
# SUPREME COURT OF THE STATE OF NEW YORK

## APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

**DECISIONS FILED**

**OCTOBER 1, 2010**

**HON. HENRY J. SCUDDER, PRESIDING JUSTICE**

**HON. SALVATORE R. MARTOCHE**

**HON. NANCY E. SMITH**

**HON. JOHN V. CENTRA**

**HON. EUGENE M. FAHEY**

**HON. ERIN M. PERADOTTO**

**HON. EDWARD D. CARNI**

**HON. STEPHEN K. LINDLEY**

**HON. ROSE H. SCONIERS**

**HON. SAMUEL L. GREEN**

**HON. ELIZABETH W. PINE**

**HON. JEROME C. GORSKI, ASSOCIATE JUSTICES**

**PATRICIA L. MORGAN, CLERK**

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**918**

**TP 10-00042**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF ALBERTO RODRIGUEZ, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

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ALBERTO RODRIGUEZ, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL), FOR RESPONDENT.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered December 31, 2009) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**919**

**KA 07-01565**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARGUERITE D. BORK, DEFENDANT-APPELLANT.

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D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered May 9, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting her, following a jury trial, of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that the evidence is legally insufficient to support the conviction. Defendant made only a general motion for a trial order of dismissal at the close of the People's case and thus has failed to preserve her contention for our review (*see People v Gray*, 86 NY2d 10, 19). Defendant also failed to preserve for our review her contention concerning the misstatement of County Court in its jury instructions concerning a date in the indictment (*see People v Green*, 35 AD3d 1211, 1212, *lv denied* 8 NY3d 985), as well as her contention that she was denied a fair trial based on prosecutorial misconduct (*see People v Clark*, 281 AD2d 947, 947-948, *lv denied* 96 NY2d 860), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**920**

**KA 10-00875**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT BATJER, DEFENDANT-APPELLANT.

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EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered July 27, 2007. The judgment convicted defendant, upon a nonjury verdict, of body stealing (eight counts), opening graves (eight counts), unlawful dissection of a human body (eight counts) and scheme to defraud in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, eight counts each of body stealing (Public Health Law § 4216), opening graves (§ 4218) and unlawful dissection of a human body (§ 4210-a). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as he failed to move for a trial order of dismissal at the close of the People's case (*see People v Gray*, 86 NY2d 10, 19). In any event, we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see e.g. People v Mosley*, 59 AD3d 961, 962), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to the contention of defendant, he was not denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). In light of our determination that the evidence is legally sufficient to support the conviction, defendant thus has "failed to demonstrate that his 'contention [with respect to the legal sufficiency of the evidence] would be meritorious upon [our] review' " (*People v Martinez*, 73 AD3d 1432). We have considered defendant's remaining contentions concerning the alleged shortcomings of defense counsel and conclude that they are without merit.

Defendant further contends that the indictment should be dismissed pursuant to the "good faith" exception set forth in Public Health Law § 4306 (3). We reject that contention. Section 4306 (3) provides that "[a] person who acts in good faith *in accord with the terms of [article 43]* or with the anatomical gift laws of another state is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his [or her] act" (emphasis added). Here, defendant was prosecuted under article 42 of the Public Health Law, governing the treatment of cadavers, not article 43, which concerns anatomical gifts. In any event, the record does not support a determination that defendant acted in good faith.

We reject the further contention of defendant that County Court erred in allowing the People to introduce in its direct case statements made by defendant to an investigator for the Kings County District Attorney's Office pursuant to a proffer agreement. The agreement expressly provides only that "the [Kings County District Attorney's] Office" would not use any information provided by defendant in its case-in-chief in any criminal proceeding. It does not provide that defendant's statements would not be used to prosecute him in another jurisdiction. Contrary to the contention of defendant, the fact that a Kings County investigator sought the aid of the Rochester Police Department in obtaining a search warrant for the Rochester office for BioMedical Tissue Services (BTS), a human tissue procurement agency based in New Jersey, does not establish that Monroe County and Kings County were acting in concert such that the former could be bound by the promises of the latter.

We agree with defendant, however, that the court erred in admitting in evidence certain records of BTS inasmuch as the People failed to establish that the records fall within the business records exception to the hearsay rule (*see* CPLR 4518 [a]; CPL 60.10). An employee of Regeneration Technologies, Inc. (RTI), a human tissue processing company that contracts with BTS, testified that RTI relied on the records submitted by BTS, which were incorporated into RTI's records following a reconciliation process. The employee also testified that RTI was required to maintain those records, that the records were made in the regular course of RTI's business, and that RTI maintained those records in the regular course of business. However, the RTI employee was not familiar with the record-keeping procedures of BTS and thus was unable to testify whether BTS made the records contemporaneously with the events being recorded, whether the records in question were made in the regular course of the business of BTS, or whether it was in fact the regular course of the business of BTS to make such records (*see People v Burdick*, 72 AD3d 1399, 1401-1402; *cf. People v Brown*, 13 NY3d 332, 341). The two witnesses from BTS likewise failed to establish the requisite foundation for the admissibility of the documents in question as business records (*see Burdick*, 72 AD3d at 1401-1402). Nevertheless, we conclude that the court's error in admitting those records is harmless because the proof of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted if not for the error (*see People v Edmonds*, 251 AD2d 197, 198-199, *lv denied* 92 NY2d

924; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**921**

**KA 08-01665**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR PETT, DEFENDANT-APPELLANT.

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PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

JOHN H. CRANDALL, DISTRICT ATTORNEY, HERKIMER, FOR RESPONDENT.

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Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered June 4, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the matter is remitted to Herkimer County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]). The judgment must be reversed and the plea vacated because County Court failed to advise defendant prior to the entry of the plea that his sentence would include a period of postrelease supervision (*see People v Hill*, 9 NY3d 189, 191-192, *cert denied* 553 US 1048; *People v Catu*, 4 NY3d 242, 245). The reference to postrelease supervision by defense counsel in proposing an alternative sentence that was rejected by the court "cannot substitute for the court's duty to ensure, at the time the plea is entered, that the defendant is aware of the terms of the plea . . ., especially in light of the fact that it was not stated that postrelease supervision was required to be part of any sentence with a determinate prison term" (*People v Key*, 64 AD3d 793, 793-794, *lv dismissed* 14 NY3d 889; *see People v Cornell*, 75 AD3d 1157).

We further note that the court erred in enhancing the sentence by ordering defendant to pay restitution without first affording him the opportunity to withdraw his plea, inasmuch as restitution was not part of the plea agreement (*see People v Pett*, 74 AD3d 1891; *People v Trisvan*, 53 AD3d 1057). In light of our decision, we do not address defendant's challenge to the severity of the sentence.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**922**

**KA 07-01489**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES MCFARLEY, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered April 26, 2007. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of endangering the welfare of a child (Penal Law § 260.10 [1]). Contrary to defendant's contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 348-349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). It cannot be said that the victim's testimony was incredible as a matter of law (*see People v Rufus*, 56 AD3d 1175, *lv denied* 11 NY3d 930; *cf. People v O'Neil*, 66 AD3d 1131, 1133-1134). We note in any event that defense counsel highlighted the evidence concerning the motivation of the victim to fabricate her allegations, and the jury's resolution of credibility issues with respect to the victim's testimony is entitled to great deference (*see People v Young*, 55 AD3d 1234, 1235-1236, *lv denied* 11 NY3d 901; *People v Baker*, 30 AD3d 1102, *lv denied* 7 NY3d 846).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**923**

**KA 07-00810**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

NORMAN SHAMPINE, DEFENDANT-APPELLANT.

