

# WINGATE, RUSSOTTI & SHAPIRO, LLP

# UPDATE

## NEWSLETTER

### WRS Announces New Partner



We are pleased to announce that [Jason M. Rubin](#) has become a member of the firm. Jason specializes in medical malpractice and product liability litigation.

He has tried cases involving failure to diagnose kidney disease, resulting in loss of one kidney, culminating in a \$1,250,000 settlement; the failure to diagnose an impending heart attack causing the death of a 33 year old woman, which settled for \$2,950,000; failure to diagnose pancreatic cancer; and improperly discontinuing Coumadin in a patient with antiphospholipid syndrome resulting in kidney damage.

He has also written and argued numerous appeals in medical malpractice cases. Two decisions in the same case, *Schiavone v. Victory Memorial Hospital*, 292 AD2d 365 (2nd Dep't. 2002) and 300 AD2d 294 (2nd Dep't. 2002) have become leading New York cases on the ability to add newly discovered parties to a lawsuit after the statute of limitations has expired against them, under the relation back doctrine.

Jason's attention to detail, knowledge of the law and excellent grasp of applicable medicine makes him a formidable opponent in any medical malpractice case. Jason looks forward to a fulfilling and lengthy career at [Wingate Russotti & Shapiro](#).

### \$5 Million Settlement

## Construction Worker Dies by Suffocation when Trench Collapses, Burying Him

[Clifford Shapiro](#) and [Kenneth Halperin](#)

worked together to obtain a \$5,000,000 settlement for the family of a construction worker who was killed while working in a trench at a construction site on



Staten Island. The decedent left a wife and five children, three (3) of whom were under the age of 14.

At the time of the accident the worker was inside a 12 foot deep trench. The trench walls, which were not shored in any way, collapsed while the worker was in the trench, burying him underneath a mountain of dirt, where he died. The general contractor pled guilty to various crimes for knowingly failing to properly shore the walls of the trench to prevent this type of collapse.

The trench was dug on a New York City roadway, so that the contractor could connect pipes underneath the roadway to an adjacent housing development that was under con-

struction. The problem that we faced in bringing our Labor Law claims in this case was that the decedent was employed by the general contractor, who was also the owner of the land that the houses were being constructed on. Thus, we were barred by the Worker's Compensation laws from bringing a cause of action against them.

In light of this, Ken Halperin, proceeded with a case against the City of New York because the trench was dug on the City street, which was owned by the City of New York. Before depositions, Ken made a brilliant strategic move to immediately seek summary judgment against the City of

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## New York Super Lawyer



This past year, [Phil Russotti](#) was chosen by the Editors of Law and Politics as a [Super Lawyer](#) in New York specializing in plaintiff's personal injury litigation. This achievement is based upon a survey of over 89,000 New York lawyers in the metropolitan area who were asked to nominate the best attorneys they personally observed in action. Additionally, the Editorial Board reviewed national and local legal periodicals, legal trade journals, professional data bases and online sources for records of attorneys. They also conducted in person interviews. The evaluation process considered the verdicts, settlements, experience, honors, awards, special certifications, professional activities, scholarly lectures and writings of the prospective attorneys.

Finally, candidates were reviewed by a panel of attorneys who specialize in their respective practice areas. They made final recommendations which were passed upon by the Law & Politics editors. Only 5% of the total lawyers in the New York metropolitan area were listed as Super lawyers in their various specialties.

Phil, who is also certified by the National Board of Trial Advocacy as a civil trial specialist, is honored to have been selected to join in this elite group of attorneys.

## Partner Settles Over \$14 Million for Brain Damaged Infants

This past year [Phil Russotti](#) settled three cases involving brain damaged infants totaling over \$14,000,000 with structured settlement pay-outs worth over \$50,000,000, depending on the longevity of these three children.

