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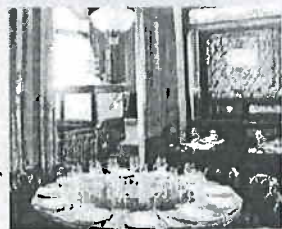
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E-Recording Is Coming To New York

By Benjamin Weinstock



Benjamin Weinstock

My beloved property law professor often joked that nothing new has happened in real estate law for more than 400 years. Well, perhaps 35 years ago he was correct. However, the changes that have transpired during my career are stunning, and another game-changer is about to happen.

In a mere nine months, the way we record real estate transactions will undergo a fundamental change by entering the digital age. Deeds, mortgages, leases and other conveyances will be "on the public record" at the speed of light, rather than the snail's pace at which many recording offices presently dysfunction.

On September 23, 2011 Governor Cuomo signed into law Senate Bill 2373A and Assembly Bill 6870A, adding section 291-1 to the Real Property Law. The law will technically become effective on Saturday, September 22, 2012, although practically it will be first operative on Monday, September 24, 2012, when recording offices open for business. On that date, everyone offering an instrument for recording in a county where the recording officer, usually the County Clerk, has opted to participate in electronic recording will have the opportunity to record a digitized image of the original paper instrument, or an electronically executed instrument, without the need to present the original paper instrument to the clerk.

In support of the legislation, the bill's sponsors noted that virtually all businesses have become "e-businesses." They concluded that local government must respond to the ongoing challenge to deliver more services with fewer resources. Not only will e-recording save money for County Clerks, it will assuredly be more effi-

cient and enhance service. Even the State's Court System has learned to be e-friendly by creating "NYSCEF" to allow electronic filing in some cases.

The sponsoring memos predict a dramatic reduction in the number of paper records that recorders will need to image and store. This will result in a corresponding reduction in personnel costs, postage for mailing hard copies of documents back to the recording party, and fewer errors in the recording process.

The exact details of how the system will work are still being developed, but certain specific mechanisms and concepts are in the statute. The public will still be permitted to record the "old-fashioned way" - the

(Continued on page 27)

SCBA Holiday Party

Photo by Arthur Stulman



The SCBA Holiday Party was once again an enjoyable evening for all. There to enjoy the festivities were, from left, Lynn Poster-Zimmerman, SCBA President Matthew Pachman, SCBA Secretary John Calcagni, Kim Smith, and Past President Sheryl Randazzo.

PRESIDENT'S MESSAGE

Members Continue to Answer the Call

By Matthew E. Pachman



Matthew Pachman

As many of us are aware, the term *pro bono* is short for the Latin "*pro bono publico*," which means "for the public good." During an October 24 address at the National Pro Bono Summit in Washington, American Bar Association president William Robinson III urged attorneys to continue dedicating themselves to pro bono work "because it is what elevates us as a profession." He praised attorneys who "...continue to devote [their] professional skill and [their] personal energy to make a positive difference..."

Since its inception, Suffolk County Bar Association members have demonstrated an enthusiastic commitment to the provision of pro bono services. Many consider it their duty to help to ensure that justice is available to all persons, regardless of income, and they strive to provide quality legal representation for those in our communities who are least able to pay, yet most in need of those services. It is ingrained in our organization's culture.

Although the profession continues to feel the effects of the economic downturn, and some experts believe that when times are tough attorneys are not in a position to give as much of themselves, SCBA members continue to volunteer. For example, we have a very active mortgage foreclosure project (in which more than 175 attorneys volunteered over 4,000 pro bono hours since 2010). In addition, the association is in the process of revamping and revitalizing its pro bono matrimonial clinic, and we have many attorneys who represent veterans free of charge.

It can not be argued that access to justice is one of the bedrocks of our society. Because the law is still a profession as well as a business, lawyers have special obligations to undertake pro bono work. I am proud to say that in Suffolk County, SCBA members continue to answer this call.



BAR EVENTS

Annual Judicial Swearing-In & Robing Ceremony

Monday, Jan. 9, at 9 a.m.
Touro Law Center
District Administrative Judge C. Randall Hinrichs presiding. Reception to follow.

Cohalan Cares for Kids

Thursday, Feb. 2, 6 to 8 p.m.
Bar Center
An evening of wine and cheese and music to benefit the Cohalan Court Children's Center. Wine tasting by Martha Clara Vineyard and music by Gerard Donnelly, Esq. and Rafael Penate, Esq.
Tickets are \$50. Hosted by the SCBA.

Pro Bono Recognition Night

Thursday, March 22, 6 p.m.
Annual dinner to recognize SCBA Pro Bono attorneys.
Location to be announced.