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JAMES S. HINMAN, ROCHESTER, FOR DEFENDANT-APPELLANT.

NORMAN SHAMPINE, DEFENDANT-APPELLANT PRO SE.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZIUBA OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Jefferson County Court (Kim H. Martusewicz, J.), entered March 22, 2007. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**924**

**KA 09-01246**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD ANDRUS, DEFENDANT-APPELLANT.

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D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (ALAN P. REED OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered March 2, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted course of sexual conduct against a child in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him, following his plea of guilty, of attempted course of sexual conduct against a child in the first degree (Penal Law §§ 110.00, 130.75 [1] [a]), defendant contends that his statement to the police was taken in violation of his *Miranda* rights. We reject that contention. "The People met 'their burden of establishing the legality of the police conduct and defendant's waiver of rights,' and defendant failed to establish that he did not waive those rights, or that the waiver was not knowing, voluntary and intelligent" (*People v Grady*, 6 AD3d 1149, 1150, *lv denied* 3 NY3d 641). Although defendant denied that he was advised of his *Miranda* rights, that denial is belied by the evidence presented at the suppression hearing. We further conclude that defendant did not unequivocally invoke his right to counsel (*see People v D'Eredita*, 302 AD2d 925, *lv denied* 99 NY2d 654). Indeed, County Court found that defendant's testimony at the suppression hearing was not credible, and that credibility determination is entitled to great deference (*see People v Coleman*, 306 AD2d 941, *lv denied* 1 NY3d 596).

We also reject the contention of defendant that the social worker who interviewed him following his arrest should have advised him of his *Miranda* rights because she was acting as an agent of law enforcement. Even assuming, arguendo, that the social worker was in fact acting as an agent of law enforcement when she interviewed

defendant, we note that the interview occurred within a reasonable time after the initial *Miranda* warnings were issued and that defendant had remained in continuous custody (*see People v Stanton*, 162 AD2d 897, *lv denied* 76 NY2d 991). Considering the totality of the circumstances surrounding defendant's statement, as we must (*see People v Richardson*, 202 AD2d 958, *lv denied* 83 NY2d 914), we conclude that there is no merit to the contention of defendant that his statement was the product of coercion and deception. Although a police officer admitted at the suppression hearing that he lied to defendant about the results of the polygraph examination, such deception does not require suppression of defendant's statement. The deception did not "create a substantial risk that the defendant might falsely incriminate himself" (*People v Alexander*, 51 AD3d 1380, 1382, *lv denied* 11 NY3d 733 [internal quotation marks omitted]; *see People v Tankleff*, 84 NY2d 992, 994), nor was it so "fundamentally unfair as to deny due process" (*People v Tarsia*, 50 NY2d 1, 11).

Defendant failed to preserve for our review his present challenge to his *Alford* plea (*see People v Sherman*, 8 AD3d 1026, *lv denied* 3 NY3d 681), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, the sentence is not unduly harsh or severe.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**925**

**KA 07-01379**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT A. BERMUDEZ, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 14, 2007. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of manslaughter in the second degree (Penal Law § 125.15 [1]), defendant contends that the testimony at trial rendered the indictment duplicitous. Defendant failed to preserve that contention for our review (*see People v Bracewell*, 34 AD3d 1197) and, in any event, it is without merit (*cf. id.*). The evidence presented at trial established that defendant caused the death of the victim either by his own conduct or by acting in concert with another, i.e., defendant either acted as a principal in striking the victim with a baseball bat or he acted in concert with another individual, who punched the victim in the face, causing the victim to fall from his bicycle onto the street. Whether defendant acted as a principal or an accomplice is of no moment (*see People v Rivera*, 84 NY2d 766, 769; *People v Moore*, 274 AD2d 959, 959-960, *lv denied* 95 NY2d 868). Indeed, as County Court properly charged the jury, although a unanimous verdict was required with respect to defendant's guilt, unanimity was not required with respect to whether defendant was acting as a principal or an accomplice in causing the victim's death inasmuch as "[t]he elements of the indicted crime[] [of manslaughter in the second degree] were the same whether defendant was a principal or an accessory" (*Rivera*, 84 NY2d at 771).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**926**

**KA 08-01135**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEON CHATT, ALSO KNOWN AS RUSTY,
DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 14, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). We reject the contention of defendant that he was denied his due process right to prompt prosecution based upon preindictment delay of nearly 33 years. Although that delay is substantial and "may have caused some degree of prejudice to defendant, the People satisfied their burden of demonstrating that they made a good faith determination not to proceed with the prosecution in [1974] due to, what was at the time, insufficient evidence" (*People v Decker*, 13 NY3d 12, 16; *see People v Vernace*, 96 NY2d 886, 888). Supreme Court properly permitted the People to present evidence that the victim had been raped, both to establish motive (*see People v Alvino*, 71 NY2d 233, 242; *People v Molineux*, 168 NY 264, 293) and to "complete the narrative of the event[] charged in the indictment" (*People v Leeson*, 48 AD3d 1294, 1296, *affd* 12 NY3d 823). Further, evidence that the victim had previously reported an attempted assault by defendant was properly admitted for the limited purpose of providing background information with respect to the relationship between defendant and the victim (*see Leeson*, 48 AD3d at 1296).

Defendant further contends that the court erred in denying his motion seeking a mistrial during jury deliberations on the ground that a juror had become "grossly unqualified to serve in the case" and had "engaged in misconduct of a substantial nature" when she failed to

report in a timely manner that she overheard a conversation about the case between jurors who served at defendant's first trial (CPL 270.35 [1]). We reject that contention. After conducting a "probing and tactful inquiry," the court determined that the juror's ability to remain fair and impartial had not been affected (*People v Buford*, 69 NY2d 290, 299; *see People v Harrison*, 251 AD2d 681, 682, *lv denied* 92 NY2d 898; *People v Ferguson*, 248 AD2d 147, *lv denied* 92 NY2d 851), and that the juror's failure to report the conversation earlier did not amount to substantial misconduct (*see generally People v Bradford*, 300 AD2d 685, 688, *lv denied* 99 NY2d 612, 615; *People v Matiash*, 197 AD2d 794, 796, *lv denied* 82 NY2d 899). "The decision to disqualify turns on the facts of each particular case, and we accord deference to [the c]ourt's careful evaluation of the juror[']s answers and demeanor, perceiving no basis upon which to disturb its determination" (*People v Harris*, 288 AD2d 610, 616, *affd* 99 NY2d 202).