One case involved negligently permitting a mother to deliver vaginally after a C section (VBAC) which resulted in rupturing her uterus and requiring an emergency C section. Phil proved that although VBACs are very common and have gained in acceptance over the past 15 years, this one should not have been allowed because the mother, who had just delivered by C section 16 months earlier, had never had a vaginal delivery and the baby was greater than 4,000 grams. Phil utilized studies which showed that these circumstances increased the risk of uterine rupture three to four times, thus, rendering this a potentially dangerous labor. This proved to be the case, when during labor, the uterus ruptured and the baby was born with the placenta detached from the uterus causing severe hypoxia with resulting cerebral palsy and mental retardation. The case settled for \$6,000,000 during jury selection.

In the second case, Phil proved that a baby born 26 weeks premature and admitted to the ICU was not properly monitored. Approximately two months after delivery, at 8:00 a.m. one morning, the baby showed signs of infection and impending sepsis (infection in the blood) as evidenced by apneas (periods of not breathing), tachycardia (increased heart rate) and that the baby was noted to be pale and lethargic. Despite these signs, the nurses and neonatologist did nothing to deal with the impending sepsis. At approximately 4 p.m., a neonatologist noted similar signs and ordered administration of antibiotics and blood tests. The antibiotics were not

delivered until 10:00 p.m. that night. The following day the baby was diagnosed with severe meningitis caused by *serratia marcescens*, a virulent bacteria which spread to the baby's brain. As a result, the infant suffered severe brain abscesses, cerebral palsy and mental retardation. Phil was prepared to prove that had the signs of infection been immediately addressed by the administration of antibiotics, plaintiff's brain injury, which although not being totally preventable, would have been significantly reduced. This case settled for \$5,000,000.

Finally, Phil proved in the third case that the attending obstetrician failed to properly interpret fetal heart monitor strips, which indicated that the mother's contractions were excessive in both number and strength and that the baby's heart rate was decelerating in a non-reassuring way (late decelerations), indicating that the baby was not recovering following the contractions. The obstetrician allowed this to proceed for approximately three hours until the baby finally gave up fighting against the repeated insults with his ability to recover. When his heart rate dropped to 60 beats per minute an emergency C section was required. By that time, the baby had suffered severe hypoxia. He currently has a diagnosis of cerebral palsy and severe cognitive deficits. That case settled for the full amount of the insurance available which was \$3,000,000.

In all of these cases Phil suggested and the families agreed to invest part of the funds in annuities which would have pay-outs of approximately \$19,793,000, \$24,271,157, and \$18,723,197 respectively. While the harm caused by the negligence of these doctors is incalculable, the parties are now able to provide for their disabled children in the best way possible for the rest of their lives.

## Partner Obtains **\$1.9 Million Recovery** for Faulty Home Construction

WRS Partner, [Stavros Sitas](#), obtained a \$1.9 million recovery for a 51 year old client who fell through an unsecured piece of plywood on the second floor of a home being built for him. This settlement was especially significant because the defendant construction company only had a \$500,000 insurance policy with the balance of \$1.4 million coming from the defendant.



At the time of the accident, plaintiff was checking on the progress of construction of his new home. Our client was admiring the views from what would eventually become his master bedroom, and while walking across the home's second level flooring, stepped upon an unsecured piece of plywood covering the staircase opening leading to the home's basement. He fell approximately 25 feet onto the basement floor, sustaining amongst many other injuries a burst fracture at the L1 level of his spine and compression fracture

of the L3 vertebrae. The client required surgery for the insertion of titanium rods to stabilize his spine. He also required a surgically implanted pain medicine pump for the continuous delivery of pain medication.

The defendants first claimed that the accident was entirely the fault of the plaintiff, alleging that there was safety-colored spray paint along the perimeter of the plywood and that there was even a worker who was actively cutting along the edges of this piece when plaintiff walked across it.

Moreover, the defendants alleged that only the construction company should have been sued and not two of the individual owners. They claimed that the plaintiff had entered into a contract with the construction company only and not with the individual owners of the company, therefore, the owners' personal assets could not be sought in satisfaction of this claim. Had they been successful with the argument, our client would have been lim-

ited to a recovery of the \$500,000 bodily injury limits of the insurance policy. Stavros, with invaluable assistance from Scott Stern, was able to pierce the corporate veil and attach liability to the individual owners of the construction company because at the time of the accident, the company owners had failed to file the necessary corporate documents and in fact, the company was nothing more than a fictitious corporate entity, thereby, exposing the individual owners to personal liability.

