

UPDATE SPRING 2012 NEWSLETTER

MEDICAL MALPRACTICE - \$10.2M RECOVERY Failure to Timely Diagnose Herpes in Newborn Causes Severe Brain Damage

WRSH Partner Philip Russotti recently settled a case at trial for \$10,200,000. The infant plaintiff was born on June 9, 2003. Ten days later he was brought to a local medical clinic because the mother had noticed white spots on his tongue a day prior. The doctor at the clinic noted a cold sore on the mother's lip, bumps on the infant's tongue and referred the mother to Defendant Medical Center #1 with a referral slip documenting vesicles on the boy's tongue and a cold sore, described as herpes labialis, on the mother's lip.

The mother took the infant to the Defendant Medical Center #1 that day where he was examined by Defendant Doctor, who diagnosed the mother with herpes labialis (herpes on the lips) and noted the vesicles on the infant's tongue without making a diagnosis for him. He was sent home with instructions for the mother to return if fever, irritability, or lethargy developed.

The next morning Defendant Doctor spoke with a neonatologist at the medical center and asked what the vesicles could be. The neonatologist told Defendant Doctor to immediately get the baby back to the hospital for evaluation. Defendant Doctor got in touch with the parents and the baby was brought back to the emergency room. Another emergency room doctor examined him and arranged for immediate transfer via ambulance to Defendant Medical Center #2 to rule out possible herpes.

The infant was examined at Defendant Medical Center #2 by a resident in the emergency room who noted 10-11 gray flat plaques in the boy's tongue. The ER attending doctor obtained a consult by an unidentified oral maxillary surgeon who made a diagnosis of oral burn caused by a baby bottle. The infant was again discharged without proper diagnosis or treatment.

Six days later the mother brought the infant to a scheduled appointment with his Defendant Doctor Pediatrician. The mother told Defendant Doctor Pediatrician that the infant had a fever and lethargy in the days before. Defendant Doctor Pediatrician did not notice any vesicles or abnormalities on the boy's tongue and reported that the baby was otherwise healthy. She ordered a CBC and blood culture for a possible fever of unknown origin in a baby under thirty days old and administered the first of three doses of antibiotics for possible sepsis. She told the parents to return the next day. That night at 1:00 a.m., the infant spiked a fever.

The parents brought the baby to Defendant Hospital where he was seen in the emergency room by another Defendant Doctor. Defendant Doctor noted a fever of 101.2 and eventually reached Defendant Doctor Pediatrician at 4:00 a.m. who instructed Defendant Doctor to tell the parents to come into her office at 8:00 a.m. the following morning. The parents returned the

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ANNOUNCEMENTS:

▶ NEW FIRM NAME

We are pleased to announce that because of **Ken Halperin's** tremendous contribution to the firm's success, his name has been added to the masthead. As of January 1, 2012 our new name is **WINGATE, RUSSOTTI, SHAPIRO & HALPERIN, LLP.**

▶ TWO MORE SUPER LAWYERS

WRSH Partner Ken Halperin and Of Counsel Robert Bellinson, have been selected for the New York Super Lawyers listing. They join partners **Phil Russotti** and **Jason Rubin** in this prestigious honor.

Only the top five percent of attorneys in the state have earned the title "Super Lawyers". Attorneys are selected as "Super Lawyers" after a rigorous multi-phased process that includes a statewide survey of lawyers, an independent research evaluation of candidates, peer nominations and peer evaluations by the top attorneys in New York. Each candidate is evaluated by a combination of factors, including peer recognition and professional achievement.

"Having four attorneys named 'Super Lawyers' is recognition of our firm's commitment to our clients and our profession," says managing partner, **Clifford H. Shapiro**. "We are pleased that other New York attorneys are aware of the high standards we set for our attorneys and the clients they represent."



Medical Malpractice – \$10.2 Million Recovery

Philip Russotti - Continued from cover

following morning and a fever of 100.5 was noted. Defendant Doctor Pediatrician, administered a second dose of the antibiotics pending the outcome of the blood culture and instructed the parents to return the next day.