FOCUS ON
MUNICIPAL
LAW
SPECIAL EDITION

MEDICAL MALPRACTICE

Mental Health Providers and Potential Duty to Non-Patients

By Caroline A. Sullivan

Note: This is part one of a two part series.

Mental healthcare providers often treat patients who may be a danger to others or themselves. When a hospitalized or outpatient mentally ill individual attacks a third person, questions often arise as to the potential liability of the healthcare provider for failing to properly treat the patient. Whether the healthcare provider is liable to a third person is a question of duty for the courts to determine. This question depends in large part on the identity of the victim and his or her relationship to the patient and/or health care provider.

In the most recent case of *Fox v. Marshall*, the Appellate Division, Second Department addressed what it called the "often muddled issue" of whether a legally viable medical malpractice cause of action could be asserted against a physician by a third party where no doctor-patient relationship ever existed between the parties.¹

On August 17, 2006, Evan Marshall, a man with a history of substance abuse and psychiatric problems, who had been treated at 10 different drug abuse and mental health facilities within the span of three months, brutally murdered 57 year old Denise Fox, a retired teacher living in Glen Cove, New York.² On the day of the murder, Marshall bought cocaine and went to his mother's house that lived two houses away from Mrs. Fox. After intentionally striking a woman who had been jogging with his car, he forced his way into Mrs. Fox's house and murdered and dismembered her body.³

Marshall was arrested and it was discovered that he was residing and being treated at SLS Residential, Inc. ("SLS"), a substance abuse and mental health facility located in Brewster, New York. On the day of the murder, SLS gave Marshall a "pass" to leave the facility to visit his mother in Glen Cove.⁴ While enrollment in the facility's various programs was "voluntary,"

the agreement also stated that a member was required to give 30 days written notice of an intention to leave the program. There was no language in the agreement governing a procedure in which a member would be prohibited to temporarily leave the facility.⁵

Mrs. Fox's husband commenced an action against various defendants including Evan Marshall, his mother, Jacqueline Marshall, SLS and its related corporate entities, as well as various employees at the facility, including a psychiatrist. The plaintiff alleged several causes of action for negligence and a separate cause of action for medical malpractice against the SLS defendants and the psychiatrist alleging that they "breached their duty to the public, and in particular to Denise Fox, by . . . failing to properly diagnose Evan Marshall."⁶

All of the defendants, except Evan Marshall, moved to dismiss the complaint for failure to state a cause of action. Additionally, the defendant psychiatrist moved to dismiss the complaint as asserted against him, arguing that a physician's duty of care is owed solely to the patient and thus, he did not owe a duty of care to the decedent.⁷ On August 9, 2011, the Appellate Division, Second Department, held that the plaintiff's complaint sufficiently alleged a cause of action for negligence against the SLS defendants and the SLS employees. However, the court held that the absence of any doctor-patient relationship between the decedent and the SLS defendants or the psychiatrist, precluded a cause of action based on medical malpractice.⁸

The court's decision was based on a question of duty. In order for the psychiatrist to be liable to the plaintiff, the court had to find the existence of a duty between the doctor and the decedent's family. In holding that the medical malpractice action was not viable, the court cited the



Caroline A. Sullivan

long recognized general rule that the existence of a doctor-patient relationship is essential for a viable medical malpractice claim.⁹ A doctor's "duty of care is ordinarily only one owed to his or her patient."¹⁰ As there was no physician-patient relationship between the decedent and the defendants, the court refused to extend a duty of care

to the decedent.

The holding in *Fox v. Marshall*, reflects a reluctance of the court to extend a physician's duty to anyone other than his or her patients except in very limited special circumstances. For example, in the 1988 case of *Purdy v. Public Adm'r of County of Westchester*, the Court of Appeals held that where the plaintiff was hit by a car driven by a voluntary resident of a health related facility, the defendant physician did not have a duty to prevent the resident from driving or warn her of the dangers of driving.¹¹ Even though the defendants were aware that the resident had a medical condition that left her susceptible to fainting spells and blackouts, the court stressed that she was a voluntary resident and did not relinquish her general autonomy.¹² The court noted that in the ordinary circumstance, the common law in the State of New York does not impose a duty to control the conduct of third persons to prevent them from causing injury to others.¹³ While the court acknowledged a duty can be imposed where there is a relationship between a defendant and a third person whose actions expose a plaintiff to harm such as would require the defendant to attempt to control the third person's conduct, or a relationship between the defendant and plaintiff requiring the defendant to protect the plaintiff from others,¹⁴ the court held that based on the facts there was no such relationship on which to find the defendants liable. As the defendants did not have the necessary authority or ability to exercise such control over the resident's conduct, there was no duty on the part of the defendant to protect a member of the general public.¹⁵