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*This case is a prime example of our firm's tenacity in leaving no stone unturned while seeking to hold tortfeasors accountable for their negligent acts.*

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As a result, Stavros obtained not only the full \$500,000 insurance limits, but also a personal settlement contribution from the company's owners in the amount of \$1.4 million. This case is a prime example of our firm's tenacity in leaving no stone unturned while seeking to hold tortfeasors accountable for their negligent acts.

## Roadway Design in New York: **\$1.325 Million Recovery** for Bicyclist Who Rode Through Red Light

Roadway design cases against municipalities pose some of the most challenging litigation hurdles in the field of civil justice. In order to even get to the point where an attorney may be given the opportunity to present the case at trial, there must be



evidence to overcome the "qualified immunity" enjoyed by all municipalities in this State. Specifically, it is not enough to show that the municipality, the City of New York in this case, was negligent; it is necessary to show there

were a multitude of accidents in the same location without any action taken thereafter by the City, or in a case like ours without prior accidents, that the City did not use any reasonable basis to configure the roadway and/or its traffic signals.

Through five years of diligent discovery and asking the right questions at depositions, [Bill Hepner](#) was able to uncover

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## New Medical Malpractice Associate

We are pleased to introduce [Thomas M. Oliva](#), the newest addition to our medical malpractice team. Tom brings a wealth of medical malpractice experience to our firm, having been a medical malpractice defense attorney at a top New York firm for 15 years prior to joining us. He has tried every type of malpractice case, including failure to properly treat chronic hydrocephalus resulting in brain damage; failure to diagnose and treat tubercular meningitis of an infant; birth trauma of an infant from meconium aspiration at birth; orthopedic malpractice involving the failure to properly treat ACL tear and patella ligament realignment; improper prescription of medication causing permanent deafness of an adult; and failure to properly perform colorectal surgery leading to the need for complete anal reconstruction.

After he graduated from Hofstra University, Tom served as an Assistant District Attorney in the Bronx County District Attorney's Office, where he worked in the Special Victim's Bureau. Accordingly, Tom brings his particular compassion, sensitivity and skill to dealing with the difficulties encountered by victims of malpractice and their families.

Tom looks forward to a long and successful career on the plaintiff's side of the practice.



*"Dealing with my clients with sensitivity and respect are my first priorities in handling their case. I am ever cognizant that my actions on their behalf can profoundly affect their lives. There is great satisfaction in bringing the full force of the law to work on their behalf."*

### **\$1,000,000 Settlement** **Failure to Diagnose** **Bladder Cancer**

This past May WRS's newest attorney, [Thomas M. Oliva](#), settled a failure to diagnose bladder cancer case for \$1,000,000. Our client, who is 72 years old, was being treated at the Bronx Veterans Hospital for complaints of blood in his urine. Years previous our client had been treated with radiation for colon cancer. Knowing this, the doctors at the VA Hospital entertained the idea that he was suffering from bladder cancer but did little to rule in or rule out this diagnosis. Instead, the doctors treated him only symptomatically for a bowel irritated by the previous radiation treatment. Ignoring his continuing symptoms for two years, no chemotherapy was ever instituted. Because of the delay of diagnosis, our client lost his bladder and a ureter. He now faces a shortened life expectancy and has to urinate into a bag via a tube. Due to a recent recurrence, our client elected to settle this matter as quickly as possible.

### **Roadway Design in New York**

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the evidence necessary in this case to arguably overcome the stringent requirements of the law, and convince the City that it would be taking a substantial risk by not settling this action, in which our client was partially paralyzed after she rode her bicycle through a red light and collided with a driver who only had a \$25,000 insurance policy.

Shortly before the commencement of trial by Bill, Cliff Shapiro was able to negotiate a \$1.1 million settlement with the City. This was because Bill was able to establish that this large intersection in Brooklyn, which included a down ramp from an elevated portion of the BQE, was confusing to travelers, particularly in the way its traffic signals were placed and timed.

