

## And The Defense Wins

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**Kaufman Borgeest & Ryan LLP** partners and [Stephanie B. Gitnik](#), [Michael P. Mezzacappa](#) and associate [Allison A. Waase](#), all DRI members, recently prevailed on a motion for summary judgment in favor of the defendant building owner based on a July 1, 2008, fire where two infant plaintiffs died and four plaintiffs (three adults and one child) alleged significant injuries.

Plaintiffs argued that the fire was caused by a missing light fixture in the ceiling of the closet, in the apartment. However, defendant successfully relied upon the FDNY Fire Marshal's non-party deposition testimony as well as the Fire Marshall's report to support its experts' opinions that there was no evidence that a light fixture ever existed or that the fire was electrical in nature. Plaintiffs' experts alleged that a light fixture existed and was the cause of the fire, however neither the physical evidence left at the scene, the condition of the electrical wiring in the closet nor the overhaul undertaken of the apartment revealed any evidence that a light fixture ever existed. Plaintiffs' experts were unable to point to any other electrical cause of the fire. The court also relied upon the initial statements of the plaintiffs to the Fire Marshal and investigating officers, which placed the fire low near the closet floor as opposed to up high near the top of the ceiling as they testified at their deposition.

The court also referenced the significant testimony and evidence that indicated that the fire was caused when the decedent children were playing with matches and smoke bombs/fireworks near the closet, as they had been doing earlier that evening in the courtyard of the building. A book of matches was also recovered from the children's bedroom during the fire investigation. *Fuentes v. Ocean Newkirk*, Index. No. 361/2010, N.Y. Sup, Kings County 2016.