Likewise, in the Court of Appeals case *McNulty v. City of New York*, the court held that physicians who treated a patient for infectious meningitis owed no duty of care to the patient's friend to advise her that she needed treatment after being in close contact with the patient.¹⁶ In *McNulty*, the plaintiff, a registered nurse, was in close contact with her friend who had infectious meningitis. The patient's treating physician had informed the plaintiff and the patient's family members that she needed to be isolated. Various doctors either did not inform the plaintiff that she needed treatment due to the close contact with her friend, and/or affirmatively told her she did not. The plaintiff became sick with infectious meningitis and sued the hospital and individual doctors alleging they were negligent in failing to provide her with treatment that would have immunized her.¹⁷ The court recognized that the threshold question in this matter was whether the defendants owed a non-patient a duty of care. Noting the court's reluctance to expand a doctor's duty of care to encompass non-patients, the court reiterated that a doctor generally owes a duty of care only to his or her patient. Since the plaintiff in *McNulty* was never a patient of the hospital or defendant doctors, she was not owed a duty of care.¹⁸

The courts have extended a physician's duty to non-patients in limited circumstances. For example, in *Tenuto v. Lederte Laboratories*, the Court of Appeals held that a pediatrician owed his patient's parents a duty of care to warn them of personal health risks arising from a vaccination of the child.¹⁹ In *Tenuto*, the court allowed a medical malpractice action by the father of the minor patient who claimed that he had not been warned of the risk posed to him by a polio vaccination given to his daughter. The court found that there was a duty as a special relationship has been established between the plaintiff parents and the defendant physician because of their status as primary caretakers, as well as because the physician was a pediatrician engaged by the parents to provide medical services to their infant.

As an immediate family member, the plaintiff fell within a determinate and identifiable class of people to whom a duty was owed.²⁰ Likewise, in *Miller v. Rivard*, the Third Department held that where a defendant doctor unsuccessfully performed a vasectomy on the plaintiff's husband causing the plaintiff to become pregnant, the duty extended to her as an immediate family member whom the defendant doctor knew or reasonably should have known was relying on his treatment.²¹

Part two to appear in the next issue, will discuss how the courts have defined a physician's duty to the general public in the mental health context.

Note: Caroline A. Sullivan is an associate at Kaufman Borgeest & Ryan LLP working in the Garden City, Long Island office. She specializes in professional liability defense and can be reached at csullivan@kbrny.com.

1 *Fox v. Marshall*, — N.Y.S.2d —, 2011 WL 3505902, 2011 N.Y. Slip. Op. 06214 (2d Dept 2011).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 The Complaint against Evan Marshall's mother was also dismissed. *Id.*

9 *Id.* Citing, *Bazakos v. Lewis*, 12 NY3d 631, 883 N.Y.S.2d 785 (2009).

10 *Purdy v. Public Adm'r of County of Westchester*, 72 N.Y.2d 1, 530 N.Y.S.2d 313 (1988).

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* The Court explained that under the appropriate circumstances, the traditional master-servant relationship, the relationship between parent and child, or the relationship between a common carrier and its passengers are examples of such special relationships. *Id.*

15 *Id.*

16 100 N.Y.2d 227, 792 N.E.2d 162 (2003).

17 *Id.*

18 *Id.*

19 90 N.Y.2d 606, 687 N.E.2d 1300 (1997).

20 *Id.*

21 180 A.D.2d 331, 585 N.Y.S.2d 523 (3d Dept 2002).

Workshop For Families Recovering From Divorce

Families Recovering From Divorce, a free psycho-educational workshop for families, coordinated by Neil S. Grossman, Ph.D., will be presented at the Half Hollow Hills Library on Saturday, January 21, 2012, 9:30 a.m. – 12:30 p.m. The workshop is co-sponsored by: Suffolk County Psychological Association, Nassau County Psychological Association and Collaborative Dispute Resolutions.

The presentation will:

1. Provide information to help families readjust after a divorce.
2. Discuss the transitions families typically go through after a divorce
3. Indicate how families successfully make these transitions, issues that may interfere with the recovery, and how to overcome these issues.
4. Report what children/adoles-

cents want to tell their parents after a divorce and during different phases of the transition.

This workshop will be family friendly and while parents can attend alone they are encouraged to bring adolescents and children over 6 years old. Part of the morning will include separate activities for parents, adolescents and children. Although the workshop is designed for families, it also may be helpful for one parent, an adult child of divorce or step-parents.

Learn more about the workshop at www.FamiliesRecoveringFromDivorce.org

Register at the website, by emailing info@CDRLI.com or call (631) 421-4530. Please indicate your name, phone # & email, and how many adults, adolescents (13-19 yrs. old) and children (6-12 yrs. old) will be attending. Questions contact DrNeil@mindspring.com