To Be Argued By:
RUSSELL M. STEINTHAL

New York County Clerk's Index No. 114818/09

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

JOHN R. LUCKER, ELIZABETH A. LUCKER, NANCY L. ROUSSEAU, LYNN COHEN and FRAN GOLDSTEIN as representatives of a class consisting of themselves and all others similarly situated,

Plaintiffs-Appellants,

—against—

BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK,

Defendants-Respondents,

—and—

COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC.,

Defendant.

BRIEF OF DEFENDANTS-RESPONDENTS

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PRELIMINARY STATEMENT

While arising in the perhaps somewhat unusual factual context of a dispute over the perpetual care of graves at Bayside Cemetery, a large Jewish cemetery in Queens owned by Defendant-Respondent Congregation Shaare Zedek ("Shaare Zedek"),[1] this appeal presents a straightforward application of long-established rules of standing.

Plaintiffs, five individuals whose relatives are buried in Bayside Cemetery, brought this putative class action alleging that Congregation Shaare Zedek violated the General Business Law and breached its obligations as trustee of the cemetery's perpetual care trusts. Yet none of these plaintiffs allege that they personally established any of the trusts at issue, contributed any funds to them or have been personally injured by Defendants' alleged actions in any way whatsoever. Notably, with the exception of a single plaintiff who, after Defendants had filed their motion to dismiss for lack of standing, made a futile effort to bootstrap his standing by securing appointment as administrator of the estate of his long-

[1] Congregation Shaare Zedek is a religious corporation organized and existing under New York law. Shaare Zedek owns and operates Bayside Cemetery which, despite being named as a Defendant in the Complaint and a Respondent here, is not a separately incorporated legal entity. The third defendant below, Community Association for Jewish At-Risk Cemeteries ("CAJAC"), is an independent New York not-for-profit corporation and is not a party to this appeal. As used in this brief, therefore, unless the context indicates otherwise, "Defendants" or "Respondents" refers to Congregation Shaare Zedek and Bayside Cemetery.

deceased grandmother, Plaintiffs do not purport to bring these claims in a representative capacity under the Estates, Powers and Trusts Law. Instead, they argue that they should be allowed to sue in their individual capacities, "standing in the shoes" of their deceased family members. Indeed, it is notable that the Complaint's description of the putative class includes *only* "family members and near relatives" of individuals who purchased perpetual care from Defendants, but not the individuals who themselves established the trusts and for whom any representative claim would presumably be made. (Compl. ¶ 33; R. at 78.)

After carefully considering Plaintiffs' claims and arguments, the lower court granted Defendants' motion to dismiss the action in its entirety for lack of standing. The lower court applied two well-established principles of standing: (1) plaintiffs suing in their individual capacities must demonstrate that they suffered a personal injury-in-fact as a result of the defendants' conduct; and (2) cemetery perpetual care trusts are subject to the same rules of standing as any other charitable trusts, including the presumption that individual purported beneficiaries lack standing to enforce the trust. Because those principles are consistent with the repeated teachings of the Court of Appeals and this Court, whereas Plaintiffs' novel theories of standing are without support in New York law, we respectfully suggest that the dismissal of Plaintiffs' claims should be affirmed.

At the same time, it is important to note what this case is *not* about. This case is not about the condition of Bayside Cemetery. Contemporaneously with but independent of this litigation, Shaare Zedek, with the invaluable assistance of CAJAC and other Jewish communal organizations, completed a long-awaited professional cleanup of the cemetery grounds. Defendants respectfully submit that this disproves Plaintiffs' contention that "the only way to resolve the problem concerning the disgraceful condition of the cemetery is this lawsuit," (Appellants' Br. at 11) but do not suggest that either the completion of the cleanup or the ongoing need to raise funds for the long-term care of the cemetery should affect the outcome of this action. Indeed, even under Plaintiffs' theory of the case, any judgment would either (i) lead to damages payments to the individual Plaintiffs; or (ii) increase the corpus of trusts for the perpetual care of specific graves in the cemetery, but neither would make any additional funds available for the maintenance or upkeep of the cemetery as a whole.

Neither is this case about impunity. Despite Plaintiffs' suggestion (citing only a newspaper article) that "Bayside is not subject to the enforcement of N.Y. State Cemetery Law" and "is registered as a 'religious group' not a foreign or domestic 'not for profit' corporation and, therefore, virtually beyond governmental regulation," (Appellants' Br. at 11 & n.8) Defendants have never made any such

argument.[2] Defendants do not dispute, for example, that the Estates, Powers & Trusts Law specifically authorizes the Attorney General to enforce the terms of charitable trusts, including for the perpetual care of graves. *See* Estates, Powers & Trusts Law ("EPTL") §§ 8-1.1(f), 8-1.5. Nor do Defendants dispute that Section 1507(c) of the Not-for-Profit Corporation Law, which governs perpetual care trusts, applies to religious corporations like Shaare Zedek.

What is, however, at issue, is whether Defendants and other charitable trustees in New York (including other cemetery operators) will continue to be able to rely on longstanding principles of trust administration and standing, including the rule that they owe fiduciary duties only to the People of the State of New York, as the ultimate charitable beneficiaries of the trust. Being unable to establish standing under conventional rules, Plaintiffs ask this Court to rewrite not just the law of charitable trusts (to permit individual beneficiaries to sue in their own right), but also the basic rule that individuals may sue only for their own personal injuries, not those of their living or deceased relatives. As Justice James aptly noted in her decision below, "the Legislature is free to amend the statutory scheme

[2] Because the judgment that is appealed from was entered on a motion to dismiss, on which the allegations of the Complaint were taken as true, Defendants have not attempted to correct all of the factual allegations either in the Complaint or Appellants' brief that are incorrect or disputed. Nonetheless, Defendants categorically deny that they ever used trust funds to fund synagogue repairs. Notably, the *Daily News* article cited by Plaintiffs does not allege otherwise. (*Compare* R. at 190 (referring to supposed borrowing from "a nonrestricted account") *with* Appellants Br. at 1 (referring to the use of "perpetual care trust fund monies . . . in contravention of the trust agreements.").)

to provide an enhanced remedy, but that is not the function of this tribunal." (R. at 22.)

Respondents therefore respectfully request that the decision below be affirmed.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a plaintiff, who secured appointment as administrator of the estate of a decedent 23 years after her death only after commencement of this action and after his standing to sue was challenged, can state a claim for a cause of action that necessarily must have accrued after the death of his decedent?

   Answer: The court below did not address this question.

2. Whether relatives of purchasers of perpetual care in a cemetery, who did not themselves pay any funds into the trusts, have standing to sue to enforce the perpetual care trusts?

   Answer: No, such plaintiffs lack standing to sue.

3. Whether plaintiffs who purport to "stand in the shoes" of their deceased relatives, but lack any personal injury-in-fact, have standing to sue in their individual capacity or otherwise?

   Answer: No, such plaintiffs lack standing to sue.

3. Whether Plaintiffs, who did not challenge the reassignment of this action from the Commercial Division to a non-commercial part at the time of transfer, have waived any appeal on that ground that they might have had?

   Answer: The court below did not address this question, which was not presented to it.

COUNTER-STATEMENT OF THE CASE

Plaintiffs, five individuals who purport to sue "on behalf of themselves as family members or near relatives, executors, trustees, legal representatives and all other similarly situated persons," commenced this putative action on October 21, 2009 with the filing of a Summons and Complaint. (R. at 66.) Pursuant to a Request for Judicial Intervention filed by Defendant Community Association for Jewish At-Risk Cemeteries (not a Respondent here), this action was initially assigned to Justice Bernard A. Fried of the Commercial Division (Part 60). In accordance with Commercial Division Rule 24, Defendants wrote to Justice Fried on November 20, 2009, requesting a pre-motion conference in contemplation of a motion to dismiss the Complaint pursuant to CPLR 3211, which operates as a timely notice of motion, *see* Commercial Division Rule 24(h).

On December 1, 2009, Justice Fried ordered that the case be transferred to a non-commercial IAS Part, (R. at 479) and the Clerk assigned the matter to Part 59 (Debra A. James, J.S.C.). While Rule 202.70(f)(2) of the Uniform Rules for the Trial Courts permitted "[a]ny party aggrieved" by Justice Fried's order to seek reconsideration by the Administrative Judge within ten days, neither Plaintiffs nor any Defendant filed such a request, thereby waiving any right to review of the reassignment.

