

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3578 Russell W. Rosen, et al., Index 157124/15
 Plaintiffs-Appellants,

-against-

Jonathan Schwartz,
Defendant-Respondent.

Warshaw Burstein, LLP, New York (Linda Genero Sklaren of
counsel), for appellants.

Goldfarb Abrandt Salzman & Kutzin LLP, New York (Michael S.
Kutzin of counsel), for respondent.

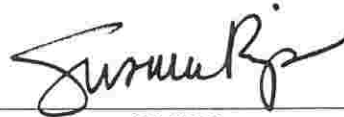
Order, Supreme Court, New York County (Geoffrey D. Wright,
J.), entered February 29, 2016, which granted defendant's motion
to dismiss the complaint, unanimously reversed, on the law,
without costs, and the complaint reinstated.

Although defendant was found not guilty by reason of mental
disease or defect in connection with the stabbing death of his
mother, the complaint stated a viable wrongful death claim
against him pursuant to EPTL 5-4.1, since an insane person may be
liable in tort for his actions (*see Hirsch v Mastroianni*, 80 AD2d
633, 634 [2d Dept 1981]; *Albicocco v Nicoletto*, 11 AD2d 690 [2d
Dept 1960], *affd* 9 NY2d 920 [1961]). A wrongful death claim was
also stated on behalf of defendant's brother, who committed
suicide after his mother's murder. To the extent Supreme Court

decided whether defendant may inherit from his mother's estate, no ruling on that question was sought by plaintiffs, and, in any event, the ruling was not only premature, but should be determined in the Surrogate's Court (see e.g. *Matter of Demesyieux*, 42 Misc 3d 730 [Sur Ct, Nassau County 2013]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 30, 2017



CLERK