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Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500 **Vol. 74 / No. 3 / December 2010**

Unauthorized Insurance Carriers In New York

BY FRANCIS SCAHILL

Francis Scahill

When a non-domiciliary comes into New York operating a vehicle registered and insured in a foreign state, New York Insurance Law §5107 provides protection for New York residents injured in a motor vehicle accident with a non-domiciliary. New York Insurance Law §5107 provides:

a.) "Every insurer authorized to transact or transacting business in this state, or controlling or controlled by or under common control by or with such an insurer, which sells a policy providing motor vehicle liability insurance coverage or any similar coverage in any state or Canadian province, shall include in each such policy coverage to satisfy the financial security requirements of Article 6 or 8 of the Vehicle & Traffic Law and to provide for the payment of first party benefits pursuant to Subsection (A) of §5103 of this article when a motor vehicle covered by such policy is used or operated in this state.

b.) Every policy described in Subsection (A) hereof shall be construed as having the coverage required by Subsection (A) of §5103 of this article" [1]

This statute, commonly known as the New York "Deemer" Provision unequivocally applies to any policy of insurance underwritten by an authorized insurer in New York. In the matter of *Allstate Insurance Company v. Ramos* the Appellate Division, 1st Department in a unanimous decision, indicated, "Consistent with New York public policy to protect the innocent victims of traffic accidents, personal protection insurance liability coverage underwritten in a sister state by insurers authorized to do business in New York is required to conform to New York minimal financial requirements and, if not, is deemed to do so". [2]

11 NYCRR §65.5 codifies the New York Rule with respect to the requirement that an out of state policy conform to the minimum insurance requirements of New York. [3] The Court of Appeals as early as 1974 in the action of *Rosado v. Everready Insurance Company* indicated, "It is the public policy of New York to protect the innocent victims of traffic accidents". [4]

The Court discussed the legislative intent indicating that "Motorists shall be financially able to respond in damages for their negligent acts, so that innocent victims of motor vehicle accidents may be recompensed for the injury and financial loss inflicted upon them". [5]

What happens to the victim of a traffic accident who is injured in New York by a non-resident operating a vehicle insured by an unauthorized insurance carrier who does not do business in New York? Vehicle & Traffic Law §318 Subsection 5(a) provides "The Commissioner, upon receipt of evidence that a person other than the owner of the vehicle, has operated upon the public highways of this state a motor vehicle not registered in the state, with knowledge of proof of financial security was not in effect with respect to such vehicle shall revoke the driver's license of such person, or if he is a non-resident, the non-resident privileges of such person." [6]

The revocation of driving privileges to the non-resident is little comfort to the New York accident victim who finds the tortfeasor to be without insurance coverage. This article explores the applicability of the New York State Insurance Law and New York State Insurance Regulations and the interplay of New York case law with respect to unauthorized insurers. The following issues are addressed in this article:

1.) A non-resident operating a vehicle insured by an unauthorized insurer and the applicability of the New York State Insurance Law threshold codified in §5102(d).

2.) A non-resident operating a vehicle insured by an unauthorized insurer with limits below the New York Statutory mandate of $25,000 per person/ $50,000 per occurrence.

3.) A non-resident operating a vehicle insured by an unauthorized insurer having limits at or above the mandatory statutory minimum.

4.) A New York resident operating a vehicle insured by an unauthorized insurer having limits below the mandatory statutory minimum.

5.) The relationship of MVAIC to a claim involving an unauthorized insurer.

6.) A New York resident operating a vehicle insured by an unauthorized insurer having limits at or above the mandatory statute.

7.) An action involving a "covered" individual v. a "non-covered" individual.

8.) Choice of law principals where the underlying policy limits are at or greater than the New York statutory minimum.

9.) Subrogation of first-party benefits paid to a covered person v. a non-covered person.

Some 784 companies are listed by the New York Insurance Department as authorized to do business in New York. [7] §65-1.8(c) of the New York State Insurance Regulations also provides "Any other unauthorized insurer may file with the Superintendent of Insurance a statement that its automobile insurance policy sold in any other state or Canadian province will be deemed to satisfy the financial security requirements of Article 6 or 8 of the New York Vehicle & Traffic Law and will be deemed to provide for the payment of first-party benefits pursuant to §5103 of the New York Insurance Law when the insured motor vehicle is used to operated in this State". [8]

What is the applicability of New York Law to a non-resident operating a vehicle in New York insured by an unauthorized insurer. In *American Millennium Insurance Company v. Castro* [9] Judge Louis B. York of Supreme Court, New York County was faced with a fact pattern which involved a New York resident as a passenger in a vehicle owned by a New Jersey corporation, operated by a New Jersey driver with a New Jersey license, registered to a New Jersey corporation. The vehicle was insured by a New Jersey commercial policy issued by American Millennium Insurance Company who was not authorized to do business in New York. The vehicle was subsequently involved in an accident in New York.

For purposes of a coverage analysis the first inquiry by coverage counsel or claims personnel is whether the insurance carrier

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Impact of Two Court Decisions on Parking Violations Bureau

BY DENNIS BOSHNACK

Dennis Boshnack

The New York City Parking Violations Bureau reportedly adjudicated over 3.2 million parking tickets in fiscal year 2010, and about 2.8 million last year. According to two recent Supreme Court, New York County, decisions--Matter of Meyers Van Lines Inc. v City of New York Dept. of Fin. Parking Violations Bur. (Nov 10, 2009, Index No. 106783/2008) and Matter of Dong Sic Ko v City of New York Dept. of Fin. Parking Violations Bur., 28 Misc 3d 603 (May 12, 2010)--PVB violated VTL 242, by making payment a prerequisite for taking an appeal, and 238 (2), by using mailing as process service. The author handled both cases. This article focuses on PVB's nine-month failure to follow Meyers and on PVB's continuing failure to follow Ko, and suggests PVB's failure to follow them lacks merit.

MEYERS

PVB rule 19 Rules of the City of New York (RCNY) 39-12 (b) (3) makes paying fines and penalties or posting a bond a prerequisite for taking an administrative appeal. That rule states:

"No appeal shall be permitted unless the fines and penalties assessed by the Hearing Examiner are paid, or the respondent shall have posted a cash or recognized surety company bond in the full amount of the final determination appealed from."

The Rochester parking violations bureau had a rule virtually identical to 19 RCNY 39-12 (b) (3). Ahl v Howard, 12 Misc 3d 870 (Sup Ct, Monroe County 2006), held the Rochester parking violations bureau rule was unenforceable for being inconsistent with VTL 242. According to the court, VTL 242 (3) provides the procedure to appeal and VTL 242 does not make payment of either a fine or a bond a prerequisite for taking an appeal.

In Meyers the second decretal paragraph of the judgment declares PVB rule 19 RCNY 39-12 (b) (3) is unenforceable:

"ADJUDGED AND DECLARED that Respondent's rule, RCNY 39-12 (b) (3), which requires payment of the fines in full prior to the taking of an appeal, is unenforceable inasmuch as

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Editor's Message

Our QCBA Heritage

By Paul E. Kerson

This past November 13, 2010, I had occasion to be invited to celebrate our Queens County Bar Association (QCBA) Heritage. The event was the solemn ceremony at Flushing Cemetery of the rededication of the headstone of Mary Prince (1846-1925), the widow of our QCBA co-founder, Governor L. Bradford Prince.

Therein lies a story of the intertwining of the history of the QCBA and of the entire North American continent, the United States Government, and our common culture, now sweeping the world.

LeBaron Bradford Prince was born in Flushing, Queens County, NY in 1840 into the region's most prominent and economically important family. His grandfather, the First of Eight William Princes in genetic succession, came to Flushing in 1737 and founded a tree nursery with his brother Robert.

By 1840, the Prince family owned much of the land of Flushing, where they grew fruit trees for replanting in the fast growing nearby cities of Brooklyn and New York (read lower Manhattan). The United Five Borough and County "City of New York" we know today was not formed (or malformed) until 1898.

On his mother's side, L. Bradford Prince was descended from William Bradford, one of the first governors of the original 1620 colony of Plymouth, Mass., founded by one of the very first boatloads of immigrants who specifically came here to have "anchor babies". Their primitive watercraft was called "The Mayflower".

In the 19th century, "Mayflower" ancestry was very respected by the voting population. L. Bradford Prince went to local Flushing schools, and graduated from the Columbia Law School in 1866. He returned to Flushing to practice law. He was active in politics, and was repeatedly elected as Flushing's New York State Assembly Member five different times from 1871 to 1875.

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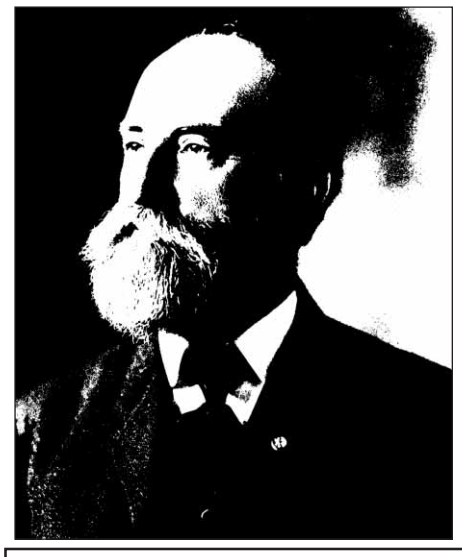

The Docket . . .

being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th St., Jamaica, New York. More information and any changes will be made available to members via written notice and brochures. Questions? Please call (718) 291-4500.

PLEASE NOTE:
The Queens Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

2010 winter CLE Seminar & Event Listing

December 2010

Wednesday, December 1	UM/SUM Update 2010 - Postponed
Wednesday, December 8	Holiday Party at Floral Terrace
Friday, December 24	Christmas Eve, Office Closed
Friday, December 31	New Year's Eve, Office Closed

January 2011

Monday, January 17	Martin Luther King, Jr.'s Birthday, Office Closed
Monday, January 31	Stated Meeting

February 2011

Tuesday, February 8	MHL Article 81/Guardianship Training for the Layman
Tuesday, February 15	Farrell Fritz Seminar PC: Employment Law 2011
Wednesday, February 16	QVLP Foreclosure Training

March 2011

Wednesday, March 2	CPLR Update (Tentative)
Wednesday, March 9	Immigration Seminar
Wednesday, March 23	Basic Criminal Law - Pt 1
Wednesday, March 30	Basic Criminal Law - Pt 2

April 2011

Wednesday, April 6	Equitable Distribution Update
Monday, April 11	Past Presidents, Golden Jubilarians & Judiciary Night
Thursday, April 14	Civil Court Committee Seminar
Friday, April 22	Good Friday, Office Closed
Thursday, April 28	Membership/Young Lawyers/Mentoring Event

May 2011

Thursday, May 5	Annual Dinner & Installation of Officers

CLE Dates to be Announced

Bankruptcy	Elder
Juvenile Justice	Labor
Lawyer's Assistance	Surrogate's Court, Estates & Trusts

New Members

Ala Amoachi	Yakeina Fidelia Dixon	Kelechi Onwuchekwa
Irina Chikerinets	Nicole Holler	Constantina
Min Chul Chang	Angella Shaun Hull	Papageorgiou
Lillian Joy Costa	Janice Sophia Jarrett	Alexandra I. Pinilla
Paul Devlin	Melissa D. Mohan	Milana Sinaniyeva
John M. Dickerson	Carrie L. O'Connell	Kim F. Trigoboff
Monika Duszak	Darya Y. Olshanetskaya	Alissa L. Van Horn

Necrology

Abraham Hecht

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PRESIDENT'S MESSAGE

Greetings!

Like many people, I always feel both hopeful and bittersweet at the holiday season.

On the one hand, the holidays are a chance to celebrate, honor tradition and give back to our community. In that spirit, on December 8th, QCBA joined with the Queens County Women's Bar Association, Brandeis Bar Association, Malcolm B. Allen Black Bar Association, Latino Lawyers Association of Queens County, St. John's Law School Alumni Association and Hellenic Lawyers Association for a very successful **holiday party and annual toy drive** at the Floral Terrace.

On the other hand, a new year always brings change; and this year, that change includes saying **goodbye to many colleagues from the courts.** The economic downturn has not spared the Office of Court Administration and many senior court personnel are soon to retire. In addition, the Honorable Robert Nahman, Surrogate of Queens County, is stepping down as a Surrogate from the bench due to the mandatory age limit. We will miss all of you and wish you the very best as you begin a new and, we hope, exciting chapter in your lives.

Chanwoo Lee

Something that is likely to become a new QCBA tradition is the **member survey**. Prior to becoming President, I had taken an informal survey, asking some of our members how QCBA could better meet their needs. One repeated response was: A basic CLE program on different areas of practice. In response to that request, David Adler, Chair of QCBA's Trust and Estate Committee, organized a basic CLE program (Will and Probate) at the Surrogate's Court on November 17, 2010 — and more than 100 attorneys attended.

Now, in preparation for our January 10th strategic planning meeting, QCBA and the American Bar Association are surveying *all members* about how we can better serve you during this challenging time for legal practice. You've all received a request to fill out the survey by email or mail and I urge you to take a few minutes to share your thoughts so that we can incorporate them into our planning. The survey is confidential and results will be compiled by Joanne O'Reilly of the ABA. If you have questions, please contact Joanne at oreillyj@staff.abanet.org.

At this season and throughout the year, our Association's growth is your growth. Please become an *active* participant and ask your friends to join QCBA!

Finally, on behalf of the entire Queens County Bar Association, I want to wish each of you, your families and your loved ones the joys of this season. May you have a holiday and a new year filled with Peace, Health, Happiness and Success.

Chanwoo Lee, Esq.
President

Bagels and Latkes Too!

BY MARK WELIKY

On the morning of December 1, 2010 the Queens County Bar Association was host to "Breakfast at Brandeis" and a special guest speaker. That speaker was James J. Wrynn the Superintendent of the New York State Insurance Department. He began serving as Superintendent on August 20, 2009. Wrynn previously served as the Executive Director of the New York State Insurance Fund and has 25 years experience as a trial attorney focusing in the areas of life, accident and health insurance, property and casualty insurance, general liability insurance, insurance coverage disputes, professional malpractice, and product liability. Wrynn was a founding partner in the law firm of MacKay Wrynn & Brady, LLP, which specializes in the area of civil litigation and appellate practice, with strong emphasis on insurance law. Superintendent Wrynn is a longtime member of QCBA and previously had served on our Board of Managers.

The Brandeis Association, the fraternal organization of Jewish judges and lawyers, was established in 1969 with a stated purpose not only to encourage friendship and culture among our members, but to foster respect for law and legal institutions, as well as vigorously asserting the interest in justice and fair play in the County of Queens and in the City and State of New York. Newly inducted President of the Brandeis Association, Lawrence M. Litwack and Brandeis Chairperson, Supreme Court Justice Bernice D. Siegal provided breakfast fare including potato latkes and jelly donuts in honor of the first night of Hanukah. There was a great turnout for the event and attendees were provided with a great deal of information on all facets of insurance matters by Superintendent Wrynn.

Revised Attorney Affirmation-Required in Residential Foreclosure Actions

In cases where the previous version of the attorney affirmation has not yet been filed, plaintiff's counsel in residential foreclosure actions involving one-to-four family homes and condominiums are now required to file the revised affirmation as follows:

For new cases, the affirmation must accompany the Request for Judicial Intervention In pending cases, the affirmation must be submitted with either the proposed order of reference or the proposed judgment of foreclosure In cases where a foreclosure judgment has been entered but the property has not yet been sold at auction, ***the affirmation must be submitted to the referee***, and a copy filed with the court, no later than five business days before the scheduled auction. Therefore, foreclosure referees would be advised to ask plaintiff's counsel for a copy of the completed affirmation perhaps at the same time that a copy of the judgment of foreclosure is requested to be sent.

Counsel remain under a continuing obligation to file an amended version of the affirmation if new facts emerge after the initial filing.

In addition to the revised affirmation, counsel may also file a client affidavit. Samples of these forms may be found at http://www.nycourts.gov/attorneys/foreclosures/Affirmation-Foreclosure.pdf

A Christmas Wish

BY JOSEPH F. DEFELICE

Good Morning on Christmas
Oh I wish you were here,
Yes boo I do miss you,
We would have some good cheer

We could open the presents
and share a sweet kiss,
Yes, good morning on Christmas
and a Happy New Year

I'd watch your eyes twinkle,
and smile at you,
yes, on the morning of Christmas,
I'd laugh with you too

I'd stroke your long hair
and be happy with you,
yes, good morning on Christmas,
my sweet little boo

If you or someone you know is having a problem with alcohol, drugs or gambling, we can help.
To learn more, contact QCBA LAC for a confidential conversation.
Confidentiality is privileged and assured under Section 499 of the Judiciary Laws as amended by Chapter 327 of the laws of 1993.
Lawyers Assistance Committee Confidential Helpline 718 307-7828

Video Conferencing

BY KEVIN BEGLEY

The Queens Supreme Court introduced the video conference initiative as a pilot program, in January of 2004. Almost immediately the program was a huge success. It was so well received that the initial users jokingly asked us not to advertise the program for fear it would falter from overuse or the paucity of available equipment. Their fears proved unfounded. As the number of users grew, both the Courts and the Department of Correction increased the resources that were devoted to this project. That process continues today. As the program prospers and the demand for video conferencing increases, we are constantly evaluating the quality (and quantity) of our equipment and seeking novel ways to utilize it.

Currently, the Queens Video Conference program is designed to accommodate attorney-client interviews, probation interviews, service provider interviews and video court appearances. However, we are not limited to these categories. In the hope of expanding the video program and making it the best that it can be, we are committed to scheduling almost any court related video session that the current technology and our equipment will permit, e.g., out of state requests, upstate prisoners, hospital arraignments etc.