Bill had to overcome the qualified

immunity arguments of the City, as well as the fact that no prior bicyclists or drivers had been sufficiently confused in the past to cause them to pass a red light and have an accident, as our client did. This case was made even more difficult by the fact that plaintiff was familiar with the area.

The result in this difficult liability case serves to highlight the importance of creative, diligent lawyering, as well as the obvious respect our firm enjoys from conservative and difficult defendants such as the City of New York. Subsequent to the settlement with the City, Bill negotiated an additional \$200,000 settlement with the State of NY, against which a separate action was pending due to the State's limited involvement. Very often a major city roadway will have implications for both the State and City of New York.

## Partner Obtains **\$650,000 Settlement** for Hastening Kidney Transplant

During a two week trial, [Jason Rubin](#) settled a medical malpractice case for \$650,000 involving a 66 year old woman who suffered renal failure and a heart attack after a nephrologist discontinued an anticoagulation medication prior to a kidney biopsy.

In February 2004, our client saw the defendant nephrologist on the recommendation of her primary care physician because blood tests indicated that her creatinine was elevated, indicating kidney insufficiency. She reported to the defendant that, approximately 5 years earlier, she had been permanently placed on Coumadin, a medication which prevents the blood from clotting. This was necessary because of several episodes of blood clots in her leg, commonly known as Deep Vein Thromboses (DVT). The defendant nephrologist recommended a kidney biopsy to determine the cause of plaintiff's renal insufficiency and advised plaintiff to discontinue the Coumadin four days prior to the biopsy, which was scheduled for several weeks later.

Plaintiff discontinued the Coumadin four days prior to the biopsy and thereafter developed acute clotting in her kidneys and her coronary arteries, resulting in a heart attack. She required dialysis for approximately 20 months and then underwent a kidney transplant in November 2005.

At trial, we claimed that the defendant nephrologist was negligent for failing to obtain blood tests to determine whether plaintiff had a clotting disorder prior to interrupting the Coumadin and failing to recommend bridge therapy while she went off of Coumadin. Specifically, bridge therapy involves administering a shorter acting anticoagulant, heparin, while a patient is off of Coumadin to provide the smallest window of time off of anticoagulation while undergoing a biopsy to reduce the risk of clotting. We demonstrated at trial, that had defendant ordered the necessary blood tests, they would have revealed that she had a condition known as antiphospholipid syndrome, which would have explained

the dysfunction of her kidneys, making the biopsy, and thus, the discontinuance of Coumadin, unnecessary. Additionally, if the biopsy was necessary, the antiphospholipid syndrome would have mandated that plaintiff receive bridge therapy while going off of Coumadin.

Defendant did not contest that stopping the Coumadin caused the blood clots, but rather that the plaintiff's kidney biopsy demonstrated that she had underlying severe, chronic kidney disease which would have necessitated dialysis and/or transplant within 1-2 years even in the best of circumstances. We were able to obtain this settlement by arguing that the dialysis could have been avoided because the kidney transplant would have been a planned anticipated procedure enabling her to go on a transplant list, and despite the fact that approximately one year after the heart attack plaintiff had substantially recovered and had an above average exercise performance on a stress test.

## Wingate Russotti & Shapiro Trial Counsel, Robert J. Bellinson, Secured a **\$575,000 Recovery** in Federal Court for Slip and Fall on Rock Salt

Our client, a 59 year old retired computer programmer, was injured when he slipped on granulated rock salt and fell down a flight of stairs inside a Target superstore in the Bronx in December, 2005. At a mediation conducted three



days before trial, Rob highlighted a former employee's testimony that she saw the salt residue on the stairs right after the accident and had previously noticed

accumulations of salt residue inside the store after Target employees applied salt to melt the snow in the parking lot. Because of defendant's failure to clean the residue which had been tracked into the store, our client sustained severe spinal injuries for which he underwent two surgical procedures in March, 2007.