The court also properly permitted the People's forensic serologist to testify concerning the application of the "product rule" to the DNA analyses conducted on the pubic hairs found at the scene of the crime and the samples obtained from defendant. At the *Frye* hearing, the People met their burden of demonstrating that the "product rule" has acquired general acceptance in the scientific community as an established principle of probability theory (*see generally Nonnon v City of New York*, 32 AD3d 91,103, *affd* 9 NY3d 825; *People v LeGrand*, 8 NY3d 449, 457).

The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction. In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The contention of defendant that the evidence at his first trial was legally insufficient and thus that his retrial was barred by the Double Jeopardy Clauses of the US and NY Constitutions is similarly without merit (*see* US Const 5th Amend; NY Const, art I, § 6). The evidence at both trials was virtually identical, and we conclude that the evidence at the first trial was legally sufficient to establish defendant's guilt of murder in the second degree (*see People v Pawlowski*, 116 AD2d 985, 986, *lv denied* 67 NY2d 948; *cf. People v Hart*, 300 AD2d 987, 988, *affd* 100 NY2d 550).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct on summation. Defendant failed to preserve for our review his contention with respect to one of the alleged instances of misconduct (*see* CPL 470.05 [2]; *People v Lombardi*, 68 AD3d 1765, *lv denied* 14 NY3d 802), and we decline to exercise our power to review that alleged instance as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to the two remaining alleged instances, the court promptly sustained defendant's objections and issued curative instructions, thereby alleviating any prejudice to defendant (*see People v Cooley*, 50 AD3d 1548, *lv denied* 10 NY3d 957). Also contrary to defendant's contentions, the court's

*Sandoval* ruling does not constitute an abuse of discretion (*see People v Rutledge*, 70 AD3d 1368), and defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**927**

**KA 07-01265**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRANDON L. DAVIS, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW J. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered March 12, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**928**

**CA 09-02444**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF THE ACCOUNTING BY LAURIE C. KALKMAN, AS TRUSTEE UNDER L. WILLIAM COULTER FAMILY TRUST DATED JULY 20, 1994 UNDER WILL OF L. WILLIAM COULTER, DECEASED, RESPONDENT.

MEMORANDUM AND ORDER

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GEOFFREY R. COULTER, APPELLANT.

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GEOFFREY R. COULTER, APPELLANT PRO SE.

LACY KATZEN LLP, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR RESPONDENT.

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Appeal from a decree of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered September 10, 2009. The decree, inter alia, dismissed the objections of Geoffrey R. Coulter to the final account of the trustee.

It is hereby ORDERED that the decree so appealed from is unanimously modified on the law by denying the cross motion in part, vacating the first and third decretal paragraphs, and reinstating objections 1 through 3, 5 through 7, and 9 through 11 in the second decretal paragraph and as modified the decree is affirmed without costs, and the matter is remitted to Surrogate's Court, Monroe County, for further proceedings on those objections in accordance with the following Memorandum: The last will and testament of L. William Coulter (testator) established a trust for the benefit of his wife and his four children. The testator died in 1994 and, in order to avoid liability for estate taxes upon her death, the wife of the testator relinquished the testator's bequest of the condominium in which they resided as well as property in the Town of Indian Lake (camp). Those properties were thereafter placed in the testator's Family Trust and were the only assets held by the trust. It is undisputed that the testator established the trust in order to limit liability for estate taxes. The testator's wife and one of the testator's daughters (trustee) were appointed co-trustees upon the relinquishment of the appointment by the institution named as trustee by the testator. In 2004 the co-trustees determined that the trust should be terminated because of a change in the laws governing estate tax, and the co-trustees distributed the assets to four of the five beneficiaries. The condominium was transferred to the testator's wife, and the camp was transferred to the trustee and two of her siblings. Geoffrey R. Coulter (objectant) was not included in the distribution of the trust assets, nor did he sign a waiver and consent with respect to distribution of the assets. We note, however, that the objectant

advised his mother by letter that he did not object to the distribution of the condominium to her, and that he objected only to being excluded from the distribution of the camp. We further note that the record contains a determination of the co-trustees and a letter from the testator's wife to her children stating that the objectant was not included in the distribution of the camp because, among other things, the testator's wife had given him substantial monetary gifts over the prior 10 years.

Upon the death of the testator's wife in 2008, the objectant petitioned for an accounting of the trust. He thereafter objected to the account and moved for summary judgment on specified objections, seeking a one-quarter share of both the condominium and the camp properties. The trustee cross-moved for summary judgment approving the account. By a decision and order, Surrogate's Court dismissed the objections to the account and the Surrogate further stated that he shall issue a decree approving "the Final Account of the co-Trustee," thus granting the cross motion of the trustee. The Surrogate thereafter issued the subject decree. We note that the order from which the appeal was taken was subsumed in the decree (*see* CPLR 5501 [a] [1]; SCPA 2701 [1] [b]). Thus, in the exercise of our discretion, we treat objectant's notice of appeal as valid and deem the appeal as taken from the decree (*see* CPLR 5520 [c]; *Matter of Marshall*, 26 AD3d 860).

The trust provides in relevant part that, "[i]n the discretion of my Trustee, [if] the income or other resources of my wife and/or my children are insufficient for their comfortable support, education and general welfare, my Trustee is authorized to pay to or for the benefit of my wife and/or my children so much of the principal of the trust fund as reasonably may be required for such purposes. No invasion of principal for any child shall be charged against the separate share which ultimately may be set aside for him. Principal shall not be so paid or applied for the benefit of any child without the prior written consent of my wife . . . ." The trust further provides that "[my] . . . Trustee, except as may be provided specifically to the contrary in my Will, may generally exercise with respect to all property all the powers which I might have exercised if personally acting, and whenever any discretion is given to my . . . Trustee, the decision . . . in good faith shall be conclusive." By its terms, the trust terminated at the death of the testator's wife, and the residuary was to be paid per stirpes to the surviving issue of the testator.

It is axiomatic that "a 'trustee owes the beneficiar[ies] an undivided duty of loyalty' . . . and 'a duty to act with the utmost good faith in administration of [the] trust' " (*Matter of Giles*, 74 AD3d 1499, 1503; *see Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 270). "To determine whether a trustee's distribution of trust assets was proper, the [testator's] intent controls . . . '[T]he trust instrument is to be construed as written and the [testator's] intention determined solely from the unambiguous language of the instrument itself' " (*Matter of Wallens*, 9 NY3d 117, 122). Here, the unambiguous language of the trust instrument provides that the

principal shall be distributed "if the income or other resources of [the testator's] wife and/or [the testator's] children are insufficient for their comfortable support, education and general welfare." With respect to the distribution of the condominium to the testator's wife, we conclude that the decision to distribute that property to her was made in good faith inasmuch as the trust did not generate income, and she was therefore paying the expenses associated with that property (*cf. id.* at 123).