Since the inception of our video program, we have witnessed a number of striking advantages from utilizing video technology. Travel time for users has been minimized; fewer inmates are transported to the courthouse; overcrowding in the court pens has lessened; probation interviews are conducted in a more timely manner and, most importantly, there has been an increase in attorney-client contacts.

The Queens Supreme Court's video unit is located on the seventh floor of the Queens Criminal Court building, just down the hall from the law library. The court video equipment operates on secure lines and no recordings are made of any video conference sessions. Presently, the video unit has at its command two courtroom setups, five interview booths and two mobile units. The mobile units afford us the added flexibility of setting up a video court appearance in any courtroom at anytime. The mobile units can also be used for attorney-client interviews, if the need for more interview booths arises.

All requests for video appearances must be made to the video conference unit by 3PM on the day prior to the scheduled session. Requests can be made by filling out a written video request form. These forms are available in room 708 of the courthouse or on-line on the Queens Supreme Court web page. The forms may be submitted in person, by fax or by email. Once the request is submitted, the video conference unit will notify the Department of Correction to place the defendant on the video conference recall sheet for the date requested. Video interviews are limited to 30 minutes, unless additional time is requested on the interview request form. If the defendant is not fluent in English, it is incumbent upon the person requesting the interview to arrange for an interpreter to be present.

For the most part, the greatest success of the video program has been the video

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Penny D. Taylor V. Joseph Rose: A Recent Decision Changing the Law Of Paternity by Estoppel

BY JOSEPH J. SAVINO AND JAMES L. HYER

On May 2, 2007, a decision was rendered by Judge Ellen Gesmer of the Bronx Supreme Court in *Penny D. Taylor v. Joseph Rosa, No. 76026-04 (Bronx Sup. 2007)*, significantly changing the law of Paternity By Estoppel.

This noteworthy Decision came less than a year after the New York State Court of Appeals, holding *In the Matter of Shondel J. v. Mark D., 7 N.Y.3d 320, 853 N.E.2d 610, 820 N.Y.S.2d 199, 2006 N.Y. Slop Op. 05238*, that ruled in favor of Paternity By Estoppel. Citing this legal doctrine, the Court of Appeals upheld the trial court and Appellate Division determination that a man was required to pay child support for a child that was not biologically his. Despite irrefutable DNA evidence that the man was not the biological father of the child, the Court of Appeals reasoned:

> **In this child support proceeding, we hold that a man who has mistakenly represented himself as a child's father may be stopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment. We reach this conclusion based the best interests of the child as set forth by the legislature.**
>
> **[*Shondel J. v. Mark D., et al.*, emphasis added]**

In *Shondel J.*, while the man testified that he had only seen the child four times since the child's birth, the Court of Appeals asserted that the man had held himself out to be the child's father by providing the child with financial support, signing a sworn statement that he was the child's father and authorizing the child's last name to be changed to his own, regularly communicating and visiting with the child, and identifying the child as his own in his life insurance policy. Although the child in *Shondel J.*, was only four or so years of age when the action was filed, the Court of Appeals found that the man's actions caused the child to justifiably rely that he was the father, and it was in the best interests of the child to prevent the father from denying paternity, thereby requiring him to continue to pay child support.

In, *Penny D. Taylor v. Joseph Rosa*, the Bronx Supreme Court struck a blow to the Court of Appeals decision in *Shondel J.*, providing that the rule of Paternity By Estoppel is not to be blindly applied in every case, but only if doing so would truly be in the best interest of the child.

Similar to the man in *Shondel J.*, Rosa took actions to assert himself as the father of the child. In an effort to do the right thing, Rosa married the mother prior to the child's birth, in November of 2002, so that the child would be an issue of the marriage, signed the child's Birth Certificate, provided financial support for the child, and identified the child as his own. However, after only with the child and mother for a few months, the parties separated in July of 2003. Rosa began to pay Child Support, and the parties obtained a Judgment of Divorce in August of 2004 that named the child as an issue of the marriage. After having no contact with the child since the Separation, Rosa filed a Summons and Petition for Visitation in December of 2004 and resumed visitation with the child.

Due to the actions, words and deeds of the mother during the Visitation Proceeding, Rosa questioned the paternity of the child and was compelled to seek a DNA Test. In February of 2005, Rosa obtained results from a DNA Test revealing that he was not the biological father of the child. Although Rosa attempted to admit the DNA Test results at a Visitation Proceeding, he was advised that the Court did not have the Jurisdiction to hear the matter. In February of 2007, the subject child being now over four years of age, Rosa filed an Order to Show Cause with the Bronx Supreme Court requesting that an Order be entered to, in part, modify the parties Judgment of Divorce to remove any reference of the child, as Rosa's child, and removed any and all obligations of Rosa to pay child support.

The memorandum of Law submitted by Rosa cited the New York State Civil Practice Law and Rules (CPLR) §5015 (a)(2), (3), requesting that Rosa be provided relief from the Judgment of Divorce on the grounds of; newly-discovered evidence which if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial

James L. Hyer

Joseph J. Savino

under section 4404, citing *Matter of Kim F. v. Glenn W., 295 AD2d 995, 995, quoting Catherine A. v. David B., 249 AD2d 964, 964, 1v dismissed 92NY2d 919; See Matter of Jennifer LL. v. Michael MM., 289 AD2d 896, 897: Matter of Beaudoin v. Robert A., 199 AD2d 842, 844; Matter of Rosa v. Diaz, 136 AD2d 512, 513-514, and Matter of Jennifer W. v. Steven X., 268 AD2d 800, 801*. In the alternative, the Memorandum argued that the Judgment should be modified due to fraud, misrepresentation, or other misconduct of an adverse party. Citing, *Matter of Oneida County Department of Social Services v. Joseph C., 289 AD2d 1077*, and *735 NYS2d 854, NY Slip OP. 10677, Queal v. Queal, 179 AD2d 1070*. Further, the Memorandum sought to distinguish the matter from *Shondel J.*, offering that there was no significant parent/child relationship, limited contact between Rosa and the child, the child had never identified Rosa as it's father, Rosa had not held the child

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Our QCBA Heritage

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1876 was one of L. Bradford Prince's banner years. He was elected as Flushing's New York State Senator, and he co-founded our QCBA, still vitally active 134 years later as perhaps Queens County's leading civic group of any type, and publisher of the *Queens Bar Bulletin* you are now reading.

On July 19, 1876, then-Senator Prince met with James W. Covert, W.J. Garretson, George Van Siclen and H.W. Eastman at the Garden City Hotel to found the QCBA. (Garden City and indeed, the whole of today's Nassau County were part of Queens County in those days.) These were our first five members, progenitors of the thousands of lawyers whose careers have been graced by QCBA membership since then.

Despite having grown up in Flushing and played football in Kissena Park adjacent to Flushing Cemetery, and been active in the QCBA since 1977, your Editor had no knowledge of L. Bradford Prince until one day in July 1995. My wife Marleen and I had taken our then school-age children on a road trip across the continent to show them our country.

After touring Elvis's house in Memphis and the Alamo in Texas, we drove into Santa Fe, New Mexico one hot July afternoon. Marleen and our daughter Deborah headed for the numerous American Indian jewelry stores lining the Town Square. Our son Ben and I headed for the New Mexico History Museum across the street.

There, lo and behold, as we entered the Museum, was a large oil painting of a smiling bearded 19th century Leader of Society, entitled as follows: "Governor L. Bradford Prince of Flushing, L.I."

I did a double-take. This is a disconnect. How did anyone from "Flushing, L.I." become Governor of New Mexico? I inquired at the Museum. No one could answer.

When I got back to the Holy Land (Queens County, NY), I commenced my research in the Citadel (the Long Island Room of the Queens Borough Public Library on Merrick Boulevard) and discovered that Senator L. Bradford Prince received a federal patronage appointment as Chief Justice of New Mexico Territory from President Rutherford B. Hayes in 1879, soon after founding the QCBA.

(Apparently, founding the QCBA was the leading qualification to serve as Chief Justice of a federal Territory in 1879. Note that the leading legal figure in 1879 in New Mexico was Billy the Kid. It turned out that there were very few laws in New Mexico in 1879, and Chief Justice Prince actually founded and compiled Volume 1 of the New Mexico Law Reports; and wrote Volume 2, which I actually later read in its entirety 117 years later, but we are getting ahead of our story.)

Having served as the Moses of New Mexico, and compiled and wrote its first decisional law, Chief Justice Prince was appointed Governor of New Mexico Territory in 1889, serving with distinction until 1893. Among other things, he founded New Mexico's public schools, the University of New Mexico, and the State's mental hospital. He persuaded the Federal Government to set up a court system to settle disputed land titles in the Territory, a major continuing problem after the Mexican War of 1845. (New Mexico did not become a State until 1912).

I researched Governor Prince's biography, and published it in our pages here back in 1995. I sent it to the New Mexico History Museum. The Director called me, and told me that Governor Prince's grandchildren and great-grandchildren were still alive, and

(left to right) Anthony Wilkins, former Comptroller, Urban League; Gloria Parker, New Mexico Regent, Daughters of the American Revolution; Thelma Brown, St. George's Church; Jim Driscoll, Vice President, Queens Historical Society; and Paul Kerson, Editor, Queens Bar Bulletin, and Counsel, Queens Historical Society.

living in New Mexico, and that they would be pleased to talk to me.

I was not then in the habit of spending time with Mayflower descendents, having spent much of my career to 1995 with Court-appointed clients in the holding pens of the Queens County Criminal Court and Queens County Supreme Court, Criminal Term. I probably would have been more comfortable with Billy the Kid.

However, I am not one to forsake historical duty. So back to New Mexico I went, in the Summer of 1996, to interview and take video and audio tapes of Governor Prince's descendents. I spent time in the New Mexico State Archives reading his correspondence, and in the New Mexico State Law Library reading his opinions as Chief Justice. Some of his letters concerned his real estate holdings in Flushing and Long Island City, NY.

I expanded my 1995 *Queens Bar Bulletin* article into a book, which I published in a limited edition in 1996. Copies are on file in the Long Island Room of the Queens Borough Public Library, the QCBA, the Queens Historical Society, the Columbia University Columbiana Collection, the UCLA Law Library and the Library of the Museum of New Mexico.

The Seventh Bill Prince is today a mining lawyer in Utah. He was so taken with the biography of his Great-grandfather L. Bradford Prince that he came to Flushing, NY to see me in 1997. I took him to his ancestral lands on Prince Street, his adjacent ancestral church, St. George's, and to the Flushing Cemetery to see L. Bradford's tombstone. I also took his cousin Gina of Santa Fe on the same Flushing tour.

Earlier this year, New Mexico Historia Pat Farr read my biography of L. Bradford Prince in the Library of the New Mexico History Museum. She was preparing the biography of "Governor" Mary Prince, L. Bradford's wife. Mary Catharine Beardsley Prince came from a prominent family in Oswego, NY. Governor Prince's first wife, Hattie E. Childs, died of food poisoning on the New Mexico frontier in 1880. He returned to New York to remarry at Trinity Church on Wall Street and Broadway, perhaps America's leading church in the 19th century.

"Governor" Mary led New Mexico society, such as it was. She was the hostess of all the political and commercial gatherings held at the Governor's Palace in Santa Fe. This structure is perhaps the oldest public building in North America. It had been the capital of Old Mexico before the Mexican War. It was the capital building of New Mexico until a new Capitol building was built in the 20th century. It is today the New Mexico History Museum, where your Editor "discovered" Governor Prince "of Flushing, L.I."

So Pat Farr called me up and asked for the Prince Tour of Flushing, NY. For the sake of the True American History, I was happy to oblige. I took her to Prince Street to imagine the fruit orchards that were once there. We toured St. George's Church, where the Second William Prince was a Vestryman in 1798. Finally, we went to the Prince family plots at Flushing Cemetery.

Mary Prince's headstone was missing.

Pat Farr was shocked by this, and vowed to correct it. Sure enough, in October of this year, I received another telephone call from Pat in New Mexico. She had arranged for the New Mexico Chapter of the Daughters of the American Revolution (DAR), to purchase a new headstone for Mary Prince, who died in 1925 in Santa Fe, NM. Her body was taken back to Flushing, NY for burial in Flushing Cemetery, despite the fact that she had spent her adult life organizing New Mexico Society.

Pat told me that on November 13, the Members of the New Mexico DAR chapter would be flying to New York to dedicate Mary Prince's new headstone. Would I attend?

First, I alerted Jim Driscoll, the past President (and now Vice President) of the Queens Historical Society (QHS), my pro bono client of 25 years.

QHS, funded by the City of New York, was founded in 1968, and absorbed the Flushing Historical Society, co-founded much earlier by, you guessed it, L. Bradford Prince. When William Friedmann joined the Queens County Supreme Court in 1985, he turned the pro bono QHS Counsel's job over to me, and I have so served ever since.

So, on November 13, 2010, Jim and I joined 22 members of the New Mexico DAR at an Episcopal service at Flushing Cemetery to honor Mary Prince. Pat Farr spoke, as did Gloria Parker, the State Regent of the New Mexico DAR. There was a graveside service to show the new headstone.

Thelma Brown, a lay minister of St. George's, gave a prayer. St. George's Church on Main Street in Flushing dates from British colonial days, from the time of the First William Prince's tree nursery on adjacent Prince Street. St. George's commenced holding a Chinese service in 1988 and a Spanish service in 1993 in addition to those in the English language. L. Bradford Prince would be especially proud of this. He founded a "Bureau of Immigration" to attract people to New Mexico Territory when he was Governor in 1889-1893.

Your Editor celebrated his Bar Mitzvah at Temple Beth Sholom of Flushing (TBS) in 1964. It was cause for great celebration when TBS member Sidney Leviss was elected to the Queens County Supreme Court in 1971, and TBS member Seymour Boyers joined him in 1974. When your Editor followed Governor Prince to the Columbia Law School in 1972, this was also celebrated at TBS as a most unusual event for the time.

So it was even more of a surprise when Pat Farr asked your Editor to address the New Mexico Chapter of the DAR at the Flushing Cemetery this past November 13, 2010. She asked me to speak about the lawsuit I brought in 2002 on behalf of four Shinnecock Indians concerning adjacent Martin's Field, a public park.

And so I did. My long term client, Mandingo Tshaka, is part African-American and part Shinnecock Indian. He is a member of the historic Macedonia A.M.E. Church of Flushing. We met on Community Board #11 Queens back in 1978.

For decades, Mandingo had been trying to get the NYC Parks Dept. to recognize that Martin's Field was not a public park at all. It was and is the ancient burial ground of his ancestors. In the 19th and early 20th centuries, Flushing Cemetery was reserved for the top of society. African Americans and white people who died in epidemics were buried at Martin's Field, the ancient Shinnecock Indian burial ground across 46th Avenue.

In 1938, in its infinite wisdom "the City of New York" Parks Department paved over Martin's Field with basketball courts and swings and slides. Mandingo remained outraged. In 2002, I sued the NYC Parks Commissioner on behalf of Mandingo and three other Shinnecock and African-American descendants, claiming continuing civil rights violations. The "City" fought the case on Statute of Limitations grounds. It was dismissed. But at the oral argument, Mandingo showed up in full Shinnecock regalia, including a coat of white feathers and a headdress. See *Tshaka v. Benepe,* 2003 WL 21243017 (EDNY 2003).

Law School teaches us that adverse US District Court decisions are appealed to the US Court of Appeals. But Martin's Field was different. We took an appeal to City Council Member John Liu, who arranged for the City Council to direct the recalcitrant Parks Department to tear out the basketball courts and swings and slides and replace them with plantings appropriate for a cemetery. John Liu is today the City's Comptroller, and its first city-wide elected Asian-American official.

In 2006, Borough President Helen Marshall held a rededication ceremony at Martin's Field. The Shinnecock Indians' Spiritual Leader came in full regalia with incense, smoke, music and traditional dance, to celebrate the memorial plaque and diorama arranged by Council Member Liu. Martin's Field is today known as "The Olde Towne of Flushing Burial Ground" and is so marked. See www.bridgeandtunnelclub.com/bigmap/queens/flushing/martins-field/index.htm.

So on November 13, 2010, at the gravesites of Governor Bradford and Mary Prince, this 1964 TBS Bar Mitzvah student told this story to the New Mexico chapter of the DAR. I said our country has come a long way. They were most appreciative. You can't make this stuff up. But I can safely say that Bradford and Mary Prince would have been as pleased as they could be - they, who with generosity of spirit, built a Bureau of Immigration to populate New Mexico with all comers, who built its Society, Government, schools, courts, University and mental hospital.

So thank you, Bradford and Mary Prince. We of the year 2010 actually can't thank you enough. Beijing is for the Chinese. Paris is for the French. London is for the British. But Queens County, New York and Santa Fe, New Mexico, well we are for everyone from everywhere, as that is how you willed it to be so long ago.

Changing the Law Of Paternity by Estoppel

Continued From Page 5

out to be his own or introduced the child to his family. In conclusion, the Memorandum offered that applying Paternity By Estoppel would act against the best interests of the child, and would only serve to hinder any possibility of the true father forming a relationship with the child. Further supporting Rosa's position, the Memorandum asked the Supreme Court to consider the language of *Shondel J.*, where the Court of Appeals itself indicated that Paternity By Estoppel should not routinely be applied, "Situations may vary, and the question whether extinguishing the relationship and its attendant circumstances will disserve the child is one for the Family Court based on the facts of each case."