During the mediation, Rob played the

demonstrative evidence – the DVD of the surgical procedures that were performed on our client – which would have been shown to the jury, enabling it to understand the nature and extent of the spinal injuries. Additionally, the spinal surgeon was prepared to testify that the injuries were severe, permanent and causally related to the trauma of this accident. The mediation session culminated in a settlement of \$575,000 despite the fact that there had never been a prior settlement offer made.

## **\$600,000 Recovery**

### **Pedestrian Struck & Killed by Out of Control Vehicle on Strip Mall Sidewalk**

WRS Partner, [Stavros Sitinas](#), obtained a \$600,000 settlement for the estate of a man who was killed by an out of control vehicle in a strip mall parking lot. The vehicle had jumped onto the sidewalk, destroying several concrete planters and a park bench before striking and killing our client. Tragically, this horrific event was witnessed by the six year old daughter of the decedent. The recovery exceeded the total available insurance proceeds by \$100,000 because Stavros convinced the driver's family members to contribute personally to the settlement.

This terrible event occurred on a beautiful summer day when our client and his 6 year old daughter went to a local shopping plaza to run some errands. At that time, the father was seated on a park bench on the sidewalk in front of the stores, while his daughter played on a

scooter near her father. At the same time, approximately 200 feet away, an elderly driver was attempting to back out of a parking space. However, what she did not realize was that she had actually placed the vehicle's transmission into "drive" rather than "reverse." As she continued to apply power to the vehicle, her front tires kept hitting the tire blocks at the front of her parking space. When the driver abruptly stepped on her gas pedal, the vehicle took off uncontrollably, driving over the tire blocks, up a curb, through a landscaped median, and up onto the sidewalk of this outdoor shopping plaza. The vehicle continued driving along the sidewalk in front of the stores and towards our client and his daughter. Our client valiantly jumped off the park bench and ran towards his daughter who was still riding her scooter.

While frantically yelling to his daughter to get out of the way, he was run over by the vehicle and instantly killed. His daughter, while physically safe, was emotionally scarred by witnessing her father's death. A witness on the scene removed the child from the scene of the accident until her mother could pick her up.

Stavros sued the 90 year old driver of the car, who unfortunately had only \$500,000 of insurance on her vehicle and no attachable assets to satisfy an excess judgment. However, Stavros was able to negotiate an additional \$100,000 of the settlement proceeds from the children of the defendant driver, even though they were not defendants in this action and had no legal obligation to pay anything towards the settlement of this matter.

### **Wingate, Russotti & Shapiro Expands Legal Services Offered by Creating a Cross Referral Network of Attorneys**

In September 2007, our law firm launched a cross referral network of New York attorneys. The goal of the network is to better service our respective clients by providing them with expert legal services in virtually any area of the law. We have already referred numerous matters to attorney participants in this network group such as real estate, divorce, commercial, immigration, and taxation. We have hosted seven events and the enthusiasm and interest generated by these attorneys is truly remarkable. We look forward to the continued success of this effort in order to better serve our clients. Thus, if you have the need for any kind of legal service, please contact us and we will refer you to an excellent attorney who practices in the specialty you require.

### **Construction Worker Dies**

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New York based on documentary evidence already obtained and the affidavit of a construction safety expert that we retained very early in the case. The City also moved to have the case against them dismissed arguing that they could not be held responsible for the accident since all they did was issue a permit for the opening of the roadway where the trench was dug. The law on this issue was unsettled. Ken successfully convinced the Court to grant summary judgment against the City of New York pursuant to Labor Law Sect. 241(6) without the City being able to disavow the documentary evidence,

Ken then also successfully defended motions to overturn this decision by the City of New York and plaintiff's employer, who was a third-party defendant, to re-argue on the basis of newly discovered evidence which the Court found was not newly discovered.

Clifford Shapiro then conducted lengthy and complicated negotiations with attorneys for the City of New York and was able to extract a large settlement for the family who are all here without legal documentation. Despite that fact, the law recognizes their right to recover in a personal injury case.