The case having been reassigned to Part 59 and therefore no longer being subject to the Commercial Division's pre-motion conference rule, Defendants filed a motion to dismiss the action in its entirety pursuant to CPLR 3211 for, *inter alia*, lack of standing and failure to state a claim on December 18, 2009. (R. at 128-158.) After briefing and oral argument, Justice James issued a Decision and Order on September 20, 2011 carefully reviewing Plaintiffs' claims and concluding that each of them should be dismissed for lack of standing either under the General Business Law (as to the first, second and third causes of action) or at common law (as to the fourth through eighth causes of action). (R. at 10-23.) Justice James declined Plaintiffs' invitation to either hold that they had standing to enforce the perpetual care trusts at issue as beneficiaries of the trusts—a position that this Court specifically rejected in *Smithers v. St. Luke's-Roosevelt Hospital Center*, 281 A.D.2d 127 (1st Dep't 2001)—or to extend a specific set of standing rules for cases involving "trespass actions against cemeteries and gravemarkers" into a general exception to ordinary rules of standing for cases involving cemeteries.

Having concluded that Plaintiffs lacked standing to sue, Justice James did not rule on the alternative grounds for dismissal presented in Defendants' motion to dismiss, including that the claims were barred by the statute of limitations; that the Plaintiffs had failed to allege that they had any legal claim to any of the funds that Defendants had allegedly converted or by which they had been unjustly

enriched; and that the claims of Plaintiffs John Lucker, Elizabeth Lucker and Nancy Rousseau (all of whom purport to "stand in the shoes" of their grandmother Ruth Lucker) lay against the burial society through which they purportedly purchased perpetual care, not against the Defendants.

A judgment dismissing all claims against Defendants was entered by the New York County Clerk on October 6, 2011. While Plaintiffs' counsel on October 11, 2011 wrote to the Court to "request that the [the] Court (i) *sua sponte"* vacate or modify its order of dismissal, and referencing a "soon to be filed motion for reargument," Plaintiffs never filed any formal post-judgment motions. This appeal followed.

ARGUMENT

POINT ONE:

JOHN LUCKER DID NOT SUE AS A PERSONAL REPRESENTATIVE AND ANY EFFORT TO DO SO WOULD HAVE BEEN FUTILE.

Plaintiff John R. Lucker argues that the dismissal of his claims for lack of standing was in error because, more than three months after the filing of the Complaint in this action and after Defendants had filed their motion to dismiss, he obtained an *ex parte* order from a Connecticut probate court appointing him as the administrator of the estate of his grandmother, Ruth B. Lucker (R. at 270), who had died in 1987, 23 years before Plaintiff's appointment (R. at 294). But given that Mr. Lucker was not a duly-appointed executor at the time he filed his Complaint, the Complaint contained no allegations making clear that it was brought in a representative capacity on behalf of a decedent's estate and Mr. Lucker never took any action before entry of the judgment to amend the Complaint, amend the caption or otherwise put the IAS court on notice that he sued in a representative capacity, the dismissal of Mr. Lucker's claim was entirely proper.

This action was commenced on October 21, 2009, when the Summons and Complaint were filed with the Clerk of the Court. (R. at 66.) At that point, Mr. Lucker was not the duly appointed personal representative of his grandmother, and

the Complaint alleged only that "Mr. Lucker was the executor of his father's estate. His father was the executor of Mr. Lucker's estate, thereby making Mr. Lucker the present executor of his grandmother's estate." (Compl. ¶ 9, R. at 70.) That allegation was insufficient, as a matter of law, to confer standing on Mr. Lucker to sue on behalf of his grandmother's estate.

First, it is well-settled that even the executor named in a will or another person who is *entitled* to be appointed as a personal representative lacks standing to bring an action on behalf of the estate unless and until he or she has received letters testamentary or letters of administration from the Surrogate. *See Schoeps v. Andrew Lloyd Webber Art Found.*, 66 A.D.3d 137 (1st Dep't 2009); *Cho v. Cho*, 45 A.D.3d 388 (1st Dep't 2007); *Brandon v. Columbian Mut. Life Ins. Co.*, 264 A.D. 2d 436 (2d Dep't 1999); *Palladino v. Metropolitan Life Ins. Co.*, 188 A.D. 2d 708, 709 (3d Dep't 1992) ("Only a duly appointed personal representative may bring suit on behalf of a decedent. Inasmuch as letters of administration have not been issued to plaintiff, he has no standing to sue."). Moreover, the type of indirect representation described in Mr. Lucker's complaint is expressly prohibited by the EPTL. *See* EPTL § 11-3.4 ("Except as otherwise prescribed by law, a personal representative of a personal representative has no authority to commence or maintain any action or proceeding relating to the estate, effects or rights of the decedent of the first representative . . . .").