The Decision held that the DNA Test constituted new evidence that warranted modifying the Judgment of Divorce to delete provisions relating to the child, under CPLR 5015 § (a)(2). Citing, *Barbara v. Michael I., 24 AD3d 451 [2d Dept. 2005]*, the Court found that the DNA test provided the clear and convincing evidence necessary to overcome the presumption that the child, born in wedlock, was a child of Rosa and that the Judgment should be modified pursuant to CPLR 5015 § (1)(2). Addressing *Shondel J.*, the Court noted that the Plaintiff had not made a showing that it would be in the child's best interests for Rosa to be stopped from denying paternity and noted, "Moreover in light of the plaintiff's failure to appear, the Court accepts as true defendant's claim that his ties with the child are not significant, and that the child would not be harmed by his denial of paternity." Judge Gesmer then ordered that: 1) the Judgment of Divorce of the parties be modified to provide that there are no children of the marriage, to delete the provisions relating to the child, and to delete any provision obligating the Defendant to pay child support arrears for the child which accrued after January 17, 2007, the date of service of the Order to Show Cause.

The Decision in *Penny D. Taylor v. Joseph Rosa* represents a landmark case in the area of the law of paternity, as the Supreme Court has noted, for the first time since the Court of Appeals Decision in *Shondel J.*, that Paternity By Estoppel should not be applied in all cases involving a dispute over paternity where the alleged father has had contacts with the child.

Attorneys Joseph J. Savino, Esq. and James L. Hyer, Esq. represented Joseph Rosa, the Movant in Penny D. Taylor v. Joseph Rosa, and are employed by the law firm Faga Savino, LLP, where Joseph J. Savino is a partner and James L. Hyers is of counsel.

Queens County Bar Association

90-35 148th Street,

Jamaica, New York 11435

Tel 718-291-4500 • Fax 718-657-1789

NOTICE OF NOMINATING COMMITTEE MEETINGS:

Please take notice that those members who wish to be considered for nomination as Officers or Members of the Board of Managers of the Queens County Bar Association should submit written requests and resumes highlighting your activities in the Association prior to January 19, 2011.

Tentative meetings pursuant to the by-laws have been scheduled by the Nominating Committee on January 26, 2011 and finally on February 2, 2011. Said meetings are scheduled for 5:00 P.M. in the Board of Managers Room - in the Headquarters Building, 90-35 148th Street, Jamaica, N.Y.

At those meetings you may present the names of the persons whom you desire to have considered by the Nominating Committee for nomination to offices to be filled at the Annual Meeting. Hearings will be held at those times for that purpose pursuant to the by-laws.

Joseph Carola, III
Secretary

Please submit your requests in writing to the attention of the:

Nominating Committee
Queens County Bar Association
90-35 148 Street
Jamaica, N.Y. 11435

The Annual Election of Officers and Managers will be held on March 4, 2011. The newly elected Officers and Managers will assume their duties on June 1, 2011.

Dated: November 15, 2010
Jamaica, NY

Marital Quiz

Question #1 - Does the Family Court Act Provide for an award of durational maintenance?
Your answer -

Question #2 - If the Supreme Court does not grant a divorce, may it award durational maintenance?
Your answer -

Question #3 - The Appellate Division Second Department has adopted a liberal policy with respect to vacating defaults in matrimonial actions. Is it still incumbent upon a defendant to demonstrate a reasonable excuse and the existence of a meritorious defense?
Your answer -

Question #4 - May the Family Court modify a maintenance provision in a separation agreement, if the parties were never divorced?
Your answer -

George J. Nashak Jr.

Question #5 - Would your answer to Question 4 change, if the separation agreement provided that: "while this agreement will resolve these issues for the present time, the Wife shall not be foreclosed from seeking additional maintenance in negotiations with the Husband, or failing such negotiations, then filing in a court of appropriate jurisdiction for a modification of the present provisions concerning the payment of maintenance. Any application by the Wife shall be treated as a 'de novo' application to the court, since it is not possible to set future maintenance at this time because it is impossible to forecast the Wife's needs or the Husband's income/earning capacity?"
Your answer -

Question #6 - The parties' stipulation of settlement was incorporated, but did not merge the parties' judgment of divorce. May the court entertain a motion to modify the stipulation of settlement?
Your answer -

Question #7 -May the court suspend child support payments where the noncustodial parent's access to the child has been unjustifiably frustrated by the custodial parent?
Your answer -

Question #8 - If a judgment of divorce and stipulation of settlement are silent as to sharing the cost of private secondary education, should the court treat the application for the payer spouse to share said costs as a modification or a de nova determination?
Your answer -

Question #9 - Is the presumption that $25.00 per month child upport is the minimum amount to be ordered by court under §413(1)(g) of the New York Family Court Act irrebuttable?
Your answer -

Question #10 - In a separation agreement the partied elected to apply the CSSA guidelines to their total combined incomes. Are they required to articulate the reasons to justify their agreement in this regard?
Your answer -

*Editor's Note: Mr. Nashak is a Past President of our Association and Vice-Chair of our Family Law Committee. He is a partner in the firm of Ramo Nashak & Brown.

ANSWERS APPEAR ON PAGE 19

Impact of Two Court Decisions on Parking Violations Bureau

Continued From Page 1

it exceeds the requirements of VTL 242(5)."

PVB took an appeal from Meyers, with a notice of appeal dated November 19, 2009. On August 27, 2010, PVB withdrew its appeal, and on or about that date ceased enforcing 19 RCNY 39-12 (b) (3).

CPLR 5519 (a) (1) imposes an automatic enforcement stay during a government appeal, but that stay will not apply to declaratory provisions of a judgment, which do not direct performance of an act in the future but rather are self-executing and effective immediately upon promulgation of the judgment; however, that lack of application is not free from doubt in the First Department.

Ko

According to Ko, PVB mailed Mr. Ko a parking summons. The summons, by "Drive Off" and similar language, indicates his vehicle drove off before the summons was served. Mr. Ko moved to dismiss the summons for lack of personal jurisdiction. He denied he had been properly served under VTL 238 (2), in that the summons had neither been handed to him, nor placed on his car.

Administrative Law Judge Linda Hirsch denied the motion upon a hearing, found him guilty of the charged violation, and fined him $115, which he later paid. The PVB appeals board affirmed ALJ Hirsch's decision. Mr. Ko brought an Article 78 proceeding, seeking to annul the appeals board decision and have the summons dismissed for lack of personal jurisdiction.

After Mr. Ko would not accept PVB's offer to settle his Article 78 by dismissing the summons and refunding the fine, Chief ALJ Mary Gotsopoulis remanded the matter of Mr. Ko's summons to ALJ Diane Pine, who dismissed the summons, stating the dismissal was "in the interests of justice in connection with Article 78 settlement negotiations." Then, alleging PVB had dismissed the summons and begun the process for reimbursement of the $115 fine to Mr. Ko, PVB moved to dismiss Mr. Ko's Article 78 proceeding as moot.

Eventually, after denying that motion, Supreme Court vacated PVB's dismissal of Mr. Ko's summons, concluding the dismissal exceeded PVB's statutory authority, was in violation of lawful procedure, was arbitrary and capricious, and had no factual basis. Among its findings concerning statutory authority, the court stated (at 607) the VTL did not "empower ALJ [Gotsopoulis] to unilaterally remand a matter to ALJ Pine so that the PVB could dismiss the violation and render this Article 78 proceeding moot."

Supreme Court granted Mr. Ko's petition, dismissed the summons, and vacated the fine, holding PVB lacked personal jurisdiction over Mr. Ko. Ko, at 608-609, states:

"[N]o provision is made in the Vehicle and Traffic Law for service of a summons by mail. Moreover, no exception is included in VTL §238(2) for vehicle operators who 'drive off' before a summons may be completed and properly served. The statute clearly provides that service may be completed only by one of two means—by personal delivery or by affixing the summons to the car."

The Ko decision was not appealed.

PVB

PVB has not failed to comply with Meyers or Ko vis-a-vis the discrete summonses involved in those cases. However, PVB did not apply Meyers and is not applying Ko to similar cases not having litigation. Until about Aug. 27, 2010, despite Ahl and Meyers, PVB continued to enforce its pay-to-appeal rule, namely, 19 RCNY 39-12 (b) (3), by denying appeals to people convicted of parking or red-light camera violations who do not comply with that rule.

PVB does not openly reject Ko; however, on June 22, 2010, PVB's Chief ALJ e-mailed PVB's ALJs a memorandum to her from the Legal Affairs Division of the NYC Department of Finance. That one-page memorandum, which cites no authority, states:

"While the Ko decision may be relied upon by other judges, it is not binding precedent unless and until an Appellate Court rules similarly."

"[Where a summons contains 'Drive Off' or similar language, dismissal for lack of personal service may be appropriate] if the ALJ is persuaded by substantial evidence that the motorist was not evading service. If, on the other hand, the ALJ is persuaded that the motorist left the scene in order to avoid service of a summons, the decision should reflect that finding and the basis for it. In such a case, it may be appropriate for the ALJ to make a finding of proper service or that the motorist is estopped from challenging the propriety of service.

"In the Ko case, no such record was developed regarding the circumstances of the drive off."

The memorandum is saying that driving off to evade process may estop the motorist from challenging the lack of process service. PVB does not mail park-

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Impact of Two Court Decisions on Parking Violations Bureau

Continued From Page 8

ing summonses. PVB mails statutory prejudgment notices, which are not parking summonses, may be mailed only after service of process has been completed and the time for responding to the summons has expired, and do not purport to be summonses. The Ko decision, before rejecting mailing as process service, stated PVB mailed Mr. Ko a parking summons; however, no summons was mailed. In the Ko case PVB claimed notices of the summons were mailed. The Ko record contained no evidence or claim an original or copy of the summons was mailed.

Even assuming PVB mails the motorist a parking summons, the estoppel referred to in the memorandum will not support refusing to follow Ko (service by mail not permitted even in drive off cases), not even if an ALJ finds the motorist drove off to evade process. There can be no such estoppel without fraud or misrepresentation by defendant. Since under the applicable statute process service may be accomplished only by personal delivery or by affixing the summons to the vehicle, driving off cannot mislead a process server into reasonably believing the statute authorizes process service by mailing. Therefore, driving off to evade process will not estop a motorist from denying mailing is process service. "[I]t is the instinct of our jurisprudence to extend court principles to administrative or quasi-judicial hearings insofar as they may be adapted to such procedures."

Meyers and Ko serve to collaterally estop PVB, as well as those in privity with PVB, from re-litigating the issues of fact or law they necessarily decided against PVB, even if the party invoking collateral estoppel were not a party in Meyers or Ko, the tribunals or causes of action were different, or PVB's appeal in Meyers were pending.

With Meyers and Ko involving governmental operations, "on the granting of any relief to the petitioners comparable relief would adequately flow to others similarly situated under principles of stare decisis." Judges have an institutional obligation to respect stare decisis and abide by that doctrine. Stare decisis contributes practicality to the decision-making process, stability to the law, and legitimacy to decisions. It teaches that a point of law decided by a court will, in subsequent cases presenting the same legal problem, generally be followed in the same court or in other courts of equal or lower rank.

PVB issues typically evade court review. Most PVB respondents, who appear pro se, are unaware of those issues, and the small sums in controversy in their individual cases (though huge cumulatively) make suing PVB unaffordable or impractical for them. For those who do take PVB to court, PVB may be able to get their cases dismissed as moot by dismissing tickets and refunding fines and penalties after the onset of litigation, without even paying court costs or disbursements though court fees alone may far exceed the amount of the fines and penalties refunded by PVB. When motorists do win Supreme Court decisions against PVB, PVB will comply with those decisions, but, as with Meyers and Ko, may refuse to apply those decisions to similar cases not having litigation.

Dennis Boshnack is an attorney in New York. He is the attorney of record for the petitioners in the Meyers and Ko Article 78 proceedings discussed in this article, and is a former PVB Administrative Law Judge. The views in this article are his own. This article updates and expands his article published in the New York Law Journal on September 1, 2010. See Mayor's Management Report Fiscal 2010, at 182 (September 2010). VTL 242 (3) states: "A party aggrieved by the final determination of a Hearing Examiner may obtain a review thereof by serving, either personally in writing or by certified or registered mail, return receipt requested, upon the bureau, within thirty days of entry of such final determination, a notice of appeal setting forth the reasons why the final determination should be reversed or modified." VTL 242 (5) states: "The service of a notice of appeal shall not stay the enforcement of a judgment upon the determination appealed from unless the appellant shall have posted a bond in the amount of such determination, at the time of, or before the service of such notice of appeal unless the enforcement of such judgment shall have been stayed by the appeals board." VTL 242, which makes 19 RCNY 39-12 (b) (3) unenforceable (Meyers; see Ahl v Howard, 12 Misc 3d 870, supra), applies to parking violations and red-light camera violations alike (VTL 235 [1], 242, 1111-a [h]; NYC Admin Code 19-210[f]). See All Am. Crane Serv. Inc. v Omran, M-3228, Index No. 108032/08, filed on June 26, 2008 (1st Dept 2008) (discussed in Siegel, McKinney's Cons Laws of NY, Book 7B, CPLR C5519:2, 2010 Pocket Part, at 177-178); Matter of Pokoik v Department of Health Servs. of County of Suffolk, 220 AD2d 13 (2d Dept 1996); Matter of Pickerell v Town of Huntington, 219 AD2d 24 (2d Dept 1996); Schwartz v New York City Housing Auth., 219 AD2d 47 (2d Dept 1996); State of New York v Town of Haverstraw, 219 AD2d 64 (2d Dept 1996); Ocasio v City of New York, 13 Misc 3d 161 (Sup Ct, Bx County 2006); McLaughlin v Hernandez, 4 Misc 3d 964, 969 n.3 (Sup Ct, NY County 2004). VTL 238 (2) states: "A notice of violation shall be served personally upon the operator of a motor vehicle who is present at the time of service . . . [or] if the operator is not present, by affixing such notice to said vehicle in a conspicuous place." Ko at 607. Mar 26, 2009, Georges affirmation in support of cross-motion to dismiss petition, at ¶¶ 25, 27, 30. Does a tribunal prejudice the administration of justice by dismissing a parking violation to moot an Article 78 proceeding against the tribunal? VTL 242, which makes 19 RCNY 39-12 (b) (3) unenforceable (Meyers; see Ahl v Howard, 12 Misc 3d 870, supra), applies to parking violations and red-light camera violations alike (VTL 235 [1], 242, 1111-a [h]; NYC Admin Code 19-210[f]). While no longer enforcing its pay-to-appeal rule, PVB continues to inform the public, "You must pay the full amount imposed at the hearing before you will be allowed to appeal the hearing decision" (NYC Dept of Finance, Application for Appeal, at 2, available at http://www.nyc.gov/html/dof/html/pdf/adjudication/pvo-0100.pdf [accessed Oct. 12, 2010]; see 19 RCNY 39-12 (b) (3); NYC Dept of Finance, Appealing a Hearing Decision, http://www.nyc.gov/html/dof/html/parking/park_tickets_appeal.shtml [accessed Oct. 12, 2010]; id., Appeal a Red Light Camera Notice of Liability Hearing, http://www.nyc.gov/html/dof/html/parking/park_red_light_appeal.shtml [accessed Oct. 12, 2010]; id., Red Light Violation Monitoring Program - Notice of Appeal, at 2, available at http://www.nyc.gov/html/dof/html/pdf/redappel.pdf [accessed Oct. 12, 2010]). Memorandum from Beth Goldman, General Counsel, and Ellen Young, Director, Parking Division, to Chief ALJ Mary Gotsopoulis, dated June 22, 2010, re: Article 78 Decision by Justice Alice Schlesinger-Ko Case. While the memorandum may be suggesting otherwise, "the burden of proving jurisdiction is upon the party asserting it" (Green Point Sav. Bank v. Taylor, 92 AD2d 910, 910 [2d Dept 1983]). PVB mails the front of the summons in response to a request for a summons copy. Ko at 609. For example, parking summons may be issued by only designated officers (VTL 237 [9]), must be sworn to or affirmed (VTL 237 [9]), and must identify the plate designation, plate type, registration expiration date, make or model, and body type of the vehicle, or indicate that that information was not available (Matter of Ryder Truck Rental v Parking Violations Bur. of Transp. Admin. of City of N.Y., 62 NY2d 667 [1984]; Matter of Wheels, Inc. v Parking Violations Bur. of Dept. of Transp. of City of N.Y., 80 NY2d 1014 [1992]; VTL 238 [2], [2-a]). The statutory notices PVB mails (see VTL 235 [2] [a] [2], 241 [2]) do not meet any of those summons requirements, except as to plate designation and plate type. Ko at 609; see VTL 235 (2) (a) (2), 241 (2). Ko at 604, 608. Ko, 2009 NYSlip Op 32804(U), n.2 & accompanying text; Verified Answer dated January 25, 2010, at ¶¶ 81, 92, 121. See Feinstein v. Bergner, 48 NY2d 234 (1979); Spath v Zack, 36 AD3d 410 (1st Dept 2007). Ko at 28 Misc 3d 608-609; see VTL 235 (1), (2) (first paragraph), (2) (a) (1), 238 (2). Cf. Feinstein 48 NY2d 234, supra; Spath v Zack, 36 AD3d 410, supra; Guido v Kovachev, 125 AD2d 221 (1st Dept 1986) (process service falling short of statutory requirements, notwithstanding that defendant knowingly avoided process while having duty to submit to process service). Matter of Jason B. v Novello, 12 NY3d 107, 113 (2009). See Gramatan Home Invs. Corp. v. Lopez, 46 NY2d 481, 486 (1979). See id. at 485. See Kaufman v. Lilly & Co., 65 NY2d 449, 455-456 (1985). See Gilberg v. Barbieri, 53 NY2d 285, 291 (1981). See Parker v. Blauvelt Fire Co., 93 N.Y.2d 343 (1999). See Samhammer v. Home Mut Ins., 120 AD2d 59, 64 (3d Dept 1986); Siegel, NY Prac § 444, at 752 (4th Ed). But compare Northern Oil Co. v Socony Mobile Oil Co., 368 F.2d 384, 387-388 (2d Cir 1966) (denying collateral-estoppel effect to order still under appeal, where execution of that order was automatically stayed by statute pending the time for filing and after filing the notice of appeal). Matter of Rivera v Trimarco, 36 NY 2d 747 (1975). But compare Matter of Jewish Home & Infirmary of Rochester v Commissioner of N.Y. State Dept. of Health, 84 NY2d 252, 270 (1994) (dissenting opinion) (CPLR 5519 [a] [1] stay). People v Damiano, 87 NY2d 477, 489 (1996) (concurring opinion). Id. at 488-489. Id. at 488. State v Mellenberger, 95 P.2d 709, 719-720 (Oregon 1939). Matter of Silverstein v Appeals Bd. of Parking Violations Bur.,100 AD2d 778 (1st Dept 1984). But see Matter of Walker v New York City, N.Y. L.J., Sep 24, 1996, at 22, col 4 (Sup Ct, NY County 1996), affirmed, 262 AD2d 151 (1st Dept 1999); Matter of Heisler v Atlas, 69 Misc 2d 911, 912 (Sup Ct, NY County1972). See generally Matter of Melinda D. [Claudia F.], 31 AD3d 24 (2d Dept 2006) (exception to mootness doctrine).