## **New Federal Law** **Eliminates Vicarious Liability for Rental Car Companies**

In our previous newsletter, I suggested that our clients obtain as much Supplemental Underinsured Motorist Coverage as possible when purchasing automobile insurance. This cautious approach was seemingly inconsistent with advice I had previously given a colleague when discussing insurance. More specifically, he was renting a car and I advised him against purchasing any insurance at all even though his credit card did not provide insurance for rental cars.

The reasoning behind this seemingly inconsistent advice was simple. At that time, under New York's Vehicle and Traffic Law §388, a rental company was vicariously liable for any injuries arising out of the negligent use of its vehicle. Practically speaking, if my friend injured someone, the rental company's insurance would compensate the injured party, and he would be purchasing an insurance benefit he effectively received for free.

This all changed, however, when the Bush Administration enacted the Federal Transportation Equity Act of 2005, or Graves Amendment. This Federal law abolished vicarious liability in all lawsuits commenced after August 10, 2005 for companies who lease or rent motor vehicles, meaning the rental car company is no longer responsible to pay accident victims either through their insurance or their own assets.

The plaintiffs' bar responded by arguing that the Graves Amendment is an unconstitutional enactment of Congressional power under the United States Constitution. Unfortunately, this argument has failed. Most recently, in *Graham v. Dunkley*, 50 A.D.3d 55,

852 N.Y.S.2d 169 (2nd Dept. 2008), the Second Judicial Department held that Congress had the authority to enact the Graves Amendment, and the courts of this State are therefore bound by it based on the doctrine of Federal Preemption. Plaintiff

appealed to the Court of Appeals, but on April 29, 2008, the Court dismissed the appeal, and accident victims are left unprotected despite the vast resources and assets of rental car companies such as Hertz and Avis.

The consequences are devastating because now renters may not rely on vicarious liability and must obtain their own insurance to adequately protect themselves, both in the event they are in an accident and injure someone, or they are the victim of an accident caused by a driver of a rented or leased car. Imagine that you and a friend were driving to the beach when you both were catastrophically injured by the driver of a rental car, and the driver had the minimum insurance permitted in New York, \$25,000. Before this law, you would each have had access to insurance provided by Hertz and Avis. Today, you would each be limited to a \$25,000 recovery. This scenario, unfortunately, is the fate being met by many injured persons across the State. Indeed, this could have happened to two of our clients who were grievously injured through the negligence of the driver of a rented vehicle who possessed only \$50,000 of liability insurance for



*Scott Stern*

each occurrence.

Fortunately for our clients, we commenced their lawsuit shortly after being retained, and before the Graves Amendment became law. On May 20, 2008 - after three and a half years of extensive litigation - Phil Russotti settled

the matter for \$2.4 Million. If the new law had applied, they each would have only received \$50,000! The inequity caused by this legislation is stark. Multinational insurance companies like Hertz and Avis which are public corporations with a market capitalization of \$3.4 Billion and \$1.5 Billion respectively, save money and increase profits to their shareholders, while seriously injured accident victims go uncompensated.

The moral of the story is that you must ensure that you are adequately covered if you rent a car and, also, if you have not already done so, increase your supplemental uninsured motorist coverage to the maximum allowed under your policy. This is very inexpensive insurance, and it is the only protection you can have if you are injured by a driver who does not have sufficient coverage to compensate you for your injuries. With the enactment of the Graves Amendment, the list of potentially underinsured drivers has been greatly increased since it includes rented and leased cars.

If you have any questions about this, contact us and we will be happy to discuss it with you.

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WINGATE, RUSSOTTI & SHAPIRO, LLP  
**UPDATE**  
NEWSLETTER

This newsletter is published for our clients and friends. It is not a substitute for legal advice. If you have any further questions or comments, seek advice from professional counsel. We encourage your comments, ideas and questions.

**Our Team**

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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.

**Referrals**

We want you to think of us as your law firm. If you have a legal matter that needs attention, let us know. If we can't handle the matter, we will refer you to a competent firm that can. Please feel free to refer us to your friends and family for their legal needs. We welcome the opportunity to help.

**Practice Areas**

Auto Accidents  
Construction Accidents  
Medical Malpractice  
Negligence  
Personal Injury  
Premises Liability  
Product Liability  
Work-Related Accidents