Once Defendants had moved to dismiss Mr. Lucker's claims (along with those of the other Plaintiffs, from which they are indistinguishable in the Complaint), Mr. Lucker apparently for the first time sought to be appointed as the administrator of his grandmother's estate. (R. at 270.) Yet such a *post-hoc* appointment cannot save Mr. Lucker's action, since this Court looks to the plaintiff's standing at the time the action was commenced. *See, e.g., Drezin v. New Yankee Stadium Community Benefits Fund, Inc.*, 94 A.D.2d 542 (1st Dep't 2012) (plaintiff lacked standing where he "did not represent any interest in defendant at the time the proceeding was commenced"); *Hyman v. Previte*, 51 A.D.2d 948 (1st Dep't 1976) (petitioner who "was not an enrolled Democrat when the designating petition was filed or at the time [the] action was commenced" lacks standing). Nor did Mr. Lucker ever move to amend the Complaint or even to correct the caption. Instead, two days *after* Plaintiffs filed their opposition to the motion to dismiss—which never argues that Mr. Lucker possessed any different standing than any of the other named Plaintiffs—Plaintiffs' counsel filed a short affidavit attaching the Fiduciary Probate Certificate issued by the Connecticut Court of Probate and apparently attempting to comply with EPTL § 13-3.5, notwithstanding its requirement that the *personal representative* file an affidavit setting forth the required facts. (R. at 268.) And Mr. Lucker's appointment to act as administrator

expired on February 2, 2011, further calling into question his standing to pursue this appeal. (R. at 270.)

However, even if Mr. Lucker had amended or sought leave to amend his Complaint to sue in a representative capacity as administrator of his grandmother's estate, the amendment would have been futile, for two independent reasons.

First, Mr. Lucker's grandmother passed away in 1987, twenty-two years before the commencement of this action. Her personal representative, therefore, can only pursue claims that accrued prior to her death. *In re Estate of Gandolfo*, 237 A.D.2d 115 (1st Dep't 1997) ("The alleged breach of confidential or fiduciary duty occurred almost a year after the death of plaintiffs' decedent. Accordingly, plaintiffs' causes of action did not yet exist in decedent's favor as of his death (*cf.*,EPTL 11–3.2[b]), and plaintiffs cannot press a cause of action that was not viable during decedent's life."). Yet given the extreme length of time between the decedent's death and the appointment of Mr. Lucker as personal representative, any cause of action that accrued prior to Mrs. Lucker's death is now barred by the Statute of Limitations. *See* CPLR 214 (three year limitations period applicable to claims under the General Business Law, for conversion, for breach of fiduciary duty and for aiding and abetting a breach of fiduciary duty); CPLR 213 (six year limitations period applicable to contract and unjust enrichment claims); *see also* CPLR 210(a) (limitations period for survival actions is one year after decedent's

death); *cf. Heslin v. County of Greene*, 14 N.Y.3d 67, 78 (2010) (describing as an "unfortunate occurrence" a situation in which a personal representative authorized to commence a survival action was not appointed until after the statute of limitations had run, but declining to toll or extend the limitations period).

An attempt by Mr. Lucker to amend his Complaint would have likewise been futile because documentary evidence unambiguously demonstrates that his grandmother never purchased perpetual care from Defendants in the first place. Mr. Lucker's entire claim rests on the allegation in paragraph 9 of the Complaint that "Mr. Lucker's grandmother, through her agent the Chebra Shebath Achim Society, purchased perpetual care for the Lucker plots at Bayside Cemetery," (R. at 70.), and Exhibit C to the Complaint, a letter dated January 4, 1973 from Nathan Lipton, on behalf of the Society, to Mrs. Lucker (R. at 97). Specifically, Mr. Lucker relies on the statement in the January 1973 letter that "we purchased perpetual care of the cemetery," which Plaintiffs argue means that the Society purchased perpetual care for the Lucker graves as Mrs. Lucker's agent. (R. at 97, 181.) But another letter from Mr. Lipton, known to the Plaintiffs at the time the Complaint was filed and produced by them as part of jurisdictional discovery in a prior federal action, paints a starkly different picture. On December 23, 1972, Mr. Lipton specifically wrote that "As you know, the Board of Trustees has purchased perpetual care for our cemetery grounds. *This of course does not include the care*

of individual graves." (R. at 302) (emphasis added). Despite Plaintiffs' failure to cite the December 1972 letter in or attach it to their Complaint, the Court could properly consider it on a motion to dismiss pursuant to CPLR 3211, since it conclusively establishes that Mrs. Lucker never purchased perpetual care and therefore lacks any standing to bring this action. *See Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 A.D.2d 248 (1st Dep't 1995) (relying on two documents that "should be read and considered together as part of the same transaction" to support dismissal pursuant to CPLR 3211(a)(1)).