PHOTO CORNER

Stated Meeting: Recent Significant Decisions from the Appellate Courts - October 26,2010

Alan Rothbard, Jim Kehoe, Rich Lazarus and Dom Addabbo

Arthur Terranova, Hon. A. Gail Prudenti and Hon. Fred Santucci

Chanwoo Lee, President of QCBA, giving award to Hon. Fred Santucci for hisoutstanding service to the law.

Dom Chiariello, Ted Gorycki and Bernie Ferrera

George Nashak, Chanwoo Lee and Hugh Mo

Hon. Bernice Siegal, Chanwoo Lee, Hon. A. Gail Prudenti, Hon. FredSantucci, Donna Furey, Todd Greenberg and Spiros Tsimbinos

Hon. Martin Ritholtz, Ed Rosenthal and Perry Sklarin

Hon. Randall T. Eng, Assoc. Justice of the Appellate Division, 2ndDept.

Hon. Seymour Boyers, Hon. Norman George and Hon. Harriet George

Photos by Walter Karling

PHOTO CORNER

Stated Meeting: Recent Significant Decisions from the Appellate Courts - October 26,2010

Hon. Sheri S. Roman, Assoc. Justice of the Appellate Division, 2ndDept.

Ira Futterman, Hon. Bernice Siegal, Bernie Vishnick and Hon. AllenBeldock

Maria Alaimo, Jonathan Silver and Donna Furey

Melissa Studin, Jill Stone, Hon. Bernice Siegal and Chanwoo Lee

Paul Shechtman speaking about criminal cases in the NY Court of Appeals

Remarks from Hon. Fred Santucci after receipt of award.

Andrew Fine discussing recent developments in the US Supreme Court

Spiros Tsimbinos, Moderator, discussing other pertinent issues in theappellate courts.

Wallace Leinheardt, Hon. Seymour Boyers and Hon. Morton Povman

Photos by Walter Karling

Court Notes

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

Allan E. Binder, admitted as Allan Eli Binder (May 4, 2010)

On January 29, 2009, the respondent entered a plea of guilty in County Court, Suffolk County, to receiving a bribe in the third degree, a class C felony. He thereafter failed to notify the Appellate Division of his conviction, as required by Judiciary Law §90(4)(c). As a result of his felony conviction, the respondent was automatically disbarred, effective January 29, 2009.

Neda B. Imasuen, admitted as Neda Bernards Imasuen (May 11, 2010)

The respondent was disbarred, on default, upon a finding that he was guilty of a pattern and practice of failing to cooperate with the Grievance Committee and neglect of a legal matter entrusted to him.

Michael J. Kaper, admitted as Michael Jonathan Kaper, a suspended attorney (May 11, 2010)

The respondent was disbarred, on default, upon a finding that he was guilty of, *inter alia*, failing to re-register as an attorney with the Office of Court Administration (OCA) for the biennial periods 1994 through 2008; failing to cooperate with the Grievance Committee; neglecting legal matters entrusted to him; misrepresenting the status of a matter to a client; handling a legal matter without adequate preparation; and failing to cooperate with the Nassau County Fee Arbitration Committee in seeking to arbitrate fees with three former clients.

Alain D. Kodsi, admitted as Alain Damien Kodsi (May 11, 2010)

On or about July 19, 2006, the respondent pleaded guilty in the United States District Court, Southern District of New York, to insider trading, a Federal felony. He thereafter failed to report his conviction to the Appellate Division, as required by Judiciary Law §90(4)(c). Inasmuch as the Federal felony of insider trading would constitute a class E felony under New York's General Business Law, the respondent was automatically disbarred in New York as of the date of his Federal sentencing, November 14, 2006.

Brian Matthew Rosicky, a suspended attorney (May 11, 2010)

The respondent was disbarred, on default, upon a finding that he was guilty of failing to cooperate with the Grievance Committee; failing to re-register as an attorney with OCA for the biennial registration periods 2007-2008 and 2009-2010; misappropriating funds; failing to deliver funds; failing to render a proper accounting of funds; and failing to produce escrow records he was required to maintain.

Thomas Edward Wynne, a suspended attorney (May 11, 2010)

The respondent was disbarred, on default, upon a finding that he was guilty of a pervasive pattern of failing to cooperate with the Grievance Committee's investigation of multiple complaints involving dishonored checks and failing to release funds held in connection with a real estate action and a foreclosure action.

Nat J. Azznara, admitted as Nat John Azznara (May 18, 2010)

On January 14, 2010, the respondent was sentenced, upon his plea of guilty to grand larceny in the second degree and grand larceny in the third degree, in the County Court, Westchester County. As a result of his felony conviction, the respondent was automatically disbarred effective January 14, 2010.

Diana J. Szochet

Cesar G. Cardona, admitted as Cesar G. Cardona, Jr., a suspended attorney (May 18, 2010)

The respondent tendered a resignation from the practice of law wherein he acknowledged that he could not successfully defend himself on the merits against pending charges alleging conversion of funds entrusted to him as a fiduciary and failure to maintain required bookkeeping records.

Russell G. Cheek, a suspended attorney (June 8, 2010)

On May 15, 2008, the Supreme Court of New Jersey entered an order disbarring the respondent on consent. Upon the Grievance Committee's application of reciprocal discipline, pursuant to 22 NYCRR §691.3, the respondent was disbarred in New York.

Maureen Elizabeth Delgado, a suspended attorney (June 8, 2010)

The respondent was disbarred, on default, upon a finding that she was guilty of failing to re-register as an attorney with the Office of Court Administration (OCA) from 2001 through 2006, failing to cooperate with the Grievance Committee in its investigation of the foregoing and failing to schedule a court-ordered examination to determine if she was incapacitated due to medical illness.

Raghubir K. Gupta (June 8, 2010)

On April 7, 2008, the respondent was found guilty, after a jury trial in the United States District Court for the Southern District of New York, of immigration fraud. The Appellate Division found that the Federal felony of immigration fraud was essentially similar to the New York felony of offering a false instrument for filing in the first degree. Accordingly, the respondent was automatically disbarred pursuant to Judiciary Law §90(4)(a).

William L. Netusil, a suspended attorney (June 8, 2010)

The respondent was disbarred, on default, upon a finding that he was guilty of engaging in conduct prejudicial to the administration of justice, which adversely reflects on his fitness as a lawyer, by failing to comply with the Grievance Committee's legitimate demands in connection with the investigation of four complaints of professional misconduct alleging, *inter alia*, that respondent accepted retainers in domestic relations matters and thereafter had no further contact with the complainants.

Eric G. Oster, a suspended attorney (June 15, 2010)

The respondent was disbarred, on default, upon a finding that he was guilty of failing to cooperate with the Grievance Committee and failing to re-register as an attorney with the New York State Office of Court Administration (OCA) for four consecutive registration periods.

Ethan E. Ellner, a suspended attorney (June 22, 2010)

On December 1, 2009, the respondent was convicted, upon his plea of guilty in the County Court, Suffolk County, of three counts of grand larceny in the second degree, a class C felony, and one count of scheme to defraud in the first degree, a class E felony. By virtue of his felony conviction, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4)(a) as of December 1, 2009.

Neil W. Silberblatt, admitted as Neil William Silverblatt (June 22, 2010)

On August 21, 2009, the respondent was convicted, upon his plea of guilty in the Supreme Court, Westchester County, of grand larceny in the third degree, a class D felony, and filing a false personal tax return, a class E. felony. By virtue of his felony conviction, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4)(a) as of August 21, 2009.

Marc A. Zirogiannis, admitted as Marc Allyn Zirogiannis (June 22, 2010)

On November 24, 2009, the respondent was convicted, upon his plea of guilty in the Supreme County, New York County, to one count of grand larceny in the fourth degree, a class E felony, and scheme to defraud in the first degree, also a class E felony. By virtue of his felony conviction, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4)(a) as of November 24, 2009.

Stephen T. Mitchell, admitted as Stephen Theodore Mitchell (July 6, 2010)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations that he, *inter alia*, failed to satisfy lawful monetary judgments against him; committed escrow violations; and engaged in other conduct prejudicial to the administration of justice, which adversely reflects on his fitness to practice law.

Robert A. Rudolph, admitted as Robert Alvarez Rudolph (July 6, 2010)

By order of the Supreme Court of Florida dated March 6, 2008, the respondent was disbarred, upon his default, from the practice of law in that State. Upon the Grievance Committee's application for reciprocal discipline pursuant to 22 NYCRR 691.3, and following a "full hearing and review of the documentary evidence submitted by the Grievance Committee," the respondent was disbarred in New York.

Kathleen Anne Scanlon (July 6, 2010)

On October 8, 2009, the respondent was convicted, upon a plea of guilty in the Supreme Court, New York County, of scheme to defraud in the first degree, a class E felony. By virtue of her felony conviction, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4)(a) as of October 8, 2009.

Lisa L. Cox, a suspended attorney (July 13, 2010)

Following a disciplinary hearing, the respondent was found guilty of engaging in conduct adversely reflecting on her fitness to practice law by converting funds and/or failing to safeguard funds entrusted to her as a fiduciary; engaging in conduct adversely reflecting on her fitness to practice law by converting funds and/or capturing a legal fee from funds entrusted to her as a fiduciary; failing to render an appropriate accounting of funds held in escrow; engaging in conduct prejudicial to the administration of justice and/or adversely reflecting on her fitness as a lawyer by failing to cooperate with the lawful demands of the Grievance Committee; engaging in conduct involving dishonesty, deceit, fraud or misrepresentation by misrepresenting to the Grievance Committee that she did not receive a legal fee for her representation in a legal matter; engaging in an impermissible conflict of interest by acting as a real estate broker and lawyer in the same real estate transaction; engaging in conduct that adversely reflects on her fitness as a lawyer by failing to communicate with a client; and engaging in conduct prejudicial to the administration of justice by failing to timely re-register as an attorney with OCA. In determining an appropriate measure of discipline to impose, the Appellate Division noted the respondent's "apparent disregard for deadlines and the disciplinary process…"

Ira Samuel Schwartz, a suspended attorney (July 13, 2010)

The respondent was disbarred, on default, upon a finding that he was guilty of failing to cooperate with the Grievance Committee and failing to re-register as an attorney with OCA.

Linda M. Dietriech, admitted as Linda Marie Dietrich (August 3, 2010)

The respondent tendered a resignation wherein she acknowledged that she could not successfully defend herself on the merits against allegations that she, *inter alia*, misappropriated and failed to account for funds entrusted to her as a fiduciary, and that she failed to cooperate with the lawful demands of the Grievance Committee by failing to submit required bank and bookkeeping records and submitting fabricated documents.

Edwin Frederick (August 3, 2010)

On October 13, 2006, the respondent pleaded guilty in the United States District Court for the Eastern District of New York to making false statements for the purpose of obtaining a loan insured by the United States Department of Housing and Urban Development ("HUD"), a federal felony. On May 29, 2009, he was sentenced to neither prison nor probation, and any fine was waived, in recognition of his "extensive cooperation with the government." However, inasmuch as the federal felony of making false statements for the purpose of obtaining a HUD-insured loan is "essentially similar" to the New York felony of offering a false instrument for filing in the first degree, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4)(a), effective May 29, 2009.

Robert R. Groezinger, admitted as Robert Reinhard Groezinger (August 3, 2010)

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THE CULTURE CORNER

BY HOWARD L. WIEDER

SYMPHONY OF THE SOUL at the PARK EAST SYNAGOGUE

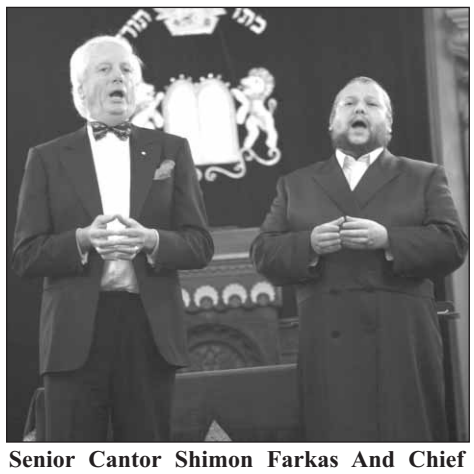
On December 4, 2010, during the celebration of Chanukah 2010, Manhattan's prestigious **PARK EAST SYNAGOGUE**, at 163 East 67th Street, presented a Jewish cantorial concert entitled "SYMPHONY OF THE SOUL." Performing at the concert were the internationally acclaimed **YITZCHAK MEIR HELFGOT,** the Chief Cantor of the synagogue, and his special guest at this year's concert - - **SENIOR CANTOR SHIMON FARKAS**, of Australia's Central Synagogue in Sydney, who once was the cantor of a now-closed resort hotel in upstate New York. Both Cantor Helfgot and Cantor Farkas were excellent and in superb form.

PARK EAST SYNAGOGUE, at 163 East 67th Street, is a noted synagogue, whose spiritual leader since 1962 has been Rabbi Arthur Schneier. The energetic Rabbi Schneier, a Holocaust survivor, will be celebrating his 81st birthday in March, 2011.

My guest for the evening, **AARON MORRILL, ESQ.,** an attorney, Chief Executive Officer, and music producer, is the Chief Executive Officer of the beverage company **FIZZY LIZZY**. Morrill likened the voice of **CHIEF CANTOR YITZCAK MEIR HELFGOT** to that of renowned tenor **LUCIANO PAVAROTTI.** I have already praised **YITZCAK MEIR HELFGOT**'s beautiful operatic voice in prior columns covering the concert, so it is great to hear an unbiased perspective that confirmed my observation. **CHIEF CANTOR YITZCAK MEIR HELFGOT** performed liturgical pieces that included *Veyiten Lecha, Ad Heyna*, and *Hamavdil*.

CANTOR FARKAS also performed liturgical pieces, but also rendered a song tribute to Australia, and a beautiful rendition of *A Yiddishe Mama*, with Farkas's wonderful mother sitting in the row in front of me. She was visibly "*shepping nachas*" - - Yiddish for a parental derivation of pride and joy from the achievements and blessings of her offspring.

This wonderful concert was followed by a splendid dessert collation. If I have one suggestion: this year's concert ran almost three hours, including a 15 minute intermission. It is hard to decide where to make cuts in a program. Should it be twenty minutes devoted to hearing the children's singing that began the concert or a lengthy by a dignitary, who may have felt obliged to give lengthy remarks? I think so. The advertisements for the concert promoted **CANTORS HELFGOT AND FARKAS**, and standing to that promotion, the concert would have been contained in proper proportions.



Senior Cantor Shimon Farkas And Chief Cantor Yitzchak Meir Helfgot, Performing At The "Symphony Of The Soul" Concert On Dec. 4, 2010"

Still, it was a wonderful evening. Credit for organizing the impressive concert "***SYMPHONY OF THE SOUL***" goes to its excellent coordinator: **CANTOR BENNY ROGOSNITZKY**. On the piano was **CANTOR DANIEL GILDAR**. **MAESTRO RUSSELL GER**, a young, wonderful conductor who has a lot of energy and whose huge talent is earning consistently a top reputation, conducted the choir.

Actor DAVID ARKEMA

BABY UNIVERSE

WAKKA WAKKA will present the United States premiere of its latest original theater piece entitled "***BABY UNIVERSE (A Puppet Odyssey)***," written and directed by Wakka Wakka members Kirjan Waage and Gwendolyn Warnock, featuring over 30 expressive hand-and-rod puppets created by Mr. Waage. "***BABY UNIVERSE,***" at the Baruch Performing Arts Center, 55 Lexington Avenue (enter on 25th Street just east of Lexington), will run through Saturday, January 8, 2011.

BABY UNIVERSE tells a story challenging to the widespread belief that only God has had the ability to create life and the world as we know it. "***BABY UNIVERSE***" takes place in a time where this has happened. On the brink of their destruction, the last inhabitants of a doomed "earth" furiously search for an escape from the dying sun. In a race against the clock, scientist-generated baby universes are being placed in the care of lonely spinsters in the hope that one might nurture to maturity a savior - - a baby universe capable of birthing a planet that can support the relocation of the entire population.

The company of five puppeteers of ***BABY UNIVERSE*** will be: Melissa Creighton, Andrew Manjuck, Peter Russo, Kirjan Waage, and Gwendolyn Warnock. The set design will be by Wakka Wakka and Joy Wang, the costume and mask design by Gwendolyn Warnock, the lighting design by Kate Leahy, the video design by Naho Taruishi, and the sound design by Brett Jarvis and Wakka Wakka. Directing consultants will be: Preben Faye-Schjøll and Daniel Goldstein. The score for "***BABY UNIVERSE***" has been composed by Lars Petter Hagen. The creative producer and U.S. Executive Producer of ***BABY UNIVERSE*** is Gabrielle Brechner.