The next day on June 28th the parents returned and reported that the baby's arms and legs had started twitching during the night. Defendant Doctor Pediatrician's associate administered the third dose of antibiotics but when the doctor noticed jerky movements she directed the parents to immediately go to Defendant Medical Center #2 emergency room.

Upon admission on June 28th to Defendant Medical Center #2 emergency room, a full sepsis work up was done including spinal tap, blood cultures, CBC. Swabs of the mouth were taken and the next day Acyclovir was started for presumed viral encephalitis from the herpes, although the test results were not obtained. Two days later on June 30th, the throat swabs came back positive for herpes simplex (HSV I). The baby remained hospitalized for a three week course of Acyclovir. On July 20th while hospitalized, an MRI of the brain revealed bilateral brain damage which doctors concluded was caused by the herpes virus.

The plaintiff made numerous claims against all of the Defendant Doctors, the two Defendant Medical Centers and the Defendant Hospital. Some of those claims were that there was negligence in not immediately admitting the infant; in not taking a Zsank swab smear of the mouth for culture; in not admitting the boy to begin Acyclovir; in not consulting with a neonatologist sooner; in making a diagnosis of an oral burn and that the consultation by a oral maxillary facial surgeon was improper; in that a consultation should have been provided by a pediatrician or infectious disease specialist who would have immediately suspected herpes and admitted the boy and started Acyclovir; in that the infant should have admitted the boy for a full sepsis work up with an infant of less than 30 days old with a fever; in that the infant should have had a spinal tap and cultures.

The infant suffered severe neurologic injuries. He is without expressive language, is non-ambulatory, cannot feed himself, has quadriplegia, and needs assistance with all activities of daily living. He has not had any surgical procedures but receives physical, occupational, and speech therapy. He can only eat pureed food. He has minimal purposeful spontaneous movement.

For more information about **Wingate, Russotti, Shapiro & Halperin** and our attorneys, please visit our website at www.wrshlaw.com.



▶ SETTLEMENTS & VERDICTS

Medical Malpractice/Wrongful Death Case – \$3 Million Settlement

Just prior to jury selection, **Jason Rubin** reached a \$3 million settlement in a case arising out of the death of a 35 year old, unmarried mother of four.

Decedent presented to the emergency room of defendant hospital with complaints of leg pain and difficulty breathing. She was discharged home and suddenly collapsed and died the next day. An autopsy revealed the cause of death to be a pulmonary embolism as a result of a deep vein thrombosis in her leg.

The emergency room chart was lost by the hospital, but Jason was able to piece together what occurred at the hospital by interviewing family members and obtaining billing records and hospital logs which indicated that decedent made complaints of pain in a limb. We claimed that she should have undergone an ultrasound of the leg, which would have revealed the deep vein thrombosis. Anticoagulation and other treatment could have then been initiated, which would have avoided her death.



Laborer Falls Eight Feet Through Hole in Floor – \$2 Million Recovery

WRSH Partner Kenneth J. Halperin recently obtained a \$2 million settlement for a laborer who fell approximately eight (8) feet through a hole in the floor at his worksite. The accident occurred when our client was in the process of cleaning debris off the floor of a building that was under construction. While he was moving debris from the middle of the floor to the side he suddenly fell through a hole that had been cut out for HVAC duct work. Unbeknownst to the plaintiff the cover had been removed and he did not observe that there was an uncovered opening. The failure to properly cover the hole was a violation of Sections 240(1) and 241(6) of the Labor Law.

The accident was unwitnessed and the hole through which he fell was very small (approximately 18in x 28in). Due to the small size the defendants' site safety officer and safety manager both speculated that plaintiff could not have fallen through the hole. They contended that he fell when trying to lower himself through the hole to access a ladder on the floor below. They argued that this provided quicker access for him to get to the floor below. Plaintiff, of course, denied doing that.

During the course of discovery we conducted a deposition of the site safety officer who after the accident prepared an accident report in which he wrote that the plaintiff had admitted to him that he was lowering himself through the hole to access the ladder. We were able to severely impair his credibility when we got him to admit that the plaintiff never told him this and that what he wrote in the report was a mistake.