For all of those reasons, despite his appointment as administrator of his grandmother's estate, Mr. Lucker has no better—indeed, potentially worse—standing than any of the other Plaintiffs. His claims were, therefore, properly dismissed.

POINT TWO:

PLAINTIFFS LACK STANDING AS FAMILY MEMBERS TO ENFORCE CHARITABLE TRUSTS CREATED BY THEIR DECEASED RELATIVES

It is undisputed that the perpetual care trusts that are at the core of this action are charitable in nature. EPTL § 8-1.5. Plaintiffs also agree, as the lower court found, that the general rule is that private individuals lack standing to enforce the terms of a charitable trust. Yet despite the clear teaching of the Court of Appeals and this Court that any exceptions to that rule must be narrowly cabined, Plaintiffs

suggest that simply by virtue of their claim to be "beneficiaries" of the perpetual care trusts, they—and, indeed, *all* relatives, of whatever degree, of individuals who purchased perpetual care—may sue to enforce the terms of the perpetual care trusts. Alternatively, they seek to carve out a broad cemetery exception that would permit them to enforce the perpetual care trusts (and potentially other cemetery-related claims) based solely on their status as descendent s of individuals buried in Bayside Cemetery. The lower court rightly declined to endorse either of those radical expansions of standing, noting that only the Legislature could authorize such novel relief. (R. at 22.)

A. Plaintiffs cannot claim standing as beneficiaries of the perpetual care trusts

Citing to two treatises and the decision of the Court of Appeals in *Alco Gravure, Inc. v. Knapp Foundation*, 64 N.Y.2d 458 (1985), Plaintiffs argue that, as relatives of individuals who established perpetual care trusts, they are the intended beneficiaries of such trusts and therefore have standing to enforce them. Yet *Alco Gravure* in fact establishes a much narrower rule that cannot support Plaintiffs' argument:

> The general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust. Instead, the Attorney-General has the statutory power and duty to represent the beneficiaries of any disposition for charitable purposes. There is an exception to the general rule, however, when a particular group of people has a special interest in funds held for a charitable purpose, as when they

> are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number.

64 N.Y.2d at 465.

In *Alco Gravure*, the Court of Appeals considered the dissolution of a foundation that was effectively a charitable trust to promote the welfare of past, current or future employees of any "printing, publishing or lithographing corporation of which Joseph P. Knapp" was a stockholder, director or officer. *Id.* at 462. As the Court pointed out, in *Alco Gravure* there was "a class of beneficiaries which is both well defined and entitled to a preference in the distribution of defendant's funds prior to the disputed amendment, *viz*., the employees of corporations in which Joseph P. Knapp was involved and the employees of successors to such corporations." *Id.* at 465-66.

By contrast, the class of "relatives" or "family members" that Plaintiffs purport to represent is neither "sharply defined" nor "limited in number"—to the contrary, it is nearly limitless, as Plaintiffs provide no limiting principle that would distinguish children from grandchildren, from favored nieces and nephews, cousins, etc. Nor do relatives have the type of "special interest" in the performance of the perpetual care trusts that *Alco Gravure* contemplates. While Plaintiffs argue that "the purchaser of perpetual care wants to ensure the maintenance of his/her plot in order to encourage future generations to visit and

pay proper respect" and that "perpetual care is purchased for the benefit of others including 'surviving family, friends and other interested parties," (Appellants' Br. at 15-16.), neither of those gives relatives a *special* interest in the trust. Unlike the employees of the Knapp companies in *Alco Gravure*, who had clearly superior rights to the charitable beneficence of the trust relative to non-employees, *anyone* visiting a grave in the cemetery, whether a relative, a history buff or just someone visiting an adjacent grave, "benefits" from any additional care provided to the grave by virtue of the perpetual care trust.[3] Conversely, unlike the trust in *Alco Gravure*, which made loans and provided other tangible assistance to the specially-benefitted class, *see* 64 N.Y.2d. at 463, none of the Plaintiffs here derive any concrete or financial benefit from the perpetual care trusts whatsoever.