WAKKA WAKKA PRODUCTIONS, INC. (www.wakkawakka.org) is a group of theater artists (Gabrielle Brechner, Kirjan Waage, and Gwendolyn Warnock) who share a common language in creation and ensemble work. Their mission is to push the boundaries of the imagination by creating works that are bold, unique, and unpredictable.

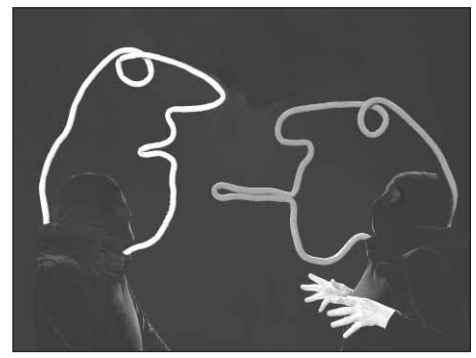
WAKKA WAKKA'S most recent work ***FABRIK: The Legend of M. Rabinowitz*** is about the life of Moritz Rabinowitz, an outspoken Polish-Jewish émigré to Norway, an entrepreneur who the Nazi's mistakenly dubbed "the leader of the Jewish Resistance in Norway." ***FABRIK*** opened in January 2008 at Urban Stages Theatre. The New York Times called it a "powerfully affecting production that capitalizes on the range of the art form (puppetry) and takes it to impressive heights." ***FABRIK*** has toured extensively throughout festivals, theaters and universities in Norway, the U.S. and the U.K. The production of ***FABRIK*** was nominated for a 2007-08 Drama Desk Award for "Unique Theatrical Experience" and was awarded a 2008 UNIMA Citation of Excellence.

A key to the success of ***FABRIK*** was the artistry of former member and co-founder of Wakka Wakka **DAVID ARKEMA**. The actor, writer, and director studied at **ÉCOLE JACQUES LECOQ**, a distinguished international theater school in Paris, France. Since leaving Wakka Wakka, **DAVID ARKEMA** continues to do groundbreaking work in theater and independent film. In 2010, **DAVID ARKEMA** appeared in over 20 films, which have begun to win awards on the film festival circuit. **DAVID ARKEMA's** recent work that just had a NY preview was the starring role in ***CERISE***, an independent dramatic comedy about a former spelling bee champion haunted by the word that took him down. More information on this exciting actor and director can be found at **www.davidarkema.com.**

The complete schedule for "***BABY UNIVERSE***" (December 1, 2010 through January 8, 2011) will be: Wednesdays through Saturdays at 8:00 p.m., and Sundays at 2:00 and 7:00 p.m. There will be four additional performances: Tuesdays, December 21 and 28 at 8:00 p.m., and Friday and Saturday, January 7 and 8 at 10 p.m. There will be no performances on Fridays, Saturdays, Sundays, December 24, 25, 26, 31, and January 1 and 2. All preview ticket prices are $20.00. (The performance on Saturday, December 4 at 8:00 p.m. is a benefit for the company and is a higher priced ticket that includes a party with the company following the performance). Beginning with the Opening Performance on Sunday, December 5 at 7:00 p.m. all tickets are $30.00, with $20.00 tickets for students and seniors. Tickets for all performances are available at 212-352-3101.

WORLD-FAMOUS MUMMENSCHANZ TROUPE RETURNS TO NYC TO CAPTIVATE AUDIENCES

Limited Engagement from December 20, 2010 – January 8, 201
at Skirball Center for the Performing Arts in Greenwich Village



MUMMENSHANZ at NYU's SKIRBALL CENTER

The magic and wonder of ***MUMMENSCHANZ*** returns to New York City for the first time since 2003 with a special three-week holiday engagement in New York City at The **SKIRBALL CENTER FOR THE PERFORMING ARTS, FROM DECEMBER 20, 2010 THROUGH JANUARY 8, 2011.** The program showcases the incredible humor, versatility and pure imagination of the celebrated Swiss performance troupe in a dazzling spectacle the whole family will love. For nearly four decades, ***MUMMENSCHANZ*** has captivated audiences worldwide with its pioneering non-verbal theatre of movement and transformation. In the surreal, comic, wordless universe of ***MUMMENSCHANZ,*** everyday objects such as toilet paper, wires, tubes, and boxes spring to life to become fantastical characters, and abstract forms and ordinary shapes interact in surprising ways to reveal timeless truths about human connections and relationships. The troupe creates a playful and uniquely memorable experience through an inventive use of forms, shadow and light and creative manipulation of sculptural, expressive masks. The result is a visually stunning spectacle of family entertainment that sparks the imagination and transcends cultural barriers.

Founding artists **BERNIE SCHÜRCH** and **FLORIANA FRASSETTO** are the featured performers on this tour, presenting some of the troupe's timeless favorites and most beloved creations. They are joined by **RAFFAELLA MATTIOLI** and **PIETRO MONTANDON**. ***MUMMENSCHANZ*** has always had a powerful connection with American audiences, and with New York theatergoers, in particular," said Schürch and Frassetto. "New York City has even more special meaning for us, since it is here that we initially enjoyed our first big breakthrough with a long-running show on Broadway at the Bijou Theatre."

Co-presented by **MUMMENSCHANZ FOUNDATION** and **THE SKIRBALL CENTER FOR THE PERFORMING ARTS**, the three-week engagement is one of the highlights of the upcoming season, and the family-friendly entertainment will be included in the theater's popular Big Red Chair Family Series. Included among the yuletide shows is a Christmas Eve matinee at 2:00 pm ET, and two specially scheduled performances on New Year's Eve, at 4:00 pm and 7:00 pm ET. The artists will also participate in a series of lively and informative "Talk Back" events following select performances, to give audiences a chance to interact with the legendary troupe and hear firsthand about the techniques used to create its unique artistry.

The 21 performances in Greenwich Village are also the centerpiece of a larger national tour spanning four months and

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On July 14, 2009, the respondent pleaded guilty in the United States District Court for the Southern District of New York to the crime of possession of child pornography transported in interstate or foreign commerce, a class C felony. On December 21, 2009, he was sentenced to 57 months imprisonment, followed by five years of supervised release. Inasmuch as the crime to which the respondent pleaded guilty is essentially similar, as per his allocution, to the New York felony of possessing a sexual performance by a child, he ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4)(a), effective December 21, 2009.

Janice L. Jessup, admitted as Janice Lorraine Jessup (August 3, 2010)

The respondent tendered a resignation wherein she acknowledged that she could not successfully defend herself on the merits against pending charges alleging that she, *inter alia*, made false statements of law or fact; engaged in conduct involving dishonesty, deceit, fraud or misrepresentation; handled a legal matter without adequate preparation; engaged in conduct adversely reflecting on her fitness as a lawyer; engaged in an impermissible conflict of interest; and engaged in conduct prejudicial to the administration of justice.

Timothy C. Quinn, a suspended attorney (August 3, 2010)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations concerning his theft of funds from a former client, for which he has been charged criminally.

Timothy J. Shea II, admitted as Timothy Joseph Shea II (August 3, 2010)

By judgment of the Supreme Judicial Court for Suffolk County in the Commonwealth of Massachusetts dated June 19, 2006, the respondent was disbarred in that State. Upon the Grievance Committee's application for reciprocal discipline pursuant to 22 NYCRR 691.3, and following a hearing wherein the Grievance Committee and the respondent entered into a stipulation of facts, which essentially consisted of the record of the Massachusetts proceeding, the respondent was disbarred in New York.

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

Emanuel A. Towns, admitted as Emanuel Alexander Towns (April 27, 2010)

Following a disciplinary hearing, the respondent was found guilty of entering into a fee agreement for, charging, or collecting illegal or excessive fees for services of both a legal and non-legal nature rendered on behalf of an 89-year-old alleged incapacitated person, and conduct reflecting adversely on his fitness to practice law as a result of the foregoing. He was suspended from the practice of law for a period of six months, commencing May 27, 2010, and continuing until further order of the Court.

Ganiu Owolabi Ajose (May 3, 2010)

The respondent was immediately suspended from the practice of law, pending further proceedings, upon a finding that he was guilty of professional misconduct immediately threatening the public interest based, *inter alia*, on his failure to cooperate with the Grievance Committee.

Sheldon Cowen (May 7, 2010)

On the Court's own motion, the respondent was suspended from the practice of law pursuant to 22 NYCRR 691.13(a) until further order of the Court, based upon a judicial declaration of his incapacity.

Robert V. Fonte (May 11, 2010)

Following a disciplinary hearing, the respondent was found guilty of breaching his fiduciary duty and failing to safeguard and ensure the transactional integrity of funds entrusted to him, incident to his practice of law; failing to promptly pay or deliver funds, which were placed in his possession by clients for disbursement to third parties, to the clients or third parties entitled to receive them; failing to make reasonable efforts to adequately supervise the work of attorneys within his firm; engaging in conduct prejudicial to the administration of justice by failing to timely respond to the lawful demand for his written response to one or more complaints of professional misconduct; and engaging in conduct adversely reflecting on his fitness as a lawyer by reason of the foregoing. He was suspended from the practice of law for a period of three years, commencing June 10, 2010, and continuing until further order of the Court.

Mark E. Gold (May 11, 2010)

By order of the Supreme Court of New Jersey filed April 22, 2009, the respondent was temporarily suspended from the practice of law in that state based upon allegations of misappropriation of clients' funds. Upon the Grievance Committee's application for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was immediately suspended from the practice of law in New York until further order of the Court.

Tara Anne Laudonio, admitted as Tara A. Puterbaugh (May 11, 2010)

Following a disciplinary hearing, the respondent was found guilty of breaching her fiduciary duty and failing to safeguard and ensure the transactional integrity of funds entrusted to her, incident to her practice of law; failing to promptly pay or deliver funds, which were placed in her possession by clients for disbursement to third parties, to the clients or third parties entitled to receive them; failing to make reasonable efforts to adequately supervise the work of attorneys within her firm; engaging in conduct prejudicial to the administration of justice by failing to timely respond to the lawful demand for her written response to one or more complaints of professional misconduct; and engaging in conduct adversely reflecting on her fitness as a lawyer by reason of the foregoing. Based upon a finding that she was less culpable than her partner Robert V. Fonte (*supra*), she was suspended from the practice of law for a period of six months, commencing June 10, 2010, and continuing until further order of the Court.

Anthony Chike Emengo (May 18, 2010)

Following a disciplinary hearing, the respondent was found guilty of violating his fiduciary obligations by failing to maintain and preserve funds entrusted to him, which belonged to another person; engaging in conduct reflecting adversely on his fitness as an attorney by reason of the foregoing; commingling personal funds with funds belonging to another person in his attorney trust account; failing to adhere to his bookkeeping duties by failing to maintain required bookkeeping entries for seven years after the events those entries recorded; and engaging in conduct reflecting adversely on his fitness as a lawyer by violating his fiduciary obligations and duties due to his inability to account for funds held in his attorney trust account. He was suspended from the practice of law for a period of two years, commencing June 18, 2010, and continuing until further order of the Court.

Wynman Chang (June 3, 2010)

The respondent was immediately suspended from the practice of law, pending further proceedings, upon a finding that he was guilty of professional misconduct immediately threatening the public interest, by virtue of his persistent pattern of failure to cooperate with the Grievance Committee and other uncontroverted evidence of professional misconduct.

Stephen E. Atkins, admitted as Stephen Edward Atkins (June 7, 2010)

The respondent was immediately suspended from the practice of law, pending further proceedings, upon a finding that he was guilty of professional misconduct immediately threatening the public interest, based upon his failure to comply with the lawful demands of the Grievance Committee and other uncontroverted evidence of professional misconduct.

Warren Scott Goodman, a suspended attorney (June 8, 2010)

Following a disciplinary hearing, the respondent was found guilty of neglecting a legal matter entrusted to him by failing to properly commence an action; engaging in conduct adversely reflecting on his fitness as a lawyer by attempting to commence a "second" action, which was dismissed as time-barred, thereby misleading the client about the "first" action; engaging in conduct adversely reflecting on his fitness as a lawyer by failing to notify the client of the dismissal of the "first" action; engaging in conduct prejudicial to the administration of justice by making assertions to the Grievance Committee with reckless disregard for the truth, thereby failing to cooperate with the Committee's lawful investigation; engaging in conduct adversely reflecting on his fitness as a lawyer by reason of the foregoing; neglecting a legal matter entrusted to him by commencing an action, which was dismissed, and failing to notify the client of the dismissal until such time as the appeal period had expired; engaging in conduct adversely reflecting on his fitness as a lawyer by neglecting to inform a client of the January 2005 dismissal of his personal injury action until March 2006, after the period for appealing the dismissal had expired; engaging in conduct adversely reflecting on his fitness as a lawyer by failing to apprise the Grievance Committee of the foregoing; engaging in conduct reflecting adversely on his fitness as a lawyer by failing to cooperate with the Committee's inquiries; engaging in conduct reflecting adversely on his fitness as a lawyer by misleading the client, in March 2006, that he could recommence the lawsuit and that he (respondent) would be willing to continue pursuing the matter; engaging in conduct prejudicial to the administration of justice by neglecting client matters; and conduct adversely reflecting on his fitness as a lawyer by misleading the Grievance Committee relative to a purportedly "valid and active" matter wherein the court file was, in fact, lost, and a motion to reconstruct the file was required before the action could be restored. The respondent was suspended from the practice of law for a period of three years, and continuing until further order of the Court.

Ronald E. Stoute, admitted as Ronald Eton Stoute (June 8, 2010)

Following a disciplinary hearing, the respondent was found guilty of converting funds entrusted to him as a fiduciary, in connection with the practice of law. He was suspended from the practice of law for a period of two years, commencing immediately, and continuing until further order of the Court.

Adam Keith Serper (June 15, 2010)

By order of the Supreme Court of Florida dated April 23, 2009, the respondent was suspended from the practice of law in that State for 91 days, effective 30 days from the date of the order. By further order of the Supreme Court of Florida dated May 1, 2009, the suspension in that State was made effective immediately in light of the respondent's notification to the Court that he was no longer practicing law. Upon the Grievance Committee's application for reciprocal discipline pursuant to 22 NYCRR 691.3, the respondent was suspended from the practice of law in New York for a period of six months, commencing July 15, 2010, and continuing until further order of the Court.

Robert Tambini (June 29, 2010)

Following a disciplinary hearing, the respondent was found guilty of forming a partnership with a non-lawyer, which partnership engaged in activities consisting of the practice of law; engaging in conduct that adversely reflects on his fitness to practice law by reason of the foregoing; dividing legal fees with a non-lawyer; misappropriating funds on deposit in his attorney trust account; engaging in conduct that adversely reflects on his fitness to practice law by reason of the foregoing; failing to exercise his supervisory responsibilities in breach of his fiduciary duty by permitting checks to be issued from his attorney trust account on one or more occasions in which there were excess disbursements by a non-lawyer using a signature stamp of the respondent's signature; engaging in conduct that adversely reflects on his fitness to practice law by reason of the foregoing; commingling personal/operating funds with funds held in a fiduciary capacity in his attorney trust account; breaching his fiduciary duty by failing to promptly notify a client or third party of his receipt and possession of funds in which the client or third party had an interest; engaging in conduct that adversely reflects on his fitness to practice law by reason of the foregoing; breaching his fiduciary duty by failing to promptly remit funds due to a client or third party; engaging in conduct that adversely reflects on his fitness to practice law by reason of the foregoing; failing to exercise his supervisory responsibilities in breach of his fiduciary duty by permitting, with little direct supervision, the entry, review and reconciliation of, information in records kept for his attorney trust account by non-lawyers; engaging in conduct that adversely reflects on his fitness to practice law by reason of the foregoing; disbursing funds from his attorney trust account by electronic transfer without having obtained the prior written approval of the party entitled to the proceeds; engaging in an impermissible conflict of interest by representing lenders, either directly or through Expedient Settlement, in one or more real estate transactions wherein Expedient Title, of which respondent is a principal, received fees for title or abstract

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services, without obtaining the consent of the lenders after full disclosure of his multiple interests in the transaction(s); accepting a financial benefit from one other than a client in relation to his representation or employment by the client; engaging in an impermissible conflict of interest by representing both the borrower and the lender, in one or more real estate transactions, without obtaining the consent of either after full disclosure; and engaging in conduct that adversely reflects on his fitness to practice law by reason of the foregoing. He was suspended from the practice of law for a period of three years, commencing July 29, 2010, and continuing until further order of the Court.

Phillip D. Miller, admitted as Phillip Douglas Miller (July 6, 2010)

Following a disciplinary hearing, the respondent was found guilty of engaging in conduct prejudicial to the administration of justice by failing to maintain and preserve funds entrusted to him in escrow pursuant to an order of the United States Bankruptcy Court for the Eastern District of New York; failing to maintain and preserve funds entrusted to him as a fiduciary by reason of the foregoing; engaging in conduct prejudicial to the administration of justice by withdrawing legal fees from his attorney trust account without Bankruptcy Court authorization; misappropriating client funds by reason of the foregoing; and engaging in conduct that adversely reflects on his fitness to practice law in that he obtained from his client a durable irrevocable power of attorney, coupled with an interest. In determining an appropriate measure of discipline to impose, the Court noted that the respondent's conduct substantially benefitted his client and brought in $3 million to the bankruptcy estate. Nonetheless, the Court found that the respondent's serious breaches of his fiduciary obligations could not be "excused" or "overlooked." Under the totality of the circumstances, the respondent was suspended from the practice of law for a period of six months, commencing August 6, 2010, and continuing until further order of the Court.