Additionally, we hired a forensic engineer to prove that based upon plaintiff's physical attributes it was a mathematical and physical certainty that a fall through a hole even of this small a size was possible. We also hired a biomedical/mechanical engineer who determined that plaintiff's injuries, especially the bruising to the underside of each bicep which we had photographs of, was consistent with a fall through a hole.

As a result of the accident, the plaintiff sustained a herniated disc in his lumbar spine which required a discectomy followed by a one level fusion approximately one year later. We argued that the plaintiff was unable to return to work in construction, although he had been cleared to perform work in some other profession that did not involve physical labor. As such, we made a loss of earnings claim for the difference in salary between the work he was doing before the accident and what he was capable of doing after the accident.



Motor Vehicle Accident – \$1.5 Million Jury Verdict

On April 27, 2011 **Thomas M. Oliva** obtained a verdict in Bronx Supreme Court in the amount of \$1,500,000 for a fifty year old women whose car was rear ended while she was on her way to work as a school lunch aide. After several months of painful therapy including trigger point injections on multiple occasions, she opted to have surgery. Our client underwent anterior cervical discectomy with cervical fusion at C5-C6 of her cervical vertebrae. This treated only one of the three herniations she sustained. She remains with two herniated vertebrae, pain, disability and restriction of the range of motion in her neck, which is permanent. Our client has, however, returned to work in order to try and obtain her pension, to which she is entitled after five more years.



SETTLEMENTS & VERDICTS

WRSH Partner Philip Russotti obtained a \$10 Million mediation settlement for failure to timely perform a Cesarean Section. The case was venued in Orange County, NY.

Infant plaintiff sustained permanent and severe multiple injuries, including spastic quadriparesis, lack of speech, impaired vision, inability to eat, inability to talk, inability to communicate except by gesture and the need for total support for her care with a gastrostomy tube and tracheostomy.

The infant plaintiff's mother presented on May 19, 2001 at 38 weeks, to defendant Hospital believing she was in labor. She was examined by Defendant Doctor One, who put her on a fetal monitor for 20 minutes. The monitor revealed decreased beat to beat variability, however she was discharged without further testing. Plaintiff returned three days later on May 2, 2001, again believing that she was in labor. She was put on a fetal monitor which again demonstrated decreased beat to beat variability. She was discharged after 2 ½ hours. She returned that evening at 9:30 p.m. with ruptured membranes and meconium stained amniotic fluid. She was admitted and put on an external fetal monitor. The tracing was non-reassuring because of decreased beat to beat variability. Defendant Doctor One was not present and did not examine her, although he was called and made aware of her condition by the nurses.

The tracing continued to be non-reassuring throughout the night of May 22, 2001, continuing until May 23, 2001, despite the fact that resuscitation techniques such as changing position and administering oxygen and fluids did not improve the tracing. Throughout the night, the nurses spoke to Defendant Doctor One at 2:30 a.m. and 6:00 a.m. and did not request that he come to the hospital to examine the patient, did not advise their supervisors of his failure to come to the hospital to examine the patient, nor the patient's continuing non-reassuring condition.



MEDICAL MALPRACTICE - \$10 MILLION - Mediation Settlement in Suit Alleging Failure to Timely Perform C-Section

Defendant Doctor One did not examine the patient until 7:30 a.m. the next morning. At 8:00 a.m. Defendant Doctor Two, Defendant Doctor One's partner, arrived to take over. He examined the strips throughout the night, did a pelvic examination and immediately ordered an emergency C-section. The baby was delivered with Apgars of 1, 1, 4, with the only score for a heart rate of less than 60 beats per minute. Resuscitation was attempted by pediatricians Third and Fourth Defendant Doctors who did not intubate the baby for ten minutes, did not insert an umbilical line, and were not able to increase the Apgars to 4 until ten minutes.

The claim against Defendant Doctor One was for his failure to deliver the infant on May 19, 2001 or provide for further testing in the presence of a non-reassuring fetal heart tracing; in prematurely discharging plaintiff on May 22, 2001 without further testing, such as scalp Ph or acoustic stimulation, or failing to deliver the infant; and in not examining the patient on May 22, 2001 throughout the night while the patient was in the hospital, and relying solely on the nurse's communications regarding the patient's condition.