With respect to the camp property, however, we conclude that the co-trustees failed to exercise the requisite reasonable care, diligence and prudence (*see generally* EPTL 11-1.7). Although the co-trustees acted in accordance with the wishes of the wife of the testator to treat her children fairly and equitably, the trust instrument did not provide them with that discretion. Indeed, pursuant to the express terms of the trust instrument, the distribution of principal to the testator's children was to be made only in the event that they lacked sufficient resources for their support and general welfare. We therefore modify the decree accordingly, and we remit the matter to Surrogate's Court for further proceedings on those objections consistent with the terms of the trust instrument.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**929**

**CA 09-02251**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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SHARON J. GIARDINA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD J. LIPPES, JAMES F. ALLEN, DANIEL D. SHONN, JR., DANA M. LOUTIT, DOING BUSINESS AS ALLEN, LIPPES & SHONN, AND THEODORE J. BURNS, DEFENDANTS-RESPONDENTS.

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DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

RICOTTA & VISCO, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (K. JOHN BLAND OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered August 4, 2009 in a legal malpractice action. The order granted defendants' motion for summary judgment and dismissed the complaint in its entirety.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this legal malpractice action, alleging that defendants, who represented her in the underlying toxic tort action, failed to comply with an order directing her to serve the defendants in the underlying action with her expert disclosure by a specified date. According to plaintiff, Supreme Court granted the motion of those defendants for summary judgment dismissing the complaint in its entirety based on plaintiff's failure to meet the deadline for expert disclosure.

Plaintiff contends that, because the defendants in this legal malpractice action previously moved for summary judgment dismissing the complaint on a different ground and prevailed only in part (*Giardina v Lippes*, 34 AD3d 1220), their present motion for summary judgment dismissing the remainder of the complaint should have been denied. We reject that contention. Although successive summary judgment motions generally are disfavored absent newly discovered evidence or other sufficient cause (*see Sexstone v Amato*, 8 AD3d 1116, *lv denied* 3 NY3d 609; *Town of Wilson v Town of Newfane*, 192 AD2d 1095), neither Supreme Court nor this Court is precluded from addressing the merits of such a motion (*see McIvor v Di Benedetto*, 121 AD2d 519, 522).

In order to prevail on a motion for summary judgment seeking dismissal of a complaint for legal malpractice, a defendant must establish that the plaintiff is unable to prove at least one necessary element of the legal malpractice action, i.e., that the plaintiff is unable to prove that he or she "would have been successful on the underlying claim but for [the defendant's] negligence" (*Potter v Polozie*, 303 AD2d 943, 944). Here, defendants met their burden of establishing that plaintiff would not have been successful on the underlying claim by submitting the affidavit of an expert who stated to a reasonable degree of medical certainty that there was no evidence to support the allegation of plaintiff that her injuries were caused by her exposure to a lawn care product. Plaintiff failed to raise an issue of fact with respect to the lack of causation, inasmuch as her expert simply made "subjective and conclusory" assertions with respect to causation in his affidavits (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 449, *rearg denied* 8 NY3d 828).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**930**

**CA 10-00760**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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THOMAS J. TRZASKA, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

ALLIED FROZEN STORAGE, INC., DEFENDANT.
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ALLIED FROZEN STORAGE, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

LANDSCAPING & EXCAVATING BY J&K, THIRD-PARTY
DEFENDANT-APPELLANT,
ET AL., THIRD-PARTY DEFENDANT.
(APPEAL NO. 1.)

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GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ALAN J. DEPETERS OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered August 11, 2009. The order, insofar as appealed from, denied the motion of third-party defendant Landscaping & Excavating by J&K for summary judgment dismissing the amended third-party complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Thomas J. Trzaska (plaintiff) when he slipped and fell on property owned by defendant-third-party plaintiff, Allied Frozen Storage, Inc. (Allied), during the course of performing waste removal services. Plaintiff had partially backed his truck into an open garage door when he attempted to open the driver's side door, which was blocked by a snow pile. Plaintiff managed to force the door open and stepped onto the snow pile. According to his deposition testimony, plaintiff fell as he was stepping off of the snow pile. Prior to plaintiff's accident, Allied had entered into a contract with third-party defendant Landscaping & Excavating by J&K (J&K) to remove snow from the property. Allied commenced the third-party action seeking, inter alia, contractual and common-law indemnification and

contribution from J&K on the grounds that J&K was negligent and had failed to fulfill its obligations under the snow removal contract. We conclude that Supreme Court properly denied the motion of J&K for summary judgment dismissing the amended third-party complaint against it inasmuch as J&K failed to establish its entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Pursuant to the snow removal contract, J&K was obligated to indemnify Allied for any damages "arising out of the performance, or failure to perform as the case may be, [of J&K]'s duties under [the c]ontract." Contrary to J&K's contention with respect to the cause of action for contractual indemnification, we conclude that J&K failed to establish as a matter of law that it fulfilled its duties under the snow removal contract (*see Baratta v Home Depot USA*, 303 AD2d 434, 435; *cf. Kearsey v Vestal Park, LLC*, 71 AD3d 1363, 1366). The contract required J&K to "clear snow from all drives and parking areas" and "to keep the property clear of snow." In support of its motion, J&K submitted the deposition testimony of Allied's Director of Engineering and Safety, who testified that the area where plaintiff fell is a driveway. That individual further testified that, prior to awarding J&K the snow removal contract, he instructed J&K's owner to keep all doorways free of snow and not to pile any snow on the blacktop. J&K's owner acknowledged that Allied had instructed him to keep the area in front of the garage door clear of snow, and he admitted that snow "should generally not be" piled in the area where plaintiff fell. We further conclude that J&K failed to establish as a matter of law that plaintiff's accident did not "aris[e] out of the performance[] or failure to perform" its duties under the contract (*cf. Sorrento v Rice Barton Corp.*, 17 AD3d 1005, 1006). Although plaintiff could not specifically identify the cause of his fall, there is sufficient evidence in the record from which a jury could reasonably conclude that the snow pile caused or contributed to plaintiff's accident (*see generally Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744-745; *Nolan v Onondaga County*, 61 AD3d 1431).

With respect to the cause of action for common-law indemnification, we conclude that J&K failed to establish as a matter of law that plaintiff's accident was not "attributable solely to the negligent performance or nonperformance of an act that was solely within [its] province" (*Kearsey*, 71 AD3d at 1367; *see Baratta*, 303 AD2d at 435; *Mitchell v Fiorini Landscape*, 284 AD2d 313, 314-315). With respect to the cause of action for contribution, we conclude that J&K's own submissions raised a triable question of fact whether J&K launched an instrument of harm by creating or exacerbating a hazardous condition, i.e., the snow pile (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140; *cf. Roach v AVR Realty Co., LLC*, 41 AD3d 821, 823-824).

Inasmuch as J&K failed to meet its initial burden on the motion, the court properly denied the motion regardless of the sufficiency of Allied's opposing papers (*see generally Alvarez v Prospect Hosp.*, 68

NY2d 320, 324).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**931**

**CA 09-02296**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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RLI INSURANCE COMPANY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LESLIE SMIEDALA, ET AL., DEFENDANTS,
MICHAEL J. HALE AND REGIONAL INTEGRATED
LOGISTICS, INC., DEFENDANTS-RESPONDENTS.