Stephen J. Caputo (July 21, 2010)

On January 4, 2010, the respondent pleaded guilty, in the United States District Court for the Southern District of New York, to one count of conspiracy to commit bank fraud and five counts of wire fraud. As a result of his plea of guilty to a serious crime, the Appellate Division immediately suspended the respondent on its own motion, pursuant to Judiciary Law §90(4)(f), pending his sentencing by the District Court and continuing until further order of the Appellate Division.

Stuart N. Kingoff, admitted as Stuart Neal Kingoff (July 21, 2010)

The respondent was immediately suspended from the practice of law pending further proceedings upon a finding that he was guilty of professional misconduct immediately threatening the public interest based on his failure to cooperate with the Grievance Committee, substantial admissions under oath that he committed acts of professional misconduct, and other uncontroverted evidence of professional misconduct.

Thomas W. Archer, admitted as Thomas Wesley Archer (July 27, 2010)

The respondent was found guilty, upon a jury verdict in the United States District Court for the Eastern District of New York, of one count of conspiracy to commit visa fraud and three counts of visa fraud emanating from his scheme to file immigration documents that contained false statements of material fact and that failed to contain any reasonable basis in law or fact. On the Appellate Division's own motion, the respondent was immediately suspended from the practice of law as a result of the jury verdict finding him guilty of a serious crime, and continuing until further order of the Court, pursuant to Judiciary Law §90(4)(f).

George J. Faeth (July 27, 2010)

The respondent was immediately suspended from the practice of law pending further proceedings upon a finding that he was guilty of professional misconduct immediately threatening the public interest based on his failure to cooperate with the Grievance Committee and other uncontroverted evidence of professional misconduct.

Anthony C. Casamassima, admitted as Anthony Christopher Casamassimia (August 2, 2010)

The respondent was immediately suspended from the practice of law pending further proceedings upon a finding that he was guilty of professional misconduct immediately threatening the public interest based on his failure to cooperate with the Grievance Committee and other uncontroverted evidence of professional misconduct.

Yohan Park, a suspended attorney (August 3, 2010)

Following a disciplinary hearing, the respondent was found guilty of converting escrow funds entrusted to him as a fiduciary, incident to his practice of law; improperly commingling funds entrusted to him as a fiduciary, incident to his practice of law, with his personal funds; and failing to maintain required records for his attorney escrow account. He was suspended from the practice of law for a period of two years, commencing immediately and continuing until further order of the Court.

David Craig Weiss (August 3, 2010)

Following a disciplinary hearing, the respondent was found guilty of converting client funds and/or breaching his fiduciary duty by failing to preserve client funds entrusted to him, and engaging in conduct adversely reflecting on his fitness to practice law by reason of the foregoing. He was suspended from the practice of law for a period of two years, commencing September 2, 2010, and continuing until further order of the Court.

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

Robert John Demers, Jr., (June 8, 2010)

On November 18, 2008, the Supreme Court of the State of New Jersey Disciplinary Review Board issued a reprimand to the respondent. Upon the Grievance Committee's application for reciprocal discipline, pursuant to 22 NYCRR §691.3, the respondent was publicly censured in New York.

Morgan D. Bottehsazan, admitted as Mojgan Bottehsazan (June 22, 2010)

Following a disciplinary hearing, the respondent was found guilty of engaging in illegal conduct that reflects on her honesty, trustworthiness or fitness as a lawyer based upon her conviction in County Court, Nassau County, of a serious crime, to wit, petit larceny, a class A misdemeanor; engaging in conduct that adversely reflects on her fitness as a lawyer by reason of the foregoing; and engaging in conduct prejudicial to the administration of justice by failing to file a record of her conviction with the Appellate Division within 30 days after her conviction, as required by Judiciary Law §90(4)(c).

Barr B. Musof, admitted as Barr Benjamin Musof (July 13, 2010)

Following a disciplinary hearing, the respondent was found guilty of engaging in illegal conduct that adversely reflects on his honesty, trustworthiness or fitness as a lawyer based upon his conviction in Supreme Court, Nassau County, of operating a motor vehicle while under the influence of alcohol, an unclassified misdemeanor, and reckless endangerment in the second degree, a class A misdemeanor, and engaging in conduct that adversely reflects on his fitness as a lawyer by reason of the foregoing.

Adam Lawrence Gross, admitted as Adam Gross (August 3, 2010)

By order of the Supreme Court of Ohio dated January 9, 2009, the respondent was immediately suspended from the practice of law in that State until such time as the Court issued an order reinstating him. The suspension was based on the respondent's non-compliance with the attorney registration and continuing legal education requirements of that State. Upon the Grievance Committee's application for reciprocal discipline pursuant to 22 NYCRR 691.3, the respondent was publicly censured in New York.

The Following Suspended Or Disbarred Attorneys Were Reinstated As Attorneys And Counselors-At-Law By Order Of The Appellate Division, Second Judicial Department:

Aida Kuperman-Umansky, admitted as Aida Kuperman, a disbarred attorney
(June 15, 2010)

Peter Francis Martin, a suspended attorney
(June 15, 2010)

J. Kevin Meneilly, admitted as James Kevin Meneilly, a disbarred attorney
(June 15, 2010)

Amanda Reid, a disbarred attorney
(June 15, 2010)

Eric Carlson, admitted as Eric Russell Carlson, voluntary resignor
(June 22, 2010)

Tomas Greenberger, a suspended attorney
(June 22, 2010)

Ben Kinzler, a suspended attorney
(July 6, 2010)

At Two Recent Meetings Of The Grievance Committee For The Second, Eleventh And Thirteenth Judicial Districts, The Committee Voted To Sanction Attorneys For The Following Conduct:

Failing to timely re-register with the New York State Office of Court Administration (5)

Failing to carry out a contract of employment and failing to maintain adequate communication with a client

Neglecting a legal matter and failing to maintain adequate communication with the client

Neglecting a legal matter; failing to supervise the work of an attorney to whom the matter was assigned; and failing to maintain adequate communication with a client

Neglecting a legal matter; failing to adequately supervise the employee to whom the attorney delegated responsibility for obtaining required information; and failing to provide a client in a domestic relations matter with a written retainer agreement and/or monthly billing statements

Neglecting legal matters and failing to act with reasonable diligence and promptness in representing clients

Failing to provide a client with a retainer agreement addressing the scope of legal services to be provided, an explanation of the fees to be charged and/or the client's right to invoke fee arbitration

Misrepresenting pertinent facts to a court

Putting a case into suit without with meeting, or discussing the matter, with the client(s) and obtaining the information to prepare the subject complaint from an adversarial party

Representing a client without paying appropriate attention to the legal work and/or adequately preparing, as well as failing to exert best efforts to ensure that the client's decisions were "informed"

Failing to promptly refund an unearned fee; failing to abide by the terms of the fee arbitration process; and failing to comply with an award and judgment issued and/or entered in Small Claims Court

Failing to maintain required bookkeeping records; failing to identify a fiduciary account as an IOLA, escrow, trust or special account, as required; and failing to timely cooperate with the Grievance Committee

Sharing fees with a non-attorney and improperly engaging in multidisciplinary practice with said non-attorney

This edition of COURT NOTES was compiled by Diana J. Szochet, Assistant Counsel to the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts and Past President of the Brooklyn Bar Association. The material contained herein is reprinted with permission of the Brooklyn Bar Association.

Culture Corner

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staged in cities from coast to coast this fall and winter, with a program showcasing some of ***MUMMENSCHANZ***'s most imaginative and humorous characters from over the years.

TICKETS & SHOW INFO: Tickets range from $45-75. (Recommended for all ages. Performance Length: 70-80 minutes with no intermission.) To order tickets online, go to skirballcenter.nyu.edu (type in the code "FAMILY" for a special discount) or visit http://mummenschanz NYC.com. Call or visit the box office: 212.352.3101 or 866.811.4111 (weekdays, 9am-9pm;_Saturday and Sunday, 10 am - 6pm); NYU Ticket Central box office, located in the lobby of 566 LaGuardia Place, at Washington Square South (Tues-Sat. 12-6 pm, and two hours prior to show time).

RESOURCES & PRESS MATERIALS: To download high-resolution production images, please register at the official website: http://www.mummenschanz.com. For information about the current tour and other source materials, visit http://www.facebook.com/mummenschanz To view performance videos, go to http://youtube.com/MummenschanzTour Engage with the troupe on twitter at http://twitter.com/mummenschanzUS

PERFORMANCE SCHEDULE: Dec. 20 – 7:00 pm, Dec. 21 - 7:00 pm, Dec. 22 - 2:00 pm* and 7:00 pm, Dec. 23 - 8:00 pm, Dec. 24 - 2:00 pm,* Dec. 26 - 2:00 pm* and 7:00 pm, Dec. 28 - 8:00 pm, Dec. 29 - 8:00 pm, Dec. 30 - 8:00 pm, Dec. 31 - 4:00 pm and 7:00 pm, Jan. 2 - 2:00 pm* Jan. 4 - 8:00 pm, Jan. 5 - 8:00 pm, Jan. 6 - 8:00 pm, Jan. 7 - 7:00 pm* and 10:00 pm, Jan. 8 - 2:00 pm* and 7:00 pm. ***Meet the artists of Mummenschanz** at **Post-show Talkbacks**

ABOUT MUMMENSCHANZ FOUNDATION: Currently in its fourth decade of existence, ***MUMMENSCHANZ*** Mask Theater remains one of the most successful theater groups in the world. Formed in 1972 by Swiss artists Bernie Schürch and Andres Bossard with Swiss-American artist Floriana Frassetto, the pioneering performance troupe created a nonverbal theatrical language that transcended the traditional barriers of nationality and culture. The group had its breakthrough during an extended Broadway run at the Bijou Theatre in New York City from 1977-1980. Never before and or since has a show without words *or* music succeeded on Broadway for three consecutive years. Since then, the group has toured continuously around the globe, performing in renowned festivals and theaters worldwide. Following the death in 1992 of founding member Andres Bossard, original artists Floriana Frassetto and Bernie Schürch went on to establish the **MUMMENSCHANZ FOUNDATION** in 1998 with the help of long-time friend and supporter Hans Jörg Tobler, a non-profit organization that aims to promote the art and expression of nonverbal theater. Since 2000, ***MUMMENSCHANZ*** has grown to a company of five, with original cast members Schürch and Frassetto now joined by featured performers Pietro Montandon and Raffaella Mattioli and technical director Jan Maria Lukas. For more information, visit www.Mummenschanz.com.

THE SKIRBALL CENTER FOR THE PERFORMING ARTS, NEW YORK UNIVERSITY, is the premiere venue for the presentation of cultural and performing arts events at NYU and in lower Manhattan. Located at 566 LaGuardia Place (at Washington Square), it provides a large-scale, professional performance space for university productions and events and live professional performances from around the world. The 860-seat theater opened in October 2003 and hosts the only major university-based professional multi-arts presenting program in Manhattan.

BRIAN DYKSTRA'S HO!

Go buy tickets for **BRIAN DYKSTRA'S *HO!*** running until December 19, 2010, at **THE DRILLING THEATER COMPANY** on West 78th street in Manhattan's Upper West Side. **BRIAN DYKSTRA** is an accomplished raconteur who presents 2 pieces of stories, with amazing rhymes, that he wrote in this excellent one-man show. In his first story, HO! - - the title of the entire show - - imagine a trademark infringement action brought by Santa Claus's well-heeled law firm against the Green Giant - - you know, of the well-known canned vegetable fame. The story is hilarious and was very well told by **BRIAN DYKSTRA** who deftly conquered and swatted occasional technical glitches that occurred on the show's opening night.

The second part of the show was **BRIAN DYKSTRA** reciting his composition of "Sammy," concerning the plight of a magnificent Vermont tree that is brought with other trees for Christmas sale. Sadly, this beautiful tree gets overlooked and not purchased for a variety of reasons, and **BRIAN DYKSTRA** brings a great vulnerability in his touching recitation.

One piece of advice for improvement on this excellent show would be to add some background to his presentation, whether it be slides, puppets, or some other visual in the background. **BRIAN DYKSTRA** chose a well-decorated Christmas living room as the set for both pieces, but the program could have been enhanced by slides or visuals in the background. **BRIAN DYKSTRA** is a fascinating raconteur and author, and I encourage you to see the show, directed by **MARGARETT PERRY** [2 "T"s, not a typo], before it closes on December 19.

LOOKING AT CHRISTMAS AT THE FLEA

THE FLEA THEATER, at 41 White Street, right by the courts in lower Manhattan, has a wonderful resident theater company of exceptionally talented actors, called **"THE BATS."** The presentation of **LOOKING AT CHRISTMAS** was worthy of the great tradition of **THE FLEA**. Written by **STEVEN BANKS**, ***LOOKING AT CHRISTMAS*** is a heartwarming and funny romantic comedy that centers on two persons, a young man and a young woman, meeting at the Christmas windows at Bloomingdale's Department store. Their attraction leads them to decide to tour other Christmas display store windows of other department stores - - and that running around has to be done, at least once, by every New Yorker, even the most jaded!

STEVEN BANKS is a distinguished head writer of the Emmy-nominated "***SPONGEBOB SQUAREPANTS***." The brilliance of **Steven Banks'** play, in addition to the easy dialogue, is the altering of scenes between those of the young couple commenting on the mannequins and those of the mannequins in the window who comment on the young couple. **BANKS'** play is witty and riveting. **JIM SIMPSON's** direction brings beautiful life to Banks' script. The direction by Jim Simpson is engaging. **GABRIEL BERRY's** costume design is spectacular. As I mentioned in my review of ***Office Hours***, also recently directed by **JIM SIMPSON** at **THE FLEA [see my CULTURE CORNER column in the November, 2010 issue], JIM SIMPSON** smartly knows how to deploy his collaborative team of exceptionally gifted cast and crew.

The acting was terrific: **ALLISON BUCK** brought a genial charm and engaging sincerity as the transplanted Midwesterner brought to New York City to pursue an acting career, but who has hit roadblocks despite her talent and persistence. **MICHAEL MICALIZZI** was winsome and appealing as a writer fired on Christmas Eve, who resists going on a tour of the windows with Charmian, Ms. Buck's character, but eventually succumbs. With the impressive talent of the BATS, one cannot find a bad performance. **BETSY LIPPITT, CHRISTIAN ADAM JACOBS, TURNA METE, HOLLY CHOU, JACK CORCORAN, JOHN RUSSO,** and **RAUL SIGMUND JULIA** were all great. I urge you to buy tickets now! I guarantee you will love this outstandingly performed and excellently directed show of a wonderful new play!

CARMEN at the METROPOLITAN OPERA

A new production of **CARMEN**, a staple of the opera repertory, has been playing to packed audiences at the Metropolitan Opera. **CARMEN** continues its run to the end of January, 2011. I urge you to buy tickets at www.metopera.org. Composer Georges Bizet died after the opening of ***CARMEN*** as a brokenhearted man, believing his opera was a failure. Today, ***CARMEN*** is probably the most beloved operas, with arias that are the most easily recognized and loved even by those individuals who are not afficionados of operas.

METROPOLITAN OPERA: *LA FANCIULLA del WEST*

The Met Presents 100th Anniversary Revival of Puccini's **LA FANCIULLA DEL WEST. DEBORAH VOIGT** sings the title role for the first time at the Met; **MARCELLO GIORDANI** makes his role debut as Dick Johnson. **NICOLA LUISOTTI** conducts the first Met Fanciulla revival since 1993.

Puccini's **LA FANCIULLA DEL WEST** will return to the Met stage on December 6 for a series of performances commemorating the 100th anniversary of the opera's 1910 world premiere at the Met**. DEBORAH VOIGT** will sing the title role of Minnie for the first time at the Met, with **MARCELLO GIORDANI** in his role debut as Dick Johnson and Lucio Gallo as the villainous Jack Rance. San Francisco Opera Music Director **NICOLA LUISOTTI** will conduct his first Met performances of the work, which the composer told *The New York Times* in 1910 he considered "the best of [his] operas." **GIANCARLO DEL MONACO** returns to direct the revival of his 1991 production.

LA FANCIULLA DEL WEST'S 1910 debut was the first ever world premiere presented by the Met. In a Gold Rush mining camp, tough frontier woman Minnie has her sights set on the mysterious Dick Johnson, and nothing - - not horses, hangmen, or a high stakes poker game - - can keep her from true love. The performance on Friday, December 10 will commemorate the exact centennial of the opera's historic Met premiere.

When **DEBORAH VOIGT** first performed the challenging role of saloon owner Minnie last summer at San Francisco Opera, the Associated Press found the role "ideally suited to Voigt's strengths – large, gleaming high notes and a stage presence that radiates an endearing charm," while the San Francisco Chronicle said her "theatrical vibrancy and considerable personal charm" made it "no stretch to imagine an entire troop of miners eating out of her hand." **MARCELLO GIORDANI**, who will be singing Dick Johnson for the first time in his career, has sung many Puccini roles at the Met, including leading roles in La Bohème, Madama Butterfly, Manon Lescaut, Turandot, and Tosca.

MAESTRO NICOLA LUISOTTI made his Met debut conducting Puccini's Tosca in 2006. **ELISABETE MATOS** will make her Met debut as Minnie on December 22, and **CARL TANNER** will make his Met debut as Dick Johnson on December 27.

The December 10, 1910 world premiere of the opera earned nineteen curtain calls for Puccini, stage director David Belasco, stars Emmy Destinn and Enrico Caruso, and conductor Arturo Toscanini. A review in the *New York Herald* suggests that the evening was a triumph for all involved: "The event had been looked forward to as socially one of the most brilliant in the history of the house, and the result justified expectation. Miss Destinn in the title role□sang as she never had here before, particularly in the second act, when her vocal art was taxed to the utmost. Mr. Caruso, as Dick Johnson, had one of the best roles that has ever fallen to his lot. Mr. Toscanini seemed to have poured all his artistic self into the conducting. Seldom has such teamwork among great artists been seen and heard. In a word, it was the kind of premiere of which older Europe would have been very proud and of which New York would have been envious."

The opera has been revived at the Met ten times. Destinn and Caruso repeated their successful performances in the opera for three consecutive seasons following the premiere. Maria Jeritza took on the role of Minnie in 1929 and 1930 revivals. A new production starring Leontyne Price and Richard Tucker opened the 1961 season, with Dorothy Kirsten and Franco Corelli assuming the lead roles in 1965. Renata Tebaldi, who had recorded the role, but never performed it on stage, sang her first Minnie at the Met in a popular 1970 revival. Del Monaco's production premiered in 1991 with Plácido Domingo as Dick Johnson.

LA FANCIULLA DEL WEST will be experienced by millions of people around the world this season in movie theaters, on the radio and on the internet, through distribution platforms the Met has established with various media partners. The January 8, 2011 matinee of **LA FANCIULLA DEL WEST** will be transmitted to more than 1,500 movie theaters in more than 40 countries globally as part of The Met: Live in HD series. The opening performance on December 6 was broadcast live on Metropolitan Opera Radio on SIRIUS channel 78 and AM channel 79, as will the performances on December 14, December 22, 2010, and those on January 3, and January 8, 2011. The January 8 matinee at 1:00 p.m. will be broadcast live over the Toll Brothers Metropolitan Opera International Radio Network.

METROPOLITAN OPERA: *PELLÉAS ET MÉLLISANDE*

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Unauthorized Insurance Carriers In New York

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transacts business in New York. New York Insurance Law §1101 sets forth with specificity what constitutes doing an insurance business in New York. This statute provides a pertinent part

a.) In this article: (1) "Insurance Contract" – Means any agreement or other transaction whereby one party, the "insurer", is obligated to confer benefit of pecuniary value upon another party, the "insured" or "beneficiary", dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening a material interest which will be adversely affected by the happening of such event.

b.) (1) Except as provided in paragraph 2, 3 or 3-A of this subsection, any of the following acts in this state, effected by mail from outside the state or otherwise, by any person, firm, association, corporation or joint-stock company shall constitute doing an insurance business in this state and shall constitute doing business in the state within the meaning of §302 of the Civil Practice Law and Rules:

c.) Making, or proposing to make, as insurer, any insurance contract, including either issuance or delivery of a policy or contract of issuance to a resident of this state or to any firm, association or corporation authorized to do business herein, or solicitation of applications for any such policy or contracts;

d.) Making, or proposing to make as warrantor, guarantor

or surety, any contract of warranty, guarantee or suretyship as a vocation and not as merely incidental to any other legitimate business or activity of the warrantor, guarantor or surety;

e.) Collecting any premium, membership fee, assessment or other consideration for any policy or contract of insurance;

f.) Doing any king of business, including a reinsurance business, specifically recognized as constituting a doing of an insurance business within the meaning of this chapter; [10]

Judge York was satisfied that American Millennium Insurance Company did not do any of the activities listed above as defined as the operation of an insurance business in New York. Therefore, the Court found Insurance Law §5107 did not apply and American Millennium Insurance Company was not required to provide New York minimum insurance requirements with respect to this accident.

What then happens to the bodily injury claim of that passenger who fails to obtain New York no-fault benefits when a suit is filled in New York versus the adverse vehicle owner and operator? Assuming for purposes of this discussion that when suit is filed in New York by a New Jersey resident against a New York resident for a tortuous act committed in New York the New York resident defendant does not remove the case to Federal Court based on the diversity jurisdiction of the Federal Court. If the matter proceeds in New York State Court, the question arises as to the applicability of the New York threshold law codified in New York Insurance Law §5102(d). In *Scotland v. Allstate Insurance Company* [11] The Appellate Division Second Department was faced with a Virginia automobile liability insurance policy with no provision for no-fault benefits. An uninsured motorist claim was filed versus Allstate in New York and the question presented was whether the claimant was required to prove a serious injury under New York no-fault law. The Appellate Division indicated the claimant was not required to prove a serious injury prior to recovery as New York Insurance Law §3420(f)(1) did not apply. This holding has not been overruled by the New York Court of Appeals Decision in 2007 in *Rafellini* v. *State Farm Mutual Automobile Insurance Company* [12] as the Rafellini Court dealt with a SUM claim by a "covered" person. The plaintiff in Rafellini was reimbursed for basic economic loss through his no-fault carrier.

In *Woodbine v. We Try Harder, Inc*., the Trial Court in Queens County (Judge Nat Hentel) found where a plaintiff did not receive no-fault coverage the defendant could not use the serious injury threshold as a bar to recovery. The Court held the claimant cannot be prevented from recovering basic economic loss which would ordinarily be a bar to recovery if the threshold law was applied. The defendant could not use the statutorily created definition of serious injury under Insurance Law §5102(d) of the New York Insurance Law where the plaintiff did not benefit from its provisions. The defendant could not use the benefits of the serious injury threshold as both a shield and a sword. The plaintiff was not recovering New York benefits and the defendant sought to use that as a shield to deny payment of basic economic loss. The defendant also sought to use the New York threshold as a sword to deny claimant's his rights under common law and basic negligent principals. The plaintiff in Woodbine (supra) was therefore entitled to recover from the first dollar of basic economic loss. [13]

What happens to the non-resident who comes into New York insured with an unauthorized insurance carrier with liability insurance limits below the mandatory statutory limits of New York Law ($25,000 per person/$50,000 per occurrence) [14]

In *Property & Casualty Insurance Company v. Clark* [15] the Court was faced with a fact pattern including a motor vehicle owned by a Pennsylvania resident, registered in Pennsylvania, and insured by a Pennsylvania insurer which was not authorized to do business in New York. The insurance carrier denied coverage in this proceeding due to an exclusion in the policy whereby the sibling of the insured was not covered under the Pennsylvania policy. This claim involved an uninsured motorist arbitration and concerned the interplay of competing statutes in New York. Under Vehicle & Traffic Law §388 "Every owner of a vehicle used to operated in this state is liable for injuries from negligence in the permissive use of such vehicle". [16] The Court was faced with the State of New York Public Policy to protect innocent victims of car accidents. However, the issue arose as to the applicability of New York rules to an unauthorized insurer. The insurance carrier in this proceeding did not do business in New York and presumably did not benefit from New York business dealings, i.e., additional premiums required for mandatory PIP and UM losses. The Court in *Property & Casualty Insurance Company of Hartford v. Clark (supra)* indicated this claim presented a valid uninsured motorist demand and did not apply New York law to an unauthorized foreign insurer.

In *General Accident Insurance Company v. Tran* [17] the Appellate Division Second Department was faced with an insurance coverage issue involving a New York resident injured in a motor vehicle accident in New York. The tortfeasor was a Florida resident operating a vehicle registered in Florida with an insurance carrier which was unauthorized to do business in New York. The liability policy limits of the offending vehicle were below the New York statutory minimum. The key determination in this proceeding was "the out of state insurance clause" which was part of the policy. The policy had a specific provision indicating, "If an insured person becomes subject to the financial responsibility law or the compulsory insurance laws of another state because of the ownership, maintenance or use of your insured car in that state, we will interpret this policy to provide any broader coverage provided by those laws". In this proceeding the out of state insurance clause was sufficient to impose New York minimum insurance requirements to the unauthorized foreign insurer.

In *Midwest Mutual Insurance Company v. Pisani* [18] the Appellate Division First Department was faced with a Pennsylvania insurance policy issued to a Pennsylvania resident containing only bodily injury and property damage coverage. No uninsured motorist coverage was provided as part of the policy issued to a Pennsylvania resident. Here the Court construed the Pennsylvania policy to provide uninsured motorist coverage for injuries the insured sustained when he was struck by an unknown motor vehicle in New York. The Appellate Court indicated "A motor vehicle insured under an out of state policy that contains liability coverage falls under the scope of Insurance Law §5107 and must be construed to contain uninsured motorist benefits". In this proceeding the Appellate Court abrogated the contract right of a citizen of another state to construe that policy as containing New York UM coverage under the New York Deemer Statute.

The import of all of the cases discussed above indicates that a non-resident of New York injured in a New York motor vehicle accident by an unauthorized insurer with limits below the minimum requirements is not subject to the New York Deemer Statute and is not required to prove a serious injury under the New York threshold law.

If a non-resident is injured in New York through the operation of a vehicle insured by an unauthorized insurer having limits at or above the mandatory statute a conflict of law would arise where the out of state policy has limits at or above the New York statutory minimum regardless of the unauthorized status of the out of state insurance carrier. The New York Deemer Statute, Insurance Law §5107, applies to authorized insurers doing business in New York. A New York Court would resolve a choice of law issue by using a "center of gravity" or "grouping of contacts" approach. The New York Court would also look to the place of the contract negotiations and performance, the location and the subject matter of the contract and the domicile of its contracting parties. Assuming for purposes of this hypothetical that the non-resident insured by the unauthorized insurer with limits above the New York statutory minimum was sued in New York for an accident that occurred in New York. New York Courts have a keen interest in protecting citizens of this state. However, that interest is not adversely affected in this fact scenario where the unauthorized insurer has coverage greater or equal to the New York minimum requirements. Assuming no-fault coverage is provided similar to New York the New York threshold of serious injury would apply to the non-resident suing in New York for a New York accident.

In *Engel v. Clapper* [19] the Appellate Division, Third Department was faced with a claim by a Quebec resident passenger, involved an accident in New York, who filed suit in New York to recover for personal injuries. The Court found no conflict with the laws of Quebec as far as no-fault benefits were concerned. The coverage under the Quebec policy was at or above the New York statutory minimum. Here the unauthorized insurer involved did not do business in New York and had no New York contacts. The Court was faced with the question as to the applicability of Quebec law where a party injured in an accident is barred from recovery against a third-party if they received no-fault benefits. In this proceeding a New York action was not dismissed on the basis of Canadian law. The Court held an exception existed under Canadian law where the accident happened outside the Province of Quebec. The plaintiff was allowed to bring an action in tort in New York which occurred outside the province.

In the *United States Automobile Association v. Melendez* [20] the First Department was faced with an issue involving a motor vehicle accident in New York with a vehicle insured out of state by an unauthorized insurer. The issue in this proceeding involved the applicability of New York law and whether the unauthorized insurer would be compelled to arbitrate an uninsured motorist claim in New York. The Appellate Division, First Department held under Connecticut law the arbitration of an uninsured motorist claim is permissible only if both sides agree to arbitrate. Here the limits provided by the unauthorized Connecticut insurer were at or above the New York statutory minimum requirements for no-fault, bodily injury and uninsured motorist coverage. The Court in United Service Automobile Association (supra) issued a permanent stay of arbitration holding the New York State Deemer Statute, Insurance Law §5107, does not apply and the parties could not be compelled to arbitrate where the law of the sister state (Connecticut), which is the situs of the contract, does not call for arbitration unless both sides agree. A similar holding occurred in *State Farm v. Torcivia* in the Second Department. [21] In this action, State Farm issued a policy in South Carolina to a South Carolina resident involved in an accident in New York. When faced with the uninsured motorist arbitration demand, the Court held "There is no requirement under New York no-fault statutes and regulations that mandates arbitration, where, as here, a policy issued out of state meets the minimum requirements of Insurance Law §5107". [22]

The issue then arises as to whether an injured party in New York, with a claim against a motor vehicle owner or operator insured by an unauthorized insurer, having limits below the mandatory statute in New York, can file a claim with the Motor Vehicle Accident Indemnification Corporation. The Motor Vehicle Accident Indemnification Corporation (MVAIC) is a creature of statute created by the Legislature in New York on January 1, 1957 to cover accidents involving certain categories of vehicles and to compensate innocent victims of motor vehicle accidents. Examples of coverage under MVAIC include:

- Unidentified hit and run
- Uninsured New York vehicle
- Stolen vehicle
- Uninsured out of state vehicle
- Insured vehicle where insurance has been deemed inapplicable to an accident
- An unregistered vehicle

In order to submit a claim to MVAIC, the claimant must be a qualified person as defined by Article 52 of the insurance law. [23] A qualified person is a resident of New York or a resident of another state having a substantially similar program for residents injured in that state. An example is a pedestrian who does not own a vehicle or qualify as an insured under a policy covering a resident relative. Persons with other applicable insurance cannot seek compensation from MVAIC. MVAIC, as the insurer of last resort, would not be required to provide coverage to a New York resident injured in a motor vehicle accident insured by an unauthorized insurance carrier having limits below the mandatory statute. The claimant would either be limited in recovery to the limits of the unauthorized insurance carrier, or required to seek SUM coverage from his own carrier or that of a resident relative.

A New York resident operating a vehicle insured by an unauthorized insurer with limits at or above the New York mandatory minimum would be subject to the same rules as a

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Culture Corner

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SIMON RATTLE, Artistic Director of the Berlin Philharmonic, will make his Metropolitan Opera debut December 17, 2010, leading a revival of Debussy's **PELLÉAS ET MÉLLISANDE**. The cast will feature Czech mezzo-soprano **MAGDALENA KO□ENÁ** as MÉLLISANDE and French baritone **STÉPHANE DEGOUT** as PELLÉAS. **GERALD FINLEY** will sing the role of PELLÉAS's jealous brother Golaud, **FELICITY PALMER** will sing the role of his mother Geneviéve, and **WILLARD WHITE** will complete the cast as the aged monarch Arkel. All five singers are making their Met role debuts.

Debussy's opera, based on the late 19th-century symbolist play by Maurice Maeterlinck, is the quintessential Impressionistic opera, with a richly orchestrated score colorfully evoking the moods of the mysterious drama on stage. Jonathan Miller's production, which premiered at the Met in 1995, is "a masterpiece of understatement, and yet it reflects the tiniest shifts of texture, urgency, and emotion in Debussy's meticulous handiwork" (*Financial Times*). **SIMON RATTLE**, the internationally acclaimed conductor who in the opinion of one Guardian reporter "has made a greater impact on the arts worldwide than any other living Brit," recently conducted ***PELLÉAS ET MÉLLISANDE*** with the Berlin Philharmonic; according to *Opera News*, he "guided his singers gently through the tangled Impressionistic forest of the score[and] made it pulsate with drama and urgency."

MAGDALENA KO□ENÁ has been heard at the Met as Cherubino in Le Nozze di Figaro, Dorabella in Cosí fan tutte, Idamante in Idomeneo, and Varvara in Janáèek's Kát'a Kabanová. Her performances of MÉLLISANDE, a role she has performed to acclaim at the Deutsche Staatsoper, Théâtre des Champs-Élysées, and in concert in Amsterdam, will be her first at the Met. When **STÉPHANE DEGOUT** sang PELLÉAS in Brussels, *Bloomber*g praised him for a "fervent, passionate" performance featuring an "ample, virile voice." **GERALD FINLEY'S** past Met roles include J. Robert Oppenheimer, the title character in the Met premiere of John Adams's Doctor Atomic, which was transmitted worldwide through The Met: Live in HD. **FELICITY PALMER'S** recent Met appearances include the Marquise of Berkenfield in the new production premiere of La Fille du Régiment, the Countess in The Queen of Spades, and Klytämnestra in Elektra. **WILLARD WHITE** is the only cast member to have sung in ***PELLÉAS ET MÉLLISANDE*** previously at the Met. He made his Met debut as Golaud in a 2000 revival of the work, conducted by James Levine.

Jonathan Miller's production features set design by John Conklin, costume design by Clare Mitchell, and lighting design by Duane Schuler.

PELLÉAS ET MÉLLISANDE will be experienced by millions of people around the world this season on the radio and on the internet, through distribution platforms the Met has established with various media partners. The December 17, 2010 opening performance will be broadcast live on Metropolitan Opera Radio on SIRIUS channel 78 and AM channel 79, as will the performances on December 23, December 29, 2010, and January 1, 2011. The December 17, 2010 performance will also be available via internet streaming at the Met's web site www.metopera.org. The January 1, 2011, 12:00 noon matinee will be broadcast live over the Toll Brothers-Metropolitan Opera International Radio Network.

***RAOUL* at BAM**

"RAOUL" was having its first American performances at the **BROOKLYN ACADEMY OF MUSIC'S ["BAM"] "NEXT WAVE FESTIVAL."** ***RAOUL*** played to packed audiences at BAM during November, 2010. I know: I saw how the last Saturday evening show was held up so that the efficient BAM ushers could fill every possible seat in the house with persons waiting on a long line trying to get in.

The show is staged by **Compagnie du Hanneton,** but is essentially a one man show of **JAMES THIERREE,** the gifted grandson of immortal actor and clown **CHARLIE CHAPLIN. JAMES THIERREE** has great energy and creativity. He is a clown, actor, acrobat, and trapeze artist, and all of his skills are needed to play this physically demanding role. The role is of pure physicality. There are no words in the piece, although occasional sounds.

JAMES THIERREE shows the isolation of the title character toward the outside world and aided by wonderful, imaginative props created by **VICTORIA THIERREE**, the mother of the show's star. Among the props were a gigantic floating elephant, a depressed jellyfish, a large asthmatic fish, and a fossilized bird.

While I admired **JAMES THIERREE's** energy, the quality that made his grandfather a cinematic legend and a comedic genius was his ability, even without words, to evoke emotion, as in Chaplin's portrayal of the tramp, even with a walk done with the back to the camera.

JAMES THIERREE has those qualities well within him, but they did not emerge. The part that engaged me was **JAMES THIERREE** as Raoul tapping his foot and eventually moving to a phonograph playing "I Whistle a Happy Tune" from *The King and I,* or his sticking his head into the long ear of the ancient phonograph when the needle got stuck. In both scenes, **JAMES THIERREE** was expressing a human emotion of happiness to the beat of the music and exasperation at a technical glitch. What made Chaplin great was his understanding and feeling of human emotions and vulnerabilities. I urge **JAMES THIERREE** to focus on those traits in a future production. I hope he returns to the USA, but in a production that also allows him to have a voice and to portray human emotions in his characterizations.

