ordered it and that he should have followed-up to make sure it was done, because despite a normal appearance, she was in a high risk category for a brain injury. That was the first time in Phil's 25 years of trying medical malpractice cases that a defendant admitted to negligence on the witness stand.

While Phil put on his emergency room care expert against the hospital, the building settled for \$3,000,000 for the injuries caused by the fall. Phil continued the case against the hospital, and with the help of a top neurosurgeon from Mt. Sinai Hospital, proved that had the surgery been performed one hour earlier, the brain herniation would not have occurred and plaintiff would not have been paralyzed.

The jury awarded \$10.7 million against the hospital. The jury clearly accepted Phil's argument that when the plaintiff first arrived in the ER, there was sufficient time to favorably address her head injury.

# SETTLEMENTS & VERDICTS

## Kenneth Halperin Obtained a **\$1,300,000** Settlement on the Eve of Trial for a 56 Year Old Man who was Injured at a Construction Site

This accident occurred while our client was in the process of painting an arcade ceiling outside a high-rise commercial building in New York City. Plaintiff was using a six foot high Baker's scaffold at the time. However, the floor upon which the scaffold rested was riddled with cracks and holes. As a result, plaintiff's scaffold wheels could not sit flush with the ground. Also, plaintiff was not provided with a safety harness to protect him from a fall. While he was descending the scaffold, it began to tip over and he fell to the ground.

**Kenneth Halperin** sued under Labor Law §240(1), and New York's so called "scaffold law" which makes owners and general contractors strictly liable for injuries when a worker falls from a scaffold. Our theory was that the manner in which the work was being performed and supervised by the general contractor created a situation in which plaintiff was forced to set up his scaffold on defective pavement in order to do his job. After discovery, the defendants moved to dismiss his claims on the basis that he was the sole cause of the accident by not carefully descending the scaffold. If accepted, this would have ended the case. Ken cross-moved for summary judgment pursuant to §240(1), which requires contractors and owners of buildings to ensure that workers performing their work at a height are provided with safe equipment.

The Court decided in our favor and awarded plaintiff summary judgment on the issue of liability.

As a result of the accident, plaintiff sustained a rotator cuff tear requiring arthroscopic surgery, a right ankle pilon fracture, a right knee derangement, and a sprain and strain of his lumbar spine. Even though our client only had arthroscopic surgery for his injuries, Ken was able to secure this significant recovery because he proved that due to his age at the time of the injury, he could not return to work as a painter or learn new construction skills.



## **\$637,000** Recovery for Delivery Person at Home Construction Site

Plaintiff, a hard working delivery person for a wood molding company, was injured when he stepped on a piece of cardboard that was covering a partially buried brick at a single family home construction site. Plaintiff twisted his knee and fell as he was descending his truck. Plaintiff, who had a prior knee surgery a few years earlier, ended up having two arthroscopic surgeries as well as a total knee replacement in the years following this accident.

The accident was unwitnessed and defendant claimed that plaintiff could not prove which, if any, of the subcontractors were responsible, or that any defendant had notice of the condition.

After Wingate, Russotti & Shapiro successfully opposed defendants' motions to dismiss the case, **William Hepner** utilized a mediation to present the strengths of plaintiff's case and obtain a substantial offer. Since the offer was less than our firm thought the plaintiff was entitled to, Bill proceeded to trial on the case. Through continued diligent negotiations, Cliff Shapiro was able to substantially raise the defendants' offer and settle the case immediately before Bill was to pick a jury.

This significant result would not have been possible without the combined efforts of Wingate, Russotti & Shapiro Partners Bill Hepner and Cliff Shapiro.



## Premises Liability – Plaintiff Struck By Falling Ceiling \$650,000 Settlement

Two weeks after a mediation, and prior to jury selection, WRS Partner **Cliff Shapiro** reached a \$650,000 settlement in the case of a 54-year-old man who was struck in the head by falling debris when the ceiling in his bathroom collapsed on him. Our client also sustained additional injuries approximately six weeks later, when he was again struck, this time by a piece of marble molding, which fell from a doorway in the lobby of the same building.

Although our client stated he had complained to the landlord and building personnel on numerous occasions about many problems in his apartment, including water leakage from the bathroom ceiling, the defendants denied knowledge of the condition. We were able to ascertain that this building had a long history of Housing Department violations for various defects, including leaks from the roof.

In addition, our client was able to produce a copy of a cancelled rent check for September 2006 rent, which included a statement from him which read, “Repairs needed, hallway light, bed and bathroom ceiling falling, intercom not working, tub needs glazing and surrounding repairs, mold and moisture on ceiling about to fall, bathroom sink not anchored.” It further indicated the address and apartment number of our client.

Our client sustained numerous injuries, the most severe being a massive right rotator cuff tear requiring multiple surgeries.

Approximately one month after Cliff mediated this case and refused an offer from the defendants of \$250,000, he was able to negotiate the settlement of \$650,000. Needless to say, our client was very happy with the outcome of his case.




## Medical Malpractice - Failure to Treat Electrolyte Imbalance Causes Death of 42 year old – \$1,875,000 Settlement

During jury selection in Westchester County, **Thomas M. Oliva** settled a case involving the death of a 42-year-old Vice President for Blue Cross/Blue Shield. Two general practitioners failed to investigate the underlying cause of diarrhea which continued for three weeks leading to fluid loss and a resulting electrolyte imbalance. This father of two suffered a heart arrhythmia and was found dead on his living room couch by his family. We sued the decedent’s internist because he never took blood work to monitor the decedent’s fluid loss, which made proving the case difficult. However, we were able to utilize certain findings on the autopsy report, notations regarding blood pressure and weight loss, to show that the decedent lost a significant amount of fluid from the untreated diarrhea. This led to a loss of sodium that affected the electrical conductivity in the decedent’s heart taking his life prematurely.

During jury selection the insurers for the doctors offered to settle. The decedent’s wife decided that she did not want to place her children through the trauma of reliving the events surrounding their father’s death, and a settlement was reached.







While most of our trials take place in New York State, senior partner, Phil Russotti, spent seven weeks in Honolulu, Hawaii trying a medical malpractice action on behalf of a 14 year old girl who had negligently been given an excessive amount of steroids during treatment for Lupus.

This tragic case began with a family vacation in Hawaii. During the vacation, our young client developed a facial rash, unsteady gait and some slurred speech. Her mother brought her to Kapiolani Medical Center in Honolulu, Hawaii. After undergoing several tests, the child was diagnosed with Lupus and put on a steroid treatment plan which included the administration of steroid “pulses”. The initial steroid dosage was to be one mg of glucocorticoids a day for three days, followed by 40 mg of steroids for four days. This course was designed to be repeated for three subsequent weeks or “pulses”. The evidence showed that the client responded so well after this initial pulse, that her unsteady gait and slurred speech resolved and her blood work appeared to be returning to normal levels. The decision was made to administer the subsequent pulses on an out-patient basis. The plaintiff and her mother returned for the 2nd and 3rd pulses, but shortly thereafter, the plaintiff started complaining of muscle weakness. The infant’s mother decided not to allow the 4th pulse to be administered because an internet search indicated her daughter may be suffering from steroid myopathy, a known complication stemming from the administration of steroids.

The parents brought plaintiff to New York Cornell Hospital under the care of a world renowned pediatric rheumatologist, where she became progressively weaker and ultimately became unable to move below the neck. She remained paralyzed in this manner for several months, communicating with her parents solely through blinking of her eyes. She developed aspiration pneumonia, requiring a tracheostomy and nearly died. After seven months of physical therapy, she slowly regained use of her arms and legs and eventually was able to sit in a wheelchair.



## Phil Russotti Obtains **\$6,150,000** Largest Personal Injury Jury Verdict in Hawaii History

Phil immediately began his prosecution of this case by retaining the pediatric rheumatologist, who actually trained the client’s treating doctor. He concluded that the defendant doctor administered significantly greater doses of steroids than had been reported anywhere in the medical community. Our expert believed that the steroid pulses should have been stopped once the patient showed such a positive response to the first pulse, because of the potential serious complications from steroids. The defendant doctor claimed her treatment of plaintiff was the protocol followed by another nationally prominent pediatric rheumatologist in Texas where she trained. The doctor had since died but the defendant utilized testimony from two other doctors at his program to establish its use. However, Phil was able to uncover that the defendant doctor had only seen this regimen used 4 -5 times, and had only used this protocol on one patient prior to the plaintiff. Therefore, he argued, the doctor did not have sufficient experience to determine that the pulses should have been continued beyond the plaintiff’s initial favorable response.

Phil also got the defendant’s expert to admit that defendant’s protocol was not peer reviewed, and that there were recognized alternatives to the protocol utilized by defendant, which used far less steroids and thus, had far fewer risks of complications, about which the defendant did not advise the parents. Phil argued that under the Hawaii Informed Consent statute, the defendant was required to advise of recognized alternatives, but failed to do so. Phil argued to the jury that, due to the negligent administration of excessive steroids and failure to obtain an informed consent, plaintiff was left with bilateral foot drop and diminished fine motor skills in the hands, all of which are permanent conditions. While the plaintiff has since graduated high school and entered college, maintaining a 3.9 GPA, she also requires the use of a motorized scooter to get around campus. Phil argued that these significant permanent injuries required a significant verdict favoring our client. The jury agreed, finding that defendant was negligent on both theories and awarded our client \$6,150,000.

This result, according to research by locally retained counsel in Honolulu, is the single largest personal injury jury verdict ever awarded in Hawaii. This result would not have been possible without the tireless efforts of Phil Russotti and demonstrates that Wingate, Russotti & Shapiro has the talent, resources and fortitude to achieve justice for our clients anywhere. This case is currently on appeal in the Hawaii Supreme Court, where we are challenging the constitutionality of Hawaii’s cap on pain and suffering. We will advise of the result of this appeal in a future issue.

# SETTLEMENTS & VERDICTS



## Medical Malpractice – Wrongful Death Failure to Diagnose Lung Cancer – **\$1.75 million**

During trial, **Jason Rubin** settled a medical malpractice case arising out of the death of a 73 year old man as a result of defendants' failure to diagnose small cell lung cancer for \$1.75 million. Decedent presented to the emergency room of his local hospital with complaints of fever, chills, shaking and dysuria (painful urination). The hospital's emergency room physician ordered multiple tests, including a chest x-ray in order to rule out lung infiltrates. Shortly thereafter, decedent was admitted to the hospital by his urologist.

The chest x-ray was interpreted by the hospital's radiologist, who reported that there was a 2.7 cm lesion in the left lung and recommended that a CT scan be performed in order to further investigate the lesion. However, the written report never made it to the patient's chart and neither the emergency room physician nor urologist ever became aware of the chest x-ray results. No CT scan was performed and decedent was discharged from the hospital several days later without any knowledge of the lung lesion.

Approximately eight months later, decedent began to experience shortness of breath and sought care from his internist, who performed a chest x-ray. This chest x-ray showed the lesion in the left lung, but it had increased to approximately 9 cm in size and there was apparent lymph node metastasis. Decedent passed away approximately 15 months later after the cancer metastasized to his brain.

At trial, Jason claimed that the hospital was negligent for not delivering the chest x-ray report to the patient's chart and for the emergency room's failure to follow up for the results of the chest x-ray that was ordered. Jason further claimed that decedent's urologist knew or should have known that the chest x-ray was ordered and therefore should have followed up for the results. Although the type of lung cancer that decedent had— small cell— is often deadly, Jason argued that the eight month delay in diagnosis deprived decedent of a significant opportunity for cure given the relative small size of the lesion when it was first detected on chest x-ray.



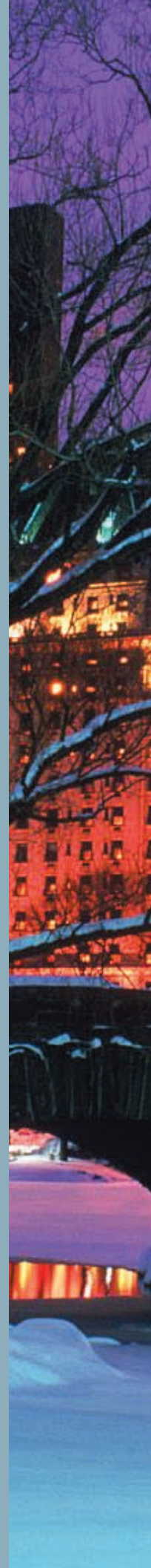
## Motor Vehicle Accident Pedestrian Knockdown – **\$695,000** verdict

Trial Counsel **Robert J. Bellinson** recently received a verdict of \$695,000 on behalf of our 12-year-old client. This pedestrian knockdown case had been pending for several years with the defendant offering \$15,000 to settle before the start of trial. During trial Rob showed the Jury that the infant's cervical and lumbar spinal injuries were real, serious and caused by this accident. Rob was able to accomplish this by calling the treating chiropractor who saw our client more than 220 times, and also an orthopedic surgeon who testified that the child was more susceptible to future injuries in his spine because of this accident. By sparing no expense or effort to put on our client's case, we received a fair verdict for our client's injuries and hopefully, made a difference in his young life.

Our philosophy is to thoroughly prepare every case for the crucible of the courtroom.

That requires meticulous preparation of all relevant facts and complete knowledge of applicable law. Our attorneys work closely with doctors and other professionals in bringing together the best expert witnesses to assist in preparation and trial of our cases.

We spare no expense because we believe that each client deserves the best opportunity to present his or her case to a jury.



# SETTLEMENTS & VERDICTS

## Mediated Settlement of **\$1,650,000** for a 45 year old Man Injured in a Construction Accident

The accident in question occurred during the construction of the New York Times building located at 620 Eighth Avenue, New York, New York. Plaintiff and his co-workers were in the process of removing construction materials from the back of a delivery truck onto a loading dock. Because of a space between the rear of the truck and the dock, Plaintiff's co-workers placed a metal plate over the gap and created a ramp. This was needed so that the dolly they were using to off-load the materials could be moved onto and off of the truck.

As they were moving multiple sheets of drywall off the truck, the wheel of the dolly pushed the metal plate into the gap. This caused the dolly to tip over and as a result the drywall boards fell onto the plaintiff's right leg.

WRS partner **Kenneth Halperin** proceeded with a case pursuant to Labor Law §200(1) and §241(6). A significant part of the case, however, hinged upon our ability to prove a violation of the New York State Industrial Code. There was, however, only one section that arguably applied to this accident. Defendants moved to dismiss the case arguing that this code section regarding "structural ramps" did not pertain to the unsecured metal plate that was the cause of this accident. Ken opposed the motion relying upon an extensive expert affidavit explaining why the code section applied to this situation. Prior to the decision on the motion, the defendants opened settlement negotiations, obviously fearing an adverse result with potentially negative precedential consequences.

As a result of the accident, plaintiff sustained tears of the anterior cruciate ligament, posterior cruciate ligament, medial collateral ligament, and meniscus in his right knee, which required reconstructive surgery, and a fractured right ankle which was treated with a closed reduction. He was unable to return to work as a carpenter, but was capable of finding other employment. Utilizing a vocational rehabilitation expert, Ken was able to prove a significant loss of earnings based upon the difference between what plaintiff would have made as a carpenter compared with what he was capable of earning in a new profession.

## **\$750,000** for Fire Suppression System Accident at Gas Station

Plaintiff, a worker for the NYC Department of Transportation, was injured while filling his work vehicle with gasoline, when the fire suppression system at the gas station mistakenly went into alarm mode dispersing a voluminous cloud of white powder meant to douse a fire. It poured down from the gas station overhang and covered plaintiff and everything around him. Surprised and fearing he was inhaling a toxic substance, plaintiff staggered, bumped into a pole and fell to the ground. He injured his hip, which already had a preexisting arthritic condition, and was forced to undergo total hip replacement surgery approximately two years after the accident. Plaintiff returned to work for over a year, but eventually had to stop permanently.

Wingate, Russotti & Shapiro partner, **William Hepner**, handled the litigation and was confronted with a major gasoline company and maintenance company claiming that regular maintenance was performed and they did nothing wrong. The records supported this proposition. While it intuitively seems that an incident like this must be the fault of the gas company or the maintenance company, the plaintiff must prove they acted negligently.

Through diligent discovery, and with the use of experts, Bill was able to prove that the system was originally installed contrary to the recommendations of the manufacturer. Using this as leverage, Cliff Shapiro was then able to obtain a sizeable settlement just days before the commencement of trial.

## OF COUNSEL



We are pleased to announce that **Mitchell R. Kahn** has recently become "Of Counsel" to our firm. Mitchell brings vast experience and expertise to our firm, having started his legal career working for law firms that specialized in such areas as construction accidents, medical malpractice, premises liability, automobile accidents and wrongful death. For the past twelve years Mitch has operated his own law practice in these areas. As part of his practice, he has frequently been retained by other firms to handle depositions and trials in some of their toughest and most catastrophic cases.

Mitchell graduated from St. John's University School of Law, State University of New York at Albany and the Bronx High School of Science. He has been admitted to practice law in the State of New York since 1992.

Mitchell is a native New Yorker and very proud of it. He was born and raised in the Bronx and takes special pride in representing his fellow New Yorkers who have been seriously injured due to the negligence of others. He feels a special connection with those he represents, since he grew up on the same streets and in the same neighborhoods. He takes great satisfaction in being able to help individuals whose lives have been turned upside down as a result of an accident and through no fault of their own.



# NEW ASSOCIATES

We are pleased to introduce our new associate, **Joseph P. Stoduto**, who recently joined our negligence team. Joseph had nearly ten years of experience prior to joining us. He is an experienced trial attorney with numerous verdicts and settlements to his credit. He has tried many types of negligence cases, including those involving motor vehicle accidents, premises liability, wrongful death, and municipal liability, among others.



Joseph graduated summa cum laude from the State University of New York at New Paltz, where he was a member of the University's Honors Program, earned selection to the Dean's List for four consecutive years, and was a recipient of the University's scholarship for academic achievement.

He received his J.D. from the Benjamin N. Cardozo School of Law in Manhattan, where he earned a Dean's scholarship and graduated with honors. He was selected to the Cardozo Trial Team, the Intensive Trial Advocacy Program, the Mediation Clinic and the Cardozo Arts and Entertainment Law Journal.

In addition to trials, Joseph is responsible for pretrial and trial preparation, depositions, and all appellate, motion, and pleading matters. He is a member of the New York State Trial Lawyers Association, Brooklyn Bar Association and Bronx County Bar Association, and is admitted to practice in the United States District Courts for the Southern and Eastern Districts of New York. He also performs pro bono legal volunteer work through the New York State Unified Court System Volunteer Attorney Program.

We are pleased to announce that **Nicole Michelle Gill** has recently joined Wingate, Russotti & Shapiro as an associate attorney in our negligence department. Nicole received her bachelor's degree from New York City College, where she graduated magna cum laude and obtained her Juris Doctor degree from the City University of New York School of Law. Following graduation, Ms. Gill spent over seven years at the New York City Law Department Office of the Corporation Counsel defending the City of New York in actions such as police assault, false arrest, negligent supervision, motor vehicle accidents, premises liability and labor law. Following her position as trial attorney with the Corporation Counsel's Office, she worked with a plaintiff's personal injury firm handling aviation accident cases as well as employment discrimination cases and trials. Nicole has the unique advantage of having been a defense attorney which provides her with insights into defense trial tactics and thus, how to anticipate and prepare for them.



Nicole's poise and skills make her a formidable trial attorney.

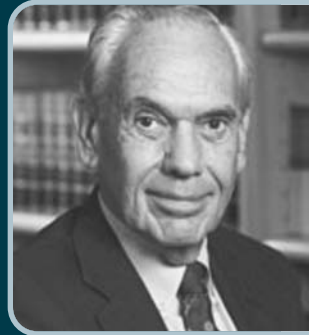
WRS is happy to announce that **Michael J. Fitzpatrick** has become an associate of our firm. Michael attended St. John's University on an academic scholarship and fulfilled requirements for a double major, graduating with honors with a B.S. in Biology and B.A. in Philosophy. After a year of post-graduate study of biology, physiology and anatomy at the New York College of Podiatric Medicine, he changed direction and became a uniformed New York State Court Officer, serving in Manhattan Family Court for 6 years.



During that time he undertook the study of law at night at New York Law School in an expedited program. In 1998 he graduated with honors and began practice in one of the New York City Law Department's busiest offices, the Brooklyn Tort Division. There, he was responsible for personal injury trials in both the Civil and Supreme Courts. In 2002 he entered the private sector concentrating on personal injury litigation. Since then, Michael has gained extensive experience in arbitration and mediation, earning millions of dollars for his clients. Michael joined Wingate Russotti and Shapiro in 2010 where he currently handles all aspects of premises liability, automobile and construction accident litigation from inception of the case to trial.

## WE ARE SADDENED TO ANNOUNCE THE PASSING OF OUR FOUNDING PARTNER

**William A. Wingate**, a founding partner of Wingate, Russotti & Shapiro, LLP, died on November 11, 2009 from complications of bladder cancer. He was 82. He is survived by two daughters, Jeri Licht and Leslie Markert; three grandchildren; and one great-grandchild.



Mr. Wingate is a past director of the New York State Trial Lawyers Association as well as a long-time trustee for the Village of Ocean Beach on Fire Island.

Mr. Wingate graduated as valedictorian of his class from Brooklyn Law School in 1949. He practiced with the firm of Wingate & Shamis for many years and then under the name of William A. Wingate, P.C.

In 1990, he joined with Philip Russotti and Clifford Shapiro to form Wingate, Russotti & Shapiro, LLP. which was then comprised of the partners, two associates and staff of four. The firm has evolved into a twelve lawyer firm with staff of seventeen.

Mr. Wingate continued to practice right up until a few months before his passing. In fact, his last trial came at the tender age of 79, when he successfully obtained a plaintiff's verdict in New York County, for an 82 year old man injured in an elevator accident. Mr. Wingate was up against a formidable adversary, but in typical Bill Wingate fashion, he never blinked. Bill was so many things to so many people but most of all he was compassionate, witty, and always capable of seeing the glass half full, not half empty. He had grace and class. We will sorely miss his presence in the office and vow to continue his vision of maintaining Wingate, Russotti & Shapiro, LLP as one of the finest personal injury and medical malpractice firms in New York.

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## WINGATE, RUSSOTTI & SHAPIRO, LLP NEWSLETTER

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Wingate, Russotti & Shapiro has a presence on the Internet. We invite our clients, friends and attorneys to visit our website to learn more about our firm. Our website includes our firm profile, attorney biographies, as well as significant settlements and verdicts. Comments, ideas and questions can be sent via email: [wrs@wrslaw.com](mailto:wrs@wrslaw.com). We look forward to hearing from you.

## Our Team

Philip Russotti	Associates	Of Counsel
Clifford H. Shapiro	Thomas M. Oliva	Kathleen P. Kettles
Kenneth J. Halperin	Joseph P. Stoduto	Paula M. Greco
William P. Hepner	Nicole M. Gill	Robert J. Bellinson
Jason M. Rubin	Michael J. Fitzpatrick	Enrique O. Guerrero
		Mitchell R. Kahn