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SCHINDEL, FARMAN, LIPSIUS, GARDNER & RABINOVICH LLP, NEW YORK CITY, HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SLIWA & LANE, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 13, 2009 in a declaratory judgment action. The order granted the motion of defendants Michael J. Hale and Regional Integrated Logistics, Inc. for summary judgment determining that plaintiff is obligated to pay costs and fees incurred by them in defending this action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion with respect to defendant Michael J. Hale and vacating those parts concerning that defendant and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking judgment declaring that it is not obligated to defend or indemnify defendants Michael J. Hale and Regional Integrated Logistics, Inc. (Regional) in the underlying personal injury action and related third-party action under the commercial automobile insurance policy issued by plaintiff to Regional. Supreme Court granted the motion of Hale and Regional for summary judgment declaring that plaintiff must defend and indemnify them under the policy. On a prior appeal, we determined that Hale is not an insured under the policy, and we therefore modified the judgment by denying that part of the motion with respect to Hale and granting judgment declaring that plaintiff is not obligated to defend or indemnify Hale in the underlying action (*RLI Ins. Co. v Smiedala*, 71 AD3d 1553). Before our decision in that appeal was issued, the court granted the subsequent motion of Hale and Regional for summary judgment determining that plaintiff is obligated to pay costs and fees incurred by them in defending the declaratory

judgment action.

Contrary to plaintiff's contention, the court properly granted that part of the motion with respect to the attorneys' fees incurred by Regional in the declaratory judgment action. "It is well settled that 'an insurer's responsibility to defend reaches the defense of *any* actions arising out of the occurrence,' and defense expenses are recoverable by the insured, including those incurred in defending against an insurer seeking to avoid coverage for a particular claim" (*National Grange Mut. Ins. Co. v T.C. Concrete Constr., Inc.*, 43 AD3d 1321, 1322, quoting *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21). Moreover, "an insured who prevails in an action brought by an insurance company seeking a declaratory judgment that it has no duty to defend or indemnify the insured may recover attorneys' fees regardless of whether the insurer provided a defense to the insured" (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 598; *see Progressive Halcyon Ins. Co. v Giacometti*, 72 AD3d 1503, 1507). We reject the contention of plaintiff that it is not obligated to pay the attorneys' fees incurred by Regional because it is an excess insurer whose coverage has not yet been triggered. Although plaintiff's duty to defend Regional may not have been triggered in the underlying action because the primary coverage has not been exhausted, Regional may nevertheless recover its attorneys' fees from plaintiff incurred in the declaratory judgment action inasmuch as Regional was "cast in a defensive posture by the legal steps [plaintiff took] in an effort to free itself from its policy obligations" (*Mighty Midgets*, 47 NY2d at 21). The coverage dispute here is between plaintiff and Regional and does not involve the primary carrier or its coverage.

We agree with plaintiff, however, that Hale is not entitled to attorneys' fees inasmuch as he is not an insured under the policy and thus did not prevail in the declaratory judgment action (*RLI Ins. Co.*, 71 AD3d at 1554-1555; *see generally Nestor v McDowell*, 81 NY2d 410, 415-416, *rearg denied* 82 NY2d 750). We therefore modify the order accordingly.

The record establishes that the same attorney represented Hale and Regional in the declaratory judgment action, and it is not possible to determine on the record before us how much of the attorneys' fees are attributable to each of them. We therefore remit the matter to Supreme Court to determine the amount of reasonable attorneys' fees to which Regional is entitled in the declaratory judgment action following a hearing, if necessary (*see Progressive Halcyon Ins. Co.*, 72 AD3d at 1507).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**933**

**CA 10-00561**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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NINA A. ACCURSO AND DAMON R. ACCURSO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NICOLE M. KLOC AND SHIRLEY J. KLOC,
DEFENDANTS-APPELLANTS.

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LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (JERRY MARTI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FLAHERTY & SHEA, BUFFALO (MICHAEL J. FLAHERTY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered December 3, 2009 in a personal injury action. The order denied the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Nina A. Accurso (plaintiff) when the vehicle she was operating was rear-ended by a vehicle owned by defendant Shirley J. Kloc and operated by defendant Nicole M. Kloc. The complaint, as amplified by plaintiffs' bill of particulars, alleges that plaintiff sustained a serious injury as a result of the motor vehicle accident under two categories of Insurance Law § 5102 (d), i.e., a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system. We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint inasmuch as defendants established as a matter of law that plaintiff did not sustain a serious injury and plaintiffs failed to raise an issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 561).

In support of their motion, defendants submitted the affirmation of the physician who conducted the independent medical examination of plaintiff (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The physician stated therein that, as a result of the motor vehicle accident, plaintiff sustained a mild lumbosacral strain with no neurologic involvement. He further stated that there was no

objective evidence that any injury sustained by plaintiff in the motor vehicle accident "kept her from doing the majority of her routine activities," nor was there any "objective evidence [that plaintiff] sustained any injury which would have caused any permanency."

In opposition to defendants' motion, plaintiffs submitted the affirmation of plaintiff's treating physician, who is board certified by the American Board of Physical Medicine and Rehabilitation. It is axiomatic that "whether a limitation of use or function is 'significant' or 'consequential' . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795, 798; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352-353). Here, plaintiffs' expert determined that plaintiff had persistent back pain with numbness in her left lower extremity that was causally related to the motor vehicle accident, and he supported that determination with objective findings from the fluoroscopically-guided injection of plaintiff's left sacroiliac joint (*see Toure*, 98 NY2d at 350; *cf. Weaver v Town of Penfield*, 68 AD3d 1782, 1785). Nevertheless, we conclude that plaintiffs failed to raise an issue of fact to defeat defendants' motion inasmuch as the affirmation of their expert failed to set forth plaintiff's limitations or restrictions of use as a result of the injuries (*cf. Toure*, 98 NY2d at 352-353). Although plaintiff testified at her deposition that she was no longer able to engage in many activities, including bicycling, housework, gardening and power-walking, plaintiffs' expert did not address or quantify any limitations in the activities of plaintiff resulting from her injuries (*cf. id.*). Indeed, plaintiffs' expert noted that plaintiff had no significant loss of range of motion and was able to continue to work at her job. Although plaintiffs' expert concluded that plaintiff may have "periodic flare-ups of pain that will require intervention . . . once or twice a year for the foreseeable future," he likewise failed to provide the requisite qualitative assessment of the seriousness of plaintiff's injuries (*see id.* at 350-351).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**934**

**CA 10-00472**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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WACHOVIA DEALER SERVICES, INC., FORMERLY KNOWN AS WFS FINANCIAL, INC., PLAINTIFF-RESPONDENT,

V ORDER

JAMES L. HARDEE, DEFENDANT-APPELLANT, ET AL., DEFENDANT.

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JAMES L. HARDEE, DEFENDANT-APPELLANT PRO SE.

HOGAN WILLIG, GETZVILLE (CAROL A. FARRAR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered October 13, 2009. The order granted plaintiff's motion for judgment against defendants.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**935**

**CA 09-02509**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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THOMAS J. TRZASKA AND DARLENE M. TRZASKA,
PLAINTIFFS-APPELLANTS,

V ORDER

ALLIED FROZEN STORAGE, INC., DEFENDANT.
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W.C.S. OF NEW YORK, INC., RESPONDENT.
(APPEAL NO. 2.)