A great contrast can be made in **BRIAN DYKSTRA's *HO!*** [reviewed above] and **JAMES THIERREE's *RAOUL*. BRIAN DYKSTRA's** show relied on all words to convey the meaning, and **BRIAN DYKSTRA's** unbelievable and gifted recitation style. It could have benefited from physicality or some screens and slides in the background to provide variation. **JAMES THIERREE,** in contrast, relied on physicality and pops, with no language. He would have benefited by some language or words, or something that would have conveyed the sadness, emotions, and immense hurdles and challenges faced by his character.

The amazing scenography in ***RAOUL*** was provided by **JAMES THIERREE.**

***THE HARD NUT* at BAM**

Mark Morris Dance Group's joyous holiday classic, ***THE HARD NUT*** is now running at ***BAM's HOWARD GILMAN OPERA HOUSE*** at 30 Lafayette Ave*nue, in downtown Brooklyn until December 19, 2010*. I urge you to buy tickets. Performances are on: Dec 10, 11 & 15–18 at 7:30pm, and on Dec 12 & 19 at 3pm. Tickets range in price from: $25, 45, 60, and 70. The show is appropriate for ages 4 & up.

THE HARD NUT, a hilarious yet reverent holiday rendition of The Nutcracker, returns to BAM after an eight year absence, part of the Mark Morris Dance Group's 30th Anniversary Season. "Morris" choreography is formally dazzling, uproariously funny," raves the *San Francisco Chronicle*. It is this mix of playfulness and exquisite dance combined with the greatest respect for E.T.A. Hoffman's original story and Pyotr Ilyich Tchaikovsky's iconic score that has resulted in this family friendly favorite winning Ovation TV's Battle of the Nutcrackers contest for three years running.

Morris updates the classic holiday tale by setting it in the swinging 1960/70s, complete with go-go boots, G.I. Joe soldiers, dancing Barbie dolls, and inspired gender-bending casting. **THE HARD NUT** takes its title from the slightly sinister plot of The Nutcracker and the Mouse King, Hoffman's story-within-a-story wherein an evil Rat Queen disfigures Princess Pirlipat and offers an impossible challenge: the girl will regain her beauty if a young man can crack the "hard nut" with his teeth. Drosselmeier, the kind family friend, searches the world over but finds the hidden nut back at home 15 years later, just when a suitor who is up to the challenge finally emerges.

MARK MORRIS was born in 1956 in Seattle, Washington. He formed the **MARK MORRIS DANCE GROUP ["MMDG"]** in 1980 and has since created more than 120 works for the company. From 1988 to 1991, he was director of dance while MMDG was the national company of Belgium at the Théâtre Royal de la Monnaie in Brussels. In 1990, he founded the White Oak Dance Project with Mikhail Baryshnikov. Morris is also a ballet choreographer having created seven works for the San Francisco Ballet since 1994 and received commissions from many others. **MARK MORRIS** has worked extensively in opera, directing and choreographing productions for The Metropolitan Opera, New York City Opera, Gotham Chamber Opera, English National Opera, and the Royal Opera, Covent Garden. Morris was named a fellow of the MacArthur Foundation in 1991. For more information, visit www.mmdg.org.

Even for Queens residents, transportation to BAM is easy:

Subway: 2, 3, 4, 5, Q, B to Atlantic Avenue; D, N, R to Pacific Street; G to Fulton Street; C to Lafayette Avenue

Train: Long Island Railroad to Flatbush Avenue

Bus: B25, B26, B41, B45, B52, B63, B67 all stop within three blocks of BAM

Car: Commercial parking lots are located adjacent to BAM

For ticket and BAM bus information, call BAM Ticket Services at 718.636.4100, or visit www.BAM.org.

***JOHN GABRIEL BORKMAN* at BAM**

HENRIK IBSEN is probably my favorite playwright, so I am delighted to share with you that **BAM** will present a production of Ibsen's classic ***JOHN GABRIEL BORKMAN*** at **BAM** in January, 2011. The production stars **ALAN RICKMAN.** I expect the show will be eventually sold out, so please do yourselves a favor and avoid being shut out: For ticket information, call BAM Ticket Services at 718.636.4100, or visit www.BAM.org.

HOWARD L. WIEDER is the writer of both **"THE CULTURE CORNER"** and the **"BOOKS AT THE BAR"** columns, appearing regularly in **THE QUEENS BAR BULLETIN,** and is **JUSTICE CHARLES J. MARKEY'S PRINCIPAL LAW CLERK** in Supreme Court, Queens County, Long Island City, New York.

Video Conferencing

Continued From Page 4

interviews. In a little more than three years, the video conference unit has entertained more than 6,000 requests for video interviews. Two thirds of those requests have come from probation officers. The remainder were scheduled by attorneys who practice in Queens. Currently we average 3000 interview requests per year. We expect this number to peak at 4000 requests in 2007.

The one area of disappointment for the video conference unit has been the video court appearances. These appearances are governed by section 182 of the Criminal Procedure Law and by Part 106 of the Rules of the Court. By statute, video court appearances are not authorized for hearings, trials, certain pleas and certain sentences. In addition, the court must obtain the consent of the defendant in order to proceed by video. The latter restriction has been the main obstacle to the success of video court appearance program. Even so, there are several situations where video court appearances would be ideal. Most obvious are the instances where attorneys intend to submit an affirmation of actual engagement. When this situation occurs it is often an abysmal waste of time and resources to have Correction bring an inmate into court simply to advise the defendant of an adjourned date. If the attorney consents to the video appearance in his/her affirmation and if the request is submitted timely, the defendant can be placed on the video calendar and spared the ordeal of being transported to court needlessly. Upstate prisoners who need to vacate misdemeanor warrants are also ideal candidates for video court appearances. Finally, defendants who are being considered for inpatient programs, where the bed is not available on the adjourned date, are also appropriate for video court appearances.

The video unit is also exploring the feasibility of using video technology for hospital arraignments. Due to the delicate nature of the hospital setting, this goal is more difficult to attain. Currently, only Bellevue Hospital has agreed to participate in a video pilot program with the Courts, but we hope to have more city hospitals on board by the end of the year.

When the notion of using videoconferencing in our daily lives was first introduced to us at the 1964 Worlds Fair and then later in the Disney theme parks, it piqued our interest, but no one truly believed that we would see this futuristic vision in our lifetime. Well, video conferencing is now a reality and the Queens Supreme Court is taking every step possible to keep abreast of the advances in this field and to address the ever increasing demand by court users to avail themselves of this cutting-edge technology.

Unauthorized Insurance Carriers In New York

Continued From Page 17

non-resident. The Deemer Statute, Insurance Law §5107, would not apply as the unauthorized insurer had limits at or greater than the New York minimum. New York rules including Insurance Law §5102(d) would apply as a New York resident is receiving similar benefits as they would with a New York authorized insurer, therefore, New York rules would apply.

In New York "A covered person" is precluded from suing another "covered person" in negligence for basic economic loss equal to the amount he or she receives in first party benefits. [24] A covered person may always sue to recover economic loss in excess of $50,000. In the case of the "covered person" suing a "non-covered person" the covered person's individual right of action is not precluded by the no-fault statute. The insured is permitted to sue for damages, including all items of basic economic loss as defined by the no-fault statute without the requirement of showing a serious injury. An insurance carrier may only exclude from coverage certain categories of loss including the following:

1.) Intentional act
2.) Injuries which occurred while the claimant was driving while intoxicated
3.) Injuries which occurred while the claimant was committing an act which would constitute a felony
4.) Injuries occurred while the claimant was drag racing
5.) Injuries occurred while the claimant was repairing an automobile in the course of his employment

New York Insurance Law §5104(b) provides in pertinent part "In any action by or on behalf of a covered person versus a non-covered person, where damage from personal injuries arising out of the use of a motor vehicle may be recovered, an insurer which has paid out or is liable for first party benefits has a lien against any recovery to the extent of benefits paid or payable by it to the covered person. No such action may be compromised by the covered person except with the written consent of the insurer, or with the approval of the Court or where the amount of such settlement exceeds $50,000". [25] In *Federal Insurance Company v. Bodsky* [26] a New York resident passenger was injured in a motor vehicle accident in Pennsylvania. The car was driven by a New York resident who rented the vehicle from the defendant National Car Rental. Federal Insurance Company as the subrogee of the injured passenger commenced an action against the operator and National Car Rental to recover payments made to the injured passenger for basic economic loss and optional basic economical loss. The defendant car rental agency contended the insurance carrier was not entitled to recover for basic economic loss and optional basic economic loss because both the driver and passenger were New York residents, the car was rented in New York and the car and its occupants were returning to New York. The Appellate Division, Second Department rejected this contention as Insurance Law §5104(a) precludes recovery for basic economic loss between covered persons when the personal injuries arose out of the use of operation of a motor vehicle in New York State only.

In *General Accident Insurance Company v. Roberts* [27] the insurance carrier sought to subrogate and enforce a lien pursuant to Insurance Law §5104(b). The insurance carrier in *General Accident v. Roberts (supra)* was not precluded from enforcing the lien created statutorily under Insurance Law §5104(b) where the injured party was involved in an accident with a farm tractor, not covered by motor vehicle liability insurance.

Choice of law principals involving vehicles which enter New York and cause injury which are insured with an unauthorized insurance carrier create vexing questions for the trial Court to determine in coverage disputes. In New York, a Jurist will use the "center of gravity" or "grouping of contacts" approach in resolving a choice of law issue. The Court will usually apply the law of the jurisdiction with the most significant contacts, that is the most significant relationship to the parties or to the transaction. In *AIU Insurance Company v. Avis Rent A Car,* [28] the Second Department was asked to determine the rights and liabilities of the insurance carrier and the rental car company (pre-Graves Amendment) involving a New York accident. A New York resident was driving an Avis Rent A Car involved in a motor vehicle accident in Staten Island. The vehicle had been rented in North Carolina by a North Carolina resident and was registered in that state. The Avis rental agreement signed in North Carolina included a provision to the effect that the statutory minimum liability coverage provided to the driver was excess to any liability coverage available to the driver from any other source. This provision was enforceable in North Carolina. Applying the grouping of contact analysis to this conflict of law issue the Court upheld North Carolina law and indicated that the rental liability coverage was in conformity with the contract. New York's interest in insuring an injured party's recourse to a financially responsible vehicle owner was not affected by the Court's analysis. In most instances, New York Courts will not abrogate the laws of a sister state unless displacing that law would advance public policy or relevant substantive law of New York. Unless some public policy can be cited in a center of gravity or more significant contacts analysis, the law of the place of the contract will be applied.

As with any insurance coverage analysis question the issue of an unauthorized insurance carrier in New York is a fact driven analysis which requires a case by case approach. While the New York Deemer Statute provides maximum protection to New York residents it does not cover every situation involving motor vehicle accidents in New York. The insurance coverage practitioner is therefore cautioned to conduct a complete factual analysis of the business dealings of the unauthorized insurer before a determination can be made as to the applicability of the New York Deemer Statute and choice of law issues are considered.

Francis J. Scahill is a long time member of the Queens County Bar Association and a partner of the law firm Picciano & Scahill in Westbury, NY.

FOOTNOTES

1 McKinney's Consolidated Laws of New York, Chapter 28 Article 51, §5107
2 234 AD2nd 41, 650 NYS 2d 210 (1st Dept. 1996)
3 11NYCRR §65.5 (a)(b)
4 34NY 2nd 43; 312 N.E. 153(1974)
5 Supra @ P. 48
6 McKinney's Vehicle & Traffic Law §318(5)
7 New York Insurance Department WebSite HTTP://www.ins.state.ny.us1
8 11 NYCRR §65-1.8(c)
9 109733/04
10 McKinney's Consolidated Laws: New York Insurance Law §1101
11 35 AD 3rd 584, 27NYS 2nd 809(Appellate Div. 2nd Dept.) 2006
9 NY3rd 196 878 N.E. 583(2007)
12 4 Misc. 2nd 573; 477 NYS 2nd 969 (1984)
McKinney's Consolidated Laws of New York Vehicle & Traffic Law §345(3) 7 Misc. 3rd 358; 793 NYS 2nd 863 (Kings County 2005)
McKinney's Consolidated Laws of New York Vehicle & Traffic Law §388
246 AD82nd 543; 667 NYS 2nd 417 (Appellate Div., 2nd Dept. 1998) 250 AD82nd 512; 673 NYS 2nd 126 (1st Dept. 1998)
14 AD83rd 855; 788 NYS2nd 683 (3rd Dept. 2005)
27 AD83rd 296; 811 NYS2nd 641 (1st Dept. 2006)
277 AD2nd 321; 715 NYS 2nd 75 (2nd Dept. 2000)
Supra @ p.321 McKinney's Consolidated Laws of New York Insurance Law Article 52 McKinney's Consolidated Laws of New York Insurance Law §5104(b) Insurance Law §5104(b)
267 AD82nd 295; 700 NYS 2nd 57 (2nd Dept. 1999)
266 AD2nd 791; 699 NYS 2nd 158 (3rd Dept. 1999)
289 AD2nd 346; 739 NYS2nd 82 (2nd Dept. 2000)

Marital Quiz

ANSWERS TO MARITAL QUIZ ON PAGE 8

Question #1 - Does the Family Court Act Provide for an award of durational maintenance?
Your answer - No, *Levy v. Levy* 2009 NY Slip Op 06809 (2nd Dept.).

Question #2 - If the Supreme Court does not grant a divorce, may it award durational maintenance?
Your answer - No, *Levy v. Levy* 2009 NY Slip Op 06809 (2nd Department). If the action for divorce is dismissed, there is no longer a matrimonial action pending and the defendant's application for maintenance is properly viewed as one for spousal support under Family Court Act §412 rather than under the provisions of DRL §236(B).

Question #3 - The Appellate Division Second Department has adopted a liberal policy with respect to vacating defaults in matrimonial actions. Is it still incumbent upon a defendant to demonstrate a reasonable excuse and the existence of a meritorious defense?
Your answer - Yes, *Cuzzo v. Cuzzo*, 2009 NY Slip Op (2nd Dept.).

Question #4 - May the Family Court modify a maintenance provision in a separation agreement, if the parties were never divorced?
Your answer - No, unless the petitioner is likely to become in need of public assistance or care. *Matter of Johna M.S. v. Russell E.S.* 10 N.Y.3d 364; 889 N.E.2d 471; 859 N.Y.S. 2d 594 (Ct of Appeals 2008).

Question #5 - Would your answer to Question 4 change, if the separation agreement provided that: "while this agreement will resolve these issues for the present time, the Wife shall not be foreclosed from seeking additional maintenance in negotiations with the Husband, or failing such negotiations, then filing in a court of appropriate jurisdiction for a modification of the present provisions concerning the payment of maintenance. Any application by the Wife shall be treated as a 'de novo' application to the court, since it is not possible to set future maintenance at this time because it is impossible to forecast the Wife's needs or the Husband's income/earning capacity?"
Your answer - No, the Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by stature. *Matter of Johna M.S. v. Russell E.S.* 10 N.Y. 3d 364; 889 N.E.2d 471; 859 N.Y.S.2d 594 (Ct. of Appeals 2008).

Question #6 - The parties' stipulation of settlement was incorporated, but did not merge the parties' judgment of divorce. May the court entertain a motion to modify the stipulation of settlement?
Your answer - No must bring a plenary action. *Reiter v. Reiter* 39 A.D. 3d 616; 835 N.Y.S.2d 240 (2nd Dept. 2008).

Question #7 -May the court suspend child support payments where the noncustodial parent's access to the child has been unjustifiably frustrated by the custodial parent?
Your answer - Yes, where the custodial parent's actions rise to the level of deliberate frustration or active interference with the noncustodial parent's visitation rights. *Matter of Thompson v. Thompson* 2010 NY Slip Op 08120 (2nd Dept.).

Question #8 - If a judgment of divorce and stipulation of settlement are silent as to sharing the cost of private secondary education, should the court treat the application for the payer spouse to share said costs as a modification or a de nova determination?
Your answer - De novo, the standard to be used is found in the CSSA, pursuant to which a court may award educational expenses, if it determines that a private school education is appropriate for the child, "having regard for the circumstances of the case and of the respective parties and in the best interest of the child, as justice requires." In the *Matter of Laura Durso v. Gerald Durso*, 68 A.D. 3d 1107; 893 N.Y.S.2d 81 (2nd Dept. 2009).

Question #9 - Is the presumption that $25.00 per month child upport is the minimum amount to be ordered by court under §413(1)(g) of the New York Family Court Act irrebuttable?
Your answer - No, 42 U.S.C.S. §667 mandates a rebuttable presumption in all cases. Clancey *v. Moody* 83 N.Y.2d 65, 607 N.Y.S.2d 906 (Ct. of Appeals, 1993).

Question #10 - In a separation agreement the partied elected to apply the CSSA guidelines to their total combined incomes. Are they required to articulate the reasons to justify their agreement in this regard?
Your answer - No, *Chalk v. Chalk* 2010 Slip Op 05501 (2nd Dept.).

CORRECTION: In the Marital Quiz which appeared in the October 2010 issue of the Queens Bar Bulletin, I cited an Appellate Division, Second Department case, *Matter of Jewett v. Monfoletto* 2010 NY Slip Op 02953. This case stood for the proposition that it is necessary to demonstrate an unanticipated and unreasonable change of circumstances in order to obtain an increase in child support, when modifying a separation or settlement agreement which was incorporated, but not merged, into a judgment of divorce. After that case was decided and after I wrote the Marital Quiz the law changed. DRL §236B(9)(b) and FCA§451 have been amended to a "substantial change of circumstances." The amendment only pertains to stipulations settlement agreements executed after the effective date of the bill, October 13, 2010.