Undeterred, Plaintiffs assert flatly that "enforcement actions by beneficiaries . . . are permissible" under New York law (Appellants' Br. at 17) and that "New York law recognizes the right of family members to enforce an abused trust," (Appellants' Br. at 18), citing in both cases to this Court's decision in *Smithers v. St. Luke's-Roosevelt Hospital Center*, 281 A.D.2d 127 (1st Dep't 2001). Yet the

[3] While Defendants agree with the lower court that the precedential value of out-of-state precedents on this question is limited, given the unique nature of New York's law on charitable trusts, (R. at 19) Plaintiffs' citation in footnote 13 of their brief to *Missouri ex rel. Nixon v. Hutcheron*, 96 S.W.3d 81 (Mo. 2003), is curious: Plaintiffs themselves quote that case as suggesting that standing turns on whether the putative plaintiff is "entitled to receive a benefit under the trust that is not merely the benefit to which members of the public in general are entitled." *Id.* at 84. Yet Plaintiffs here cannot possibly hope to meet that standard, as the "benefit" they receive from the perpetual care trusts is *exactly* the same as that received by anyone else visiting the same graves.

Court went out of its way in *Smithers* to make clear that that case did *not* involve either beneficiary standing or Mrs. Smithers' individual standing as a family member. The majority held that:

> Supreme Court incorrectly characterized Mrs. Smithers as one who "positions herself as the champion and representative of the possible beneficiaries of the Gift," with no tangible stake because she has no position or property to lose if the Hospital alters its administration of the Gift. Mrs. Smithers did not bring this action on her own behalf or on behalf of beneficiaries of the Smithers Center. She brought it as the court-appointed special administratrix of the estate of her late husband to enforce his rights under his agreement with the Hospital through specific performance of that agreement. Therefore, the general rule barring beneficiaries from suing charitable corporations has no application to Mrs. Smithers.

Id. at 138. Needless to say, with the exception of Plaintiff John Lucker, whose claim as a personal representative is discussed above, none of these Plaintiffs can meet *any* of the tests that the *Smithers* court spelled out: they *do* claim to bring this action on their own behalf as family members; they *do* claim to bring this action in their capacity as beneficiaries; and they *do not* (with the single exception discussed above) claim to be court-appointed personal representatives of a donor to the charitable trusts.

B. <u>There is no special rule of standing for "cemetery trusts"</u>

Plaintiffs also rely on treatises and largely out-of-state case law in an attempt to construct a cemetery-specific theory of standing, namely that "family members of a deceased interred in a cemetery may enforce a trust" related to the cemetery.

(Appellants' Br. at 16.) While a handful of old New York cases recognize the right of family members to protect the gravesites of their ancestors against physical desecration, the lower correctly declined to extend that limited rule to encompass Plaintiffs' purely financial perpetual care claims at issue here.

As the court below recognized, the decision of the Court of Appeals in *Mitchell v. Thorne*, 134 N.Y. 536 (1892), provides no support for Plaintiffs' argument. In *Mitchell*, the Court held that plaintiffs who sued as heirs of the grantor of a conveyance that specifically reserved burial rights on the property to the grantor *and his heirs* had the right to an injunction to prevent the fee owner of the property from destroying existing gravestones and denying the family the ongoing use of its burial easement.

Lay v. Carter, 151 N.Y.S. 1081 (Sup. Ct. – Seneca Cty. 1915), and *Chace v. Leising*, 189 Misc. 980 (Sup. Ct. – Niagara Cty. 1947), are similar. In *Lay*, the plaintiffs' family had "used, without objection from any source, portions of said lot No. 40 as a place for the burial of their dead" for more than 75 years. 151 N.Y.S. at 1082. When the record owner of the land attempted to interfere with the family's acquiesced-in property rights, the court allowed the plaintiffs to sue for a determination of the parties' respective property rights. *Id.* In *Chace*, meanwhile, the court allowed plaintiff to seek an injunction to prohibit the record owner of the land from removing monuments and destroying a cemetery that, while located on

defendant's property, had previously been dedicated as a cemetery. 189 Misc. at 981-82. Both of those cases essentially arise from the special way that New York law handles real property rights in a cemetery. As Plaintiffs themselves note (Appellants' Br. at 7-8), a party can transfer burial rights in a cemetery while still retaining fee simple title to the land; the same is true in reverse, as a party can, under certain circumstances, acquire burial rights on land to which he or she does not have fee simple title. *Lay* and *Chace* stand for the proposition that, in those cases, the party having burial rights can obtain injunctive relief to defend them like any other property rights.

Here, however, there is no allegation that anyone is destroying gravestones or taking any other action that is inconsistent with Bayside Cemetery's status as a burial ground. As the lower court held, therefore, there is no reason to extend the special standing rules that have developed for intentional trespasses to cemeteries and gravestones (which, as noted above, are frequently not "owned" by the same party that owns the underlying land in fee simple and would thus ordinarily have standing to sue, or may alternatively be the defendant) to the instant case, which involves the Defendants' administration of charitable trusts and can be more than amply handled under the general rules applicable to all such trusts.

POINT THREE:

PLAINTIFFS' GENERAL BUSINESS LAW CLAIMS WERE PROPERLY DISMISSED FOR LACK OF STANDING

The lower court dismissed Plaintiffs' first, second and third causes of action under the General Business Law for lack of standing. Because Plaintiffs have not alleged any personal injury-in-fact as a result of the alleged violations of the GBL, their claims were properly dismissed.

On appeal, Plaintiffs argue that the lower court erred in holding that the GBL violations occurred at the time that their relatives allegedly executed their perpetual care contracts. While Defendants believe that the Court was correct in that conclusion[4]—which would be important for assessing Defendants' alternative arguments that no private right of action existed for conduct before June 19, 1980 or that Plaintiffs' claims are time-barred— it was largely irrelevant to the Court's holding that the Plaintiffs lacked standing to sue.

In dismissing for lack of standing, the IAS court was merely following the Court of Appeals' clear holding that, while "the scope of the [General Business law] is intentionally broad, applying to virtually all economic activity," *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 205 (2004),

[4] See, for example, paragraph 43 of the Complaint ("When purchasing these services based on Defendants' representations and advertisements, Plaintiffs' relatives relied on Defendants' statements) (R. at 81), paragraph 49 ("Defendants' deceptive conduct caused highly vulnerable individuals who placed their trust in Defendants to pay monies for the perpetual or annual care for their own or family member's plots located at the cemetery") (R. at 82) and paragraphs 54 and 55 ("Defendants have knowingly directed and sold perpetual care contracts. . .") (R. at 83).

and "it is beyond dispute that section 349(h) permits an actually (nonderivatively) injured party to sue a tortfeasor," *id.* at 208, "what is required is that the party actually injured be the one to bring suit," *id.* Here, Plaintiffs' complaint makes clear that *they* were not personally injured, regardless of whether the unlawful conduct extended past the formation of the contracts or not. Indeed, Plaintiffs here were *less* individually injured than the insurer in *Blue Cross*, as the latter "actually paid the costs incurred by its subscribers," even though its claims were "nonetheless indirect because the losses it experienced arose wholly as a result of smoking related illnesses suffered by those subscribers." *Id.* at 207. Because Plaintiffs did not and could not even allege, let alone prove, individual injury, they lacked standing to pursue claims under the General Business Law, regardless of the substantive conduct at issue.

Plaintiffs' attempt to bootstrap their standing by claiming that they "stand in the shoes" of their deceased relatives, and are thus bringing *direct* claims for personal injury *to their relatives* (Appellants' Br. at 29) is similarly unavailing. As was discussed above in the context of Plaintiff John Lucker's standing as a personal representative, the Legislature has adopted a specific, comprehensive scheme for the survival of actions, which at common law would have abated at death. *See* EPTL § 11-3.1 et seq. The Legislature thereby explicitly vested such survival actions in the decedent's personal representative, *id.* § 11-3.1, who must

sue in his or her representative capacity, *id.* § 11-4.1, and can only bring causes of action that were viable at the time of the decedent's death, *In re Estate of Gandolfo*, 237 A.D.2d 115 (1st Dep't 1997). Plaintiffs cannot sidestep that system—and the procedural requirements that go with it—simply by adopting the fiction that they are, *ipse dixit*, "standing in the shoes" of their deceased (or living) relatives.

POINT FOUR:

PLAINTIFFS' CLAIM THAT THE JUDGMENT SHOULD BE VACATED FOR FRAUD IS ENTIRELY SPECIOUS

Plaintiffs charge, without foundation, that the judgment of dismissal was procured by fraud and should be vacated. Defendants categorically deny any fraud, intentional misrepresentation or other misconduct and would have vigorously defended the judgment below had Plaintiffs ever made a formal motion for relief under CPLR 5015, which they never did.

The sole alleged basis for the "fraud" is a single sentence that appeared in the preliminary statement to Defendants' brief not in this case, but in a related action, which read "As the Defendants and the Attorney General long ago realized, the origins of the Bayside Cemetery problem lie in the long-term cyclic changes in the makeup of the Jewish community in and around New York City." When it was pointed out to counsel for Defendants by a representative of the Attorney General's office that that sentence could be read as suggesting that the Attorney General had

taken a position on the merits of the action, we promptly wrote to the Court (which, at the time, had the related *Leventhal* action *sub judice*) to withdraw the statement and make clear that we did not intend to speak for the Attorney General in any way or suggest that his investigation was anything other than ongoing.

Needless to say, not only was this sentence insufficient to constitute "fraud, misrepresentation, or other misconduct" requiring the setting aside of a judgment under CPLR 5015, but there is no evidence in this case that it affected Justice James' decision whatsoever. As noted above, the statement in question was not in the record of this case and, given that it took another three months after the statement was withdrawn for the court to rule in the *Leventhal* action, there is little reason to believe that the court had even reviewed the briefs in *Leventhal* at the time it ruled in this action.

Moreover, even though the court's statement that the Attorney General "is overseeing negotiations to find a sustainable solution to the maintenance of Bayside Cemetery" (R. at 22) was erroneous, that error was harmless as a matter of law. First, the very same sentence stated that "the Attorney General has standing to bring the claims at issue here" and "has already begun an investigation." The former is a correct statement of the law, *see* EPTL § 8-1.1(f), and the latter was amply supported by the Attorney General's subpoena which was in the record, (R.

at 298). And the question of the Attorney General's standing was, in any event, not dispositive of the question of whether *Plaintiffs* had standing.

Of course, none of this was litigated below because Plaintiffs never filed the motion that is expressly required by CPLR 5015(a), instead relying on a letter to the court asking it to "*sua sponte*" set aside its judgment. Not having pursued a motion below, Plaintiffs waived the argument on appeal.

POINT FIVE:

ANY ARGUMENT THAT THIS CASE SHOULD HAVE BEEN ASSIGNED TO THE COMMERCIAL DIVISION WAS WAIVED.

Defendants argue on appeal that the ruling below was "void" because it was rendered by Justice James in Part 59, a non-commercial part, whereas it should have been assigned to the Commercial Division. As an initial matter, there is no reason to believe that Justice James was without jurisdiction to render judgment, so as to make the proceedings below void: Supreme Court is a court of general original jurisdiction, derived directly from the New York State Constitution, N.Y. CONST. ART. VI, § 7A, so Justice James was constitutionally authorized to hear and decide this action even if it was erroneously assigned to her.

But more importantly, Rule 202.70(f) of the Uniform Rules for the Trial Courts prescribes a specific procedure for contesting a decision to transfer a case out of the Commercial Division, as Justice Fried did:

> Any party aggrieved by a transfer of a case to a non-commercial part may seek review by letter application (with a copy to all parties) to the Administrative Judge within ten days of receipt of the designation of the case to a non-commercial part. The determination of the Administrative Judge shall be final and subject to no further administrative review or appeal.

In this case, *no party*, including Plaintiffs, wrote to the Administrative Judge within ten days of Justice Fried's December 1, 2009 order (R. at 471.) The parties therefore acquiesced to Justice James' determination of this action in IAS Part 59, and waived any right to appeal the reassignment to her that they might otherwise have had.[5]

CONCLUSION

For multiple overlapping reasons, not least of which was Plaintiffs' admission that they suffered no personal injury-in-fact, the court below was correct to dismiss Plaintiffs' action in its entirety for lack of standing. Nor does Plaintiff John Lucker stand in any different position by virtue of his much-delayed appointment as an estate administrator.

Defendants-Respondents therefore respectfully request that the Court adhere to longstanding principles of New York law and affirm the decision below in its entirety or, in the alternative, remand for consideration of the alternative grounds for dismissal presented in Defendants' motion to dismiss.

[5] It would, in any event, have been unusual to treat Justice Fried's order as appealable to this Court, given that Rule 202.70(f) specifically states that the Administrative Judge's determination would be "final and subject to no further administrative review or appeal," but there is no need to decide that here, given Plaintiffs' waiver.

Respectfully submitted,

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Dated: September 5, 2012

PRINTING SPECIFICATION STATEMENT

This computer generated brief was prepared using a proportionally spaced typeface.

Name of typeface: Times New Roman

Point size: 14 point

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents and printing specification statement is 6,850.