The case against the Hospital dealt with the labor nurse's failure to demand that Defendant Doctor One come to the hospital; their failure to properly interpret the fetal heart strips; and failure to go up the chain of command in the hospital to the nursing supervisor and medical director of the hospital to complain that Defendant Doctor One had not come into the hospital to examine his patient.

The case against the pediatricians, Defendant Doctors Three and Four, was their failure to timely and properly resuscitate the infant; giving inappropriate doses of epinephrine; and delaying ten minutes to secure an airway and provide an umbilical catheter which would have been the proper vehicle to administer epinephrine and sodium bicarbonate.

A mediation was held on July 27, 2009 at which time the case settled for \$10,000,000. Mr. Russotti retained expert witnesses in Neonatology, Neuroradiology, Pediatric Neurology, Nursing, a Life Care Planner, as well as an Economist. Mr. Russotti's thorough preparation of this case led to the successful recovery.

Security Guard Trips over Elevator Weight in Building – \$1.3 Million Settlement

WRSH Partner **Kenneth J. Halperin** recently obtained a \$1.3 million dollar settlement for a security guard who tripped and fell over an elevator weight while performing his rounds at a large commercial building in downtown Manhattan. The accident occurred when our client was in the process of walking to his post. As he attempted to open a door he suddenly tripped and fell over a small elevator weight, which is a five pound, 18 inch high object that is used by elevator mechanics to simulate weight in an elevator.

We conducted six depositions in this case of various workers that were employed both by the building and our client's employer. We went as far as South Carolina to depose a worker that had retired and moved there. Through these efforts we discovered that the weight was being used on days when it was windy as a door stop to prop open the doors during deliveries. Apparently this was done in close proximity to our client's accident and nobody put the weight back in its proper storage location. Because of the weight's close proximity to the floor and dark color that blended in with the floor, it was very difficult to see.

The defendant, building owner, argued that they had no knowledge that this was being done because only the workers from plaintiff's security company controlled the area where the accident occurred. We were able to rebut this argument by establishing that the building owner still had control over the area and the ability to supervise the workers.

As a result of the accident, the plaintiff sustained a herniated disc in his lumbar spine which required a lumbar fusion operation and one revision procedure. Plaintiff also sustained an injury to his knee which required arthroscopic surgery.

Two Elevator Mechanics Injured in Elevator Which Overspeeds – \$750,000 Recovery

Robert J. Bellinson obtained a \$750,000 settlement for two elevator mechanics who were injured when the elevator they were in over sped and then came to a sudden stop causing them to be jarred while they were in the elevator.

This was a highly disputed case in which the building owner was the only party in the case because our clients worked for the elevator maintenance company that was hired by the building to maintain the elevator. Rob settled this case only after taking a verdict on liability in which a jury found the building owner 100% at fault for the accident. Prior to the liability trial the building owner's attorney's refused to make any offer because they were confident that the jury would absolve them from blame.

The evidence adduced at trial established that seven weeks prior to the accident another elevator company had inspected the subject elevator and took it out of service because of a burnt portion of its motor. They informed the building owner that the elevator should not be used again until this repair was done. The building owner then fired that company and hired the company that employed the plaintiffs, and continued to operate the elevator.

The building owner then hired the plaintiff's company to take over the maintenance of the elevator and also contracted with them to renovate the entire elevator system. However, unbeknownst to the plaintiffs, their employer also managed to put the elevator back in service, despite its dangerous condition, so that it could be used until the renovation began. The accident involving the plaintiffs occurred the day the renovations were going to begin.

At trial, the defendant building owner tried to contend that they did not know the elevator was dangerous. This was done despite the presence of a work ticket signed by the Super of the building which stated that the elevator was being taken out of service because the engine was damaged.

As a result of the accident, one of the plaintiffs sustained a herniated lumbar disc which required an epidural injection. The other plaintiff sustained an aggravation of a prior knee injury, which resulted in two arthroscopic procedures.



REPRESENTING REAL PEOPLE WITH REAL PROBLEMS ON AN INDIVIDUAL BASIS

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

Pedestrian Knockdown – \$725,000 Recovery

WRSH Partner Cliff Shapiro obtained a settlement in the amount of \$725,000 for a 78-year-old man who was struck by a motor vehicle. The defendant driver contended that the plaintiff ran out in front of her car and caused the accident.

As a result of the accident, the client sustained a fracture of his right tibial plateau, which required open reduction and internal fixation; a rotator cuff tear of his right shoulder, which required arthroscopic surgery; head injury with laceration and stitches; as well as a fracture of a vertebrae. The plaintiff was confined to the hospital three times for a total of 18 days.

With regard to liability, Cliff claimed that the defendant driver's contention that a 78-year-old man would run out into the street in front of a car was absolutely ridiculous, and that he was confident that a jury would agree with him, after seeing and meeting our client.



Verdict for Bicyclist – \$600,000 Insurance Policy Limit \$100,000 – Recovery above policy limits

Plaintiff, a bicyclist, approximately 30 years of age, contended that the defendant cab driver negligently failed to stop at a red light, causing a collision. Plaintiff conceded that he entered the intersection on his bicycle when the light was yellow for him. As a result of the accident, plaintiff, a medical doctor in a hospital who did not lose any income as a result of the accident, sustained a fractured leg and skull fracture, as well as some alleged neuropsychological injuries which made it harder for him to do his job as a doctor. He was not wearing a helmet at the time of the accident. Plaintiff had surgery to his leg to fix the fracture as well as surgery to remove the hardware put into his leg.

This case is novel and interesting for the following reasons. This case involved a yellow cab insured by a company notorious for not settling cases in a reasonable fashion. Additionally, as with all yellow cabs in New York City, there was a \$100,000 limit of insurance. Our firm ascertained that the cab corporation in this case, which owned two medallions, had enough equity in those medallions to warrant demanding above the \$100,000 policy limit of the cab's insurance.

Therefore, even when the insurance company finally offered the \$100,000 at jury selection, Partner William Hepner told them the offer was too little, too late, and he would take a verdict unless the owner of the cab corporation paid money out of his own pocket to settle the case above the \$100,000 insurance policy. The owner refused, and Bill obtained a verdict of \$600,000. The case subsequently settled with the owner of the cab paying a substantial amount of money above the insurance policy limit, which was exhausted by the verdict.

For years cab companies have been getting away with carrying the minimum amount they are allowed under the law. (A number of years ago the minimum was raised to \$100,000 for yellow cabs and livery vehicles; for all other motor vehicles in New York State the minimum under the law is only \$25,000). This case shows that **WRSH** will not stop at just the insurance policy limits if there are assets available above the policy.



Premises Liability – \$500,000 Recovery During Trial

WRSH Associate Joseph P. Stoduto was able to obtain a settlement of \$500,000 on behalf of a 38 year old health care worker from the Bronx. The woman was walking within the kitchen of an apartment where she used to live, when she was caused to slip and fall to the ground due to a puddle of water on the floor, causing her to sustain a very serious injury to her right knee.

Our office brought an action against the owner of the building. We were able to prove that the accident occurred solely as a result of negligence in the way that the kitchen plumbing and its components were maintained by the defendant, resulting in a long standing continuous leak. Although the client had practically no formal medical treatment once she was discharged from the hospital, Joseph was able to prove that the injury was nonetheless serious, significant and permanent.

The case then proceeded to trial. During the middle of the trial, Joseph was able to negotiate a settlement in the amount of \$500,000 for our client's past and future pain and suffering.



Trip and Fall – \$425,000 Jury Verdict

Wingate, Russotti, Shapiro & Halperin attorney, **Nicole Michelle Gill**, recently obtained a \$425,000 verdict for our client who tripped and fell when the tip of her shoe caught on a defect located on the defendant's property. Our client, a 72-year-old retiree, was walking her granddaughter to the school bus when the accident occurred. She was caused to sustain a tear of the posterior horn of the medial meniscus of the left knee and other injuries. As a result, she required two arthroscopic surgeries on her left knee and will require a total left knee replacement in the future. The defendant's attorney and examining physician argued that degenerative changes as well as plaintiff's prior 1996 accident caused her injuries. We proved that the defendant was negligent in failing to maintain its property in a reasonably safe condition.



Pedestrian Knocked Down by Bicycle – \$300,000 Recovery

There has been a dramatic increase of bike traffic in New York City since the Bloomberg Administration has taken an interest in promoting bike usage as alternative transportation and creating bike lanes. However, we have seen an increase in bike accidents and numerous "near miss" situations and injuries caused by bikers without insurance. The only insurance which would cover a bike accident is home owners insurance which is not as common within the city as the suburbs. There is no rule requiring bikers to have minimum insurance and little or no regulation of them.

We handled one such accident and the client, who sustained serious injuries, was lucky because the offending bicyclist did have home owners insurance.

On the eve of trial, **WRSH Associate Michael Fitzpatrick**, obtained a settlement of \$300,000, the limits of the defendant's insurance policy, for this knockdown of a pedestrian by a bicyclist in Central Park. On July 14, 2007 at approximately 8:00 AM, our client a 62-year-old Manhattan resident went for her regular walk in Central Park. The plaintiff was on the Park Drive at 72nd Street and while attempting to cross the roadway, was struck by a bicyclist. She was hospitalized for nine days and sustained multiple injuries including head trauma with intra cranial hemorrhage, traumatic brain injury, facial and head lacerations, cervical, lumbar spine and right shoulder injuries. While the bicyclist claimed he has traveling at a reasonable rate of speed at the time of the accident, discovery by **WRSH** revealed that this particular bike was a specially designed racing bike and was being used by the defendant, a seasoned triathlete, to prepare for an upcoming competition.



NEW ASSOCIATES



We are pleased to announce that **Adam J. Roth** has become associated with our firm. Adam graduated from Ithaca College in 2004, where he was a member of the varsity wrestling team, with a degree in Philosophy and a minor in legal studies. Thereafter, he attended New York Law School on a Dean's Scholarship. While at New York Law School, he earned Dean's List Honors for three consecutive years, was elected as Attorney General of the Student Body, and wrote an article on free speech rights that was published by a student journal.

Adam joined the firm in 2011 as an associate. His career has been dedicated exclusively to the representation of those injured by the negligence of others. He has experience in all phases of litigation from case inception through trial, and has assisted in obtaining significant recoveries on behalf of the individuals whom he represents. Adam is a member of the New York County Lawyers Association, American Bar Association and Brooklyn Bar Association and is admitted to practice law in the State of New York as well as the United States District Courts for the Southern and Eastern Districts of New York.



Florina Altshiler obtained her Bachelor of Arts in Psychology (with a clinical focus on counseling crime victims) and a Certificate in International Studies from Binghamton University as a Rosefsky Language and Culture Scholar in only two years. She completed law school at St. John's University School of Law, as a Rosenberg Scholar and an Institutional Merit Scholar, in two and a half years. She received the Dr. Thomas C. Beneventano Award for Legal Medicine and an Excellence for the Future Award in Criminal Trial Advocacy. Additional distinctions she has received include the U.S. President's (Bill Clinton's) Student Service Award for Outstanding Service to America and United Hospital Fund's Student Achievement Award.

Florina's prior experience includes defense of medical malpractice cases and all aspects of insurance claims, including premises liability, automobile and construction accident litigation at two of the top defense firms in the country.

Florina has also worked at the Kings and Queens County District Attorneys' Offices as an intern and as a community associate. She also volunteered as a crisis counselor for at risk adolescents, victims of domestic violence and survivors of sexual abuse. She volunteers as a rape and domestic violence counselor in the emergency department of St. Luke's Roosevelt Hospital. Additionally, she serves as a judge at national and state level mock trial competitions for high school, college and law schools and serves as an arbitrator for the Civil Court of the City of New York.

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Wingate, Russotti, Shapiro & Halperin 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. We look forward to hearing from you.

Our Team

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Kenneth J. Halperin	Nicole M. Gill	Robert J. Bellinson
William P. Hepner	Michael J. Fitzpatrick	Enrique O. Guerrero
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