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LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ABBARNO, MCLAUGHLIN & KEDZIELAWA, BUFFALO (FRANK S. KEDZIELAWA OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered October 6, 2009. The order denied the motion of plaintiffs to sever Workers' Compensation claims from their personal injury action.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**936**

**CA 09-02510**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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DAVID U. ROBINSON AND ALZADAR ROBINSON,
PLAINTIFFS-APPELLANTS,

V

ORDER

NATIONAL VACUUM CORP., DEFENDANT.
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BROADSPIRE SERVICES, INC., RESPONDENT.
(APPEAL NO. 3.)

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LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WILLIAMS & WILLIAMS, BUFFALO (JARED L. GARLIPP OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered October 8, 2009. The order denied the motion of plaintiffs to sever Workers' Compensation claims from their personal injury action.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**937**

**CA 09-02103**

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ.

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ALMA D. PAYNE AND LOUIS B. PAYNE, JR.,
INDIVIDUALLY AND AS WIFE AND HUSBAND,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

R-D MAINTENANCE UNLIMITED, INC., ET AL.,
DEFENDANTS,
AND JOSEPH E. SMITH, DOING BUSINESS AS
JES ENTERPRISES, DEFENDANT-RESPONDENT.

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CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (PIERRE A. VINCENT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 24, 2009 in a personal injury action. The order granted the motion of defendant Joseph E. Smith, doing business as JES Enterprises, for summary judgment dismissing the amended complaint and cross claims against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the amended complaint and cross claims against defendant Joseph E. Smith, doing business as JES Enterprises, are reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Alma D. Payne (plaintiff) in a motor vehicle accident. Plaintiff was driving northbound in the left lane of Military Road near a shopping plaza when a vehicle being driven northbound in the right lane of Military Road swerved into plaintiff's lane, causing plaintiff to veer into the southbound lane and collide with an oncoming vehicle. Plaintiffs allege that the vehicle to the right of plaintiff swerved into her lane because a piece of construction/snow removal equipment in the shopping plaza parking lot protruded into the right northbound lane. According to plaintiffs, the equipment was owned by Joseph E. Smith, doing business as JES Enterprises (defendant), and was operated by one of his employees.

Supreme Court erred in granting the motion of defendant seeking summary judgment dismissing the amended complaint and cross claims against him. Defendant met his initial burden by submitting evidence

that he neither owned nor operated the equipment at issue (*see Woods v Craig*, 41 AD3d 1260, 1261). Contrary to plaintiffs' contention, the court properly considered evidence submitted by defendant in his reply papers in support of his motion because plaintiffs had an opportunity to respond and submit papers in surreply (*see Park Country Club of Buffalo, Inc. v Tower Ins. Co. of N.Y.*, 68 AD3d 1772, 1774). Nevertheless, we conclude that plaintiffs raised a triable issue of fact to defeat the motion by submitting evidence that defendant owned the type of equipment allegedly involved in the accident, as well as eyewitness deposition testimony that, at the time of the accident, such equipment was removing snow from property that defendant was contractually obligated to clear (*see generally Koblack v Croteau*, 295 NY 931).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**939**

**KA 07-01633**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARCUS M. MACON, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 19, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**940**

**KA 08-02540**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GEORGE HARRIS, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN C. RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL H. KOOSHOIAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered November 17, 2008. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**941**

**CAF 09-01595**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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IN THE MATTER OF GEORGE K., KABAH K.,
KORTO K., KUWU K., MAMMIE K., AND PEEWEE K.
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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

STEPHEN K., RESPONDENT-APPELLANT.

ORDER

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CHARLES J. GREENBERG, BUFFALO, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR GEORGE K., KABAH K., KORTO K., KUWU K., MAMMIE K., AND PEEWEE K.

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Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered July 23, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected his children.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**942**

**CAF 09-00874**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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IN THE MATTER OF ALEXANDRA J., DANIEL J.,
AND PARKER J.
---------- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

PAULETTE C., RESPONDENT-APPELLANT.

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WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

MINDY L. MARRANCA, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR ALEXANDRA J., DANIEL J., AND PARKER J.

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Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered March 19, 2009 in a proceeding pursuant to Family Court Act article 10. The order adjudicated the subject children to be neglected children.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order adjudicating the three children at issue to be neglected children. Contrary to the mother's contention, the finding of neglect is supported by a preponderance of the evidence (*see* § 1046 [b] [i]). The evidence presented at the fact-finding hearing demonstrated that the mother attempted to commit suicide by overdosing on prescription medication, causing her to lose consciousness for a prolonged period of time. The mother was not conscious when the children returned to her house following weekend visitation with their father, and the children were unable to wake her the next morning when they needed a ride to school. The mother eventually awoke later that morning but did not drive the children to school because she was physically unable to operate a motor vehicle. School officials subsequently came to the house to transport the children to school, and the mother was admitted that day to the psychiatric ward of a local hospital, where she stayed for five days. We conclude that, because of her voluntarily-induced drug stupor, the mother failed to provide the children with "proper supervision or guardianship" (§ 1012 [f] [i] [B]; *see e.g. Matter of Stephon Elijah G.*, 63 AD3d 640; *Matter of Ifeiye O.*, 53 AD3d 501) and, as a result, the children's physical, mental and emotional condition

was in imminent danger of becoming impaired (*see* § 1012 [f] [i]).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**943**

**TP 10-00789**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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IN THE MATTER OF LAWRENCE M. SELTZER, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, RESPONDENT.

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SCOTT M. GREEN, ROCHESTER, FOR PETITIONER.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (IGOR SHUKOFF OF COUNSEL), FOR RESPONDENT.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [David Michael Barry, J.], entered November 17, 2009) to review a determination of respondent. The determination, inter alia, terminated the employment of petitioner.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this proceeding seeking to annul the determination finding him guilty of disciplinary charges and terminating his employment as Municipal Parking Coordinator for respondent. We conclude that the determination is supported by substantial evidence, i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see* CPLR 7803 [4]; *see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231). We further conclude that the penalty of termination from petitioner's employment is not " 'so disproportionate to the offense[s] as to be shocking to one's sense of fairness,' " and thus it does not constitute an abuse of discretion as a matter of law (*Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**944**

**CA 10-00614**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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DOUGLAS J. CURELLA AND DARLENE CURELLA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, TOWN OF AMHERST HIGHWAY
DEPARTMENT AND DAVID M. PETRIE,
DEFENDANTS-APPELLANTS.

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BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered September 23, 2009 in a personal injury action. The order, insofar as appealed from, denied in part defendants' motion for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Douglas J. Curella when the truck he was operating collided with a snowplow owned by defendant Town of Amherst "and/or" defendant Highway Department and operated by defendant David M. Petrie. Defendants moved for summary judgment dismissing the complaint, and Supreme Court granted only that part of the motion with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d). We conclude that the court should have granted the motion in its entirety, and we therefore reverse the order insofar as appealed from. Defendants met their initial burden of establishing that the snowplow was a hazard vehicle engaged in road work pursuant to Vehicle and Traffic Law § 1103 (b) and thus that it was exempt from the rules of the road except to the extent that its operation constituted a "reckless disregard for the safety of others" (*id.*; *see Riley v County of Broome*, 95 NY2d 455, 460-462; *see generally Saarinen v Kerr*, 84 NY2d 494, 501). Defendants further established that Petrie did not act with such reckless disregard (*see generally Primeau v Town of Amherst*, 17 AD3d 1003, *affd* 5 NY3d 844), and plaintiffs failed to raise a triable issue of fact in opposition to the motion (*see Catanzaro v Town of Lewiston*, 73 AD3d

1449).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**945**

**CA 10-00527**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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CRANE-HOGAN STRUCTURAL SYSTEMS, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ESLS DEVELOPMENT, LLC, DEFENDANT-APPELLANT.
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ESLS DEVELOPMENT, LLC, THIRD-PARTY
PLAINTIFF,

V

PIERCE ENGINEERING, P.C., THIRD-PARTY
DEFENDANT-RESPONDENT.

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D'AGOSTINO, LEVINE, LANDESMAN & LEDERMAN, LLP, NEW YORK CITY (BRUCE H. LEDERMAN OF COUNSEL), AND SUGARMAN LAW FIRM, SYRACUSE, FOR DEFENDANT-APPELLANT.

GATES & ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

HARTER SECREST & EMERY LLP, ROCHESTER (JESSICA M. PATRICK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered December 29, 2009. The judgment was entered in favor of plaintiff upon its motion for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action seeking, inter alia, payment for work that it performed on a parking garage owned by defendant-third-party plaintiff (defendant). Supreme Court, inter alia, granted plaintiff's motion for summary judgment on the breach of contract cause of action and denied defendant's cross motion to compel plaintiff to comply with discovery demands and for summary judgment dismissing the complaint to the extent that it sought payment "in excess of the contract sum." The court subsequently granted defendant's motion for leave to reargue its opposition to plaintiff's motion and adhered to its prior determination, but it appears that no order was ever entered on that motion. However, a final monetary judgment was entered thereafter. Although defendant

appeals from the court's initial order and judgment, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the final judgment (*see* CPLR 5520 [c]; *McLaughlin v Midrox Ins. Co.* [appeal No. 2], 70 AD3d 1463, 1464-1465; *Tambe Elec., Inc. v Home Depot U.S.A., Inc.*, 49 AD3d 1161). We affirm for reasons stated in the decision at Supreme Court underlying the initial order and judgment and for reasons stated in the decision at Supreme Court granting defendant's motion for leave to reargue.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**946**

**CA 09-02596**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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PINO ALTO PARTNERS, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-RESPONDENT,

V ORDER

ERIE COUNTY WATER AUTHORITY,
DEFENDANT-APPELLANT.

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HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, BUFFALO (JOHN G. HORN OF COUNSEL), AND LAW OFFICE OF RALPH C. LORIGO, WEST SENECA, FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered August 18, 2009. The order provided for class notification pursuant to CPLR 904.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs for reasons stated at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**947**

**CA 10-00445**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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MARY KIDDER, INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF CINDY CHEVALIER,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LARRY MOORE AND KELLY MOORE,
DEFENDANTS-APPELLANTS.

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LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (SCOTT CARLTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (ANDREW J. CONNELLY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered January 11, 2010 in a personal injury action. The order denied the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her daughter when she was bitten by a dog owned by defendants. We conclude that Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint. "[T]he owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" (*Collier v Zambito*, 1 NY3d 444, 446). Defendants failed to meet their initial burden inasmuch as the evidence they submitted in support of the motion raised triable issues of fact whether the dog had vicious propensities and whether defendants had knowledge of those propensities (*see Grillo v Williams*, 71 AD3d 1480; *see also Francis v Becker*, 50 AD3d 1507). Although defendants established that the dog had not previously bitten anyone, the proof they submitted demonstrated that they were aware that the dog had previously growled at plaintiff's daughter and that, on at least one occasion, it had to be restrained while she was nearby. Moreover, defendants acknowledged that the dog was very protective of family members and that defendant Larry Moore had placed a "Beware of Dog" sign on the front of the house. Finally, the manner in which defendants confined the dog indicated that they may have had knowledge of its vicious propensities (*see generally Collier*, 1 NY3d at 448). We thus conclude that, by

their own submissions, defendants raised a triable issue of fact whether the dog exhibited behavior other than "normal canine behavior," which would be sufficient to support a finding of liability (*id.* at 447; *see also McLane v Jones*, 21 AD3d 1376).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**948**

**CA 10-00516**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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MARIE RADKO, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF ANDREW RADKO, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NITIN S. BANWAR, M.D., DEFENDANT-APPELLANT.

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BROWN & TARANTINO, LLC, ROCHESTER (THOMAS M. BERNACKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

KNAUF SHAW LLP, ROCHESTER (LINDA R. SHAW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered May 27, 2009 in a medical malpractice action. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs.

Memorandum: This medical malpractice action was commenced by plaintiff and Andrew Radko (decedent), who died during the pendency of the action, and plaintiff was thereafter substituted as executor of decedent's estate. Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint. With respect to the first cause of action alleging that defendant negligently performed decedent's total knee replacement surgery, the conclusory statements of defendant that he did not deviate from accepted standards of care in performing the surgery are insufficient to meet his burden of establishing that the cause of action has no merit (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *S'Doia v Dhabhar*, 261 AD2d 968). With respect to the second cause of action alleging lack of informed consent, defendant also failed to meet his burden of establishing his entitlement to judgment as a matter of law dismissing that cause of action. Defendant failed to establish that he advised decedent that the injuries decedent allegedly sustained were reasonably foreseeable risks of the surgery (*see Wilson-Toby v Bushkin*, 72 AD3d 810; *Colon v Klindt*, 302 AD2d 551, 553). The failure of defendant to meet his initial burden required denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad*, 64

NY2d at 853; *Canosa v Abadir*, 165 AD2d 823).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**950**

**CA 09-01673**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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HOLLY LAPE, PLAINTIFF-RESPONDENT,

V ORDER

WILLIAM GOLDBACH, ROLLINS, INC. AND
ORKIN, INC., DEFENDANTS-APPELLANTS.

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DAMON MOREY LLP, BUFFALO (MICHAEL L. AMODEO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CAMPBELL & SHELTON LLP, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered August 5, 2009 in a personal injury action. The order granted the motion of plaintiff for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on May 19, 2010,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**951**

**CA 10-00708**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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MONICA TESMER, AS PARENT AND NATURAL GUARDIAN
OF NORMA TESMER, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID COLONNA, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

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HISCOCK & BARCLAY, LLP, BUFFALO (BRIAN G. MANKA OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (SAREER A. FAZILI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Orleans County (Tracey A. Bannister, J.), entered September 16, 2009 in a personal injury action. The order denied the motion of defendant David Colonna for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, summary judgment is granted in favor of defendant Terry A. Weese and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her daughter when she was bitten by a dog owned by defendant Terry A. Weese. The incident occurred while plaintiff's daughter was inside the residence of Weese, which she leased from defendant David Colonna. The complaint, as amplified by the bill of particulars, alleges that defendants are liable for common-law negligence and for violations of Agriculture and Markets Law § 119 and the local leash law. We conclude that Supreme Court erred in denying the motion of Colonna for summary judgment dismissing the complaint against him. It is well established that, in an action for damages resulting from a dog bite, a plaintiff may recover only on a theory of strict liability and not for common-law negligence (*see Petrone v Fernandez*, 12 NY3d 546, 550; *Bard v Jahnke*, 6 NY3d 592, 599; *Collier v Zambito*, 1 NY3d 444, 446-448). Further, a "defendant's violation of [Agriculture and Markets Law § 119 and] the local leash law is 'irrelevant because such a violation is only some evidence of negligence, and negligence is no longer a basis for imposing liability' " for injuries sustained as the result of a dog bite (*Petrone*, 12 NY3d at 550). We therefore reverse the order, grant the motion and dismiss the complaint against Colonna. Also, pursuant to

CPLR 3212 (b), we search the record and grant summary judgment in favor of Weese dismissing the complaint against her, despite her failure to seek that relief.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**952**

**CA 09-02514**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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VELOCITY INVESTMENTS, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EVE MARIE COCINA, DEFENDANT-APPELLANT.

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LAW OFFICES OF KENNETH HILLER, AMHERST (SETH ANDREWS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MALEN & ASSOCIATES, P.C., WESTBURY (JEFFREY WOLSTEIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered December 7, 2009. The judgment granted the motion of plaintiff for summary judgment on the complaint and dismissed defendant's counterclaims.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion and reinstating the counterclaims and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action for breach of contract and account stated seeking to recover the balance due on a credit card issued to defendant by First Consumers National Bank, which assigned the debt to a third party that, in turn, assigned it to plaintiff. Plaintiff moved for summary judgment on the cause of action for an account stated and to dismiss the counterclaims alleging violations of the Fair Debt Collection Practices Act (15 USC § 1692 *et seq.*) and General Business Law § 349. Defendant cross-moved for summary judgment dismissing the complaint and for leave to file an application for attorney's fees pursuant to General Obligations Law § 5-327. We agree with defendant that Supreme Court erred in granting the motion inasmuch as plaintiff failed to submit nonhearsay evidence to support the cause of action for an account stated. We therefore modify the judgment accordingly. Although plaintiff submitted copies of credit card statements allegedly sent to defendant, who failed to pay or to object to them, plaintiff failed to lay a proper foundation for the admission of those documents as business records pursuant to CPLR 4518 (a) (*see West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949), which was the only basis proffered by plaintiff for their admissibility.

Contrary to the further contention of defendant, however, the

court properly denied that part of the cross motion seeking leave to file an application for attorney's fees pursuant to General Obligations Law § 5-327 (2). Defendant raises no issue on appeal concerning the court's denial of that part of her cross motion for summary judgment dismissing the complaint, and she therefore has abandoned any issues with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984). Thus, inasmuch as the action has not yet been finally determined in her favor, it cannot yet be said that defendant has been "successful [in the] defense" of this action (§ 5-327 [2]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**953**

**CA 10-00787**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ.

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MARY V. CARUANA, PLAINTIFF-RESPONDENT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

BHAVANSA PADMANABHA, M.D., DEFENDANT-APPELLANT.

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FAGER & AMSLER, LLP, SYRACUSE (JOHN P. POWERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered June 25, 2009 in a medical malpractice action. The order granted the motion of plaintiff Mary V. Caruana to sever certain causes of action of the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs.

Memorandum: Supreme Court properly granted the motion of Mary V. Caruana (plaintiff) to sever the medical malpractice cause of action from the derivative cause of action asserted by her husband, plaintiff Joseph Caruana (decedent), who died during the pendency of the action. Severance may be ordered "[i]n furtherance of convenience" as a matter of judicial discretion (CPLR 603), and the court's exercise of discretion "will not be disturbed absent [an] abuse of discretion or prejudice to a party's substantial rights" (*Matter of Green Harbour Homeowners' Assn. v Town of Lake George Planning Bd.*, 1 AD3d 744, 746; *see Finning v Niagara Mohawk Power Corp.*, 281 AD2d 844). Plaintiff, who is 86 years old, established that she will be prejudiced by any delay, and the court did not abuse its discretion in granting the motion to facilitate the disposition of the medical malpractice cause of action (*see Cross v Cross*, 112 AD2d 62, 64, *amended* 114 AD2d 824; *Statewide Sav. & Loan Assn. v Sawyerkill Enters.*, 65 AD2d 887). Contrary to defendant's contention, the court properly determined that, under the circumstances of this case, the medical malpractice cause of action could proceed without substitution of a personal representative for decedent (*see generally Paterno v CYC, LLC*, 46 AD3d 788; *Bova v Vinciguerra*, 139 AD2d 797, 799). "[W]here a party's demise does not affect the merits of the case, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution" (*Paterno*, 46 AD3d at 788; *see DLJ Mtge. Capital, Inc. v 44 Brushy Neck, Ltd.*, 51 AD3d 857, 858). Here, the death of decedent did not affect the merits of the case inasmuch as "his wife was the only other plaintiff[] and had a clear identity of interest

with [decedent]" (*Paterno*, 46 AD3d at 789).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**954**

**KA 09-01283**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM B. COLLIER, DEFENDANT-APPELLANT.

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DAVISON LAW OFFICE, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (DAVID V. SHAW OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered April 16, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**955**

**KA 10-00748**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

STEVE J. GRAY, DEFENDANT-RESPONDENT.

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MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Monroe County Court (John J. Connell, J.), dated September 22, 2008. The order granted those parts of defendant's omnibus motion to suppress tangible property and statements.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, those parts of the motion to suppress tangible property and statements are denied and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting those parts of defendant's omnibus motion to suppress tangible property found both in a residence pursuant to a search warrant and on defendant's person, as well as statements made by defendant at the police station. We agree with the People that reversal is required.

We note at the outset that County Court erred in determining that the police lacked reasonable suspicion to pursue defendant. "[A] defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Sierra*, 83 NY2d 928, 929). Here, defendant was the sole occupant of a residence where the police were about to execute a valid search warrant, and the police observed defendant run from the front porch into the residence and out the back door of the residence. Defendant then climbed over a nine-foot fence topped by barbed wire, fell to the ground, and continued to run before being apprehended by the police.

We further conclude that the court erred in suppressing the tangible property seized from the residence and defendant's person, as well as defendant's statements made at the police station, based on

its determination that the tangible property and statements were the result of an illegal pursuit and arrest. Upon apprehending defendant and arresting him, the police returned him to the residence that was the subject of the search warrant. The tangible property found in the residence pursuant to the valid search warrant, i.e., a handgun, crack cocaine, an electronic scale and unused baggies, was not subject to suppression (*see People v Aseltine*, 155 AD2d 819, 820). The police then searched defendant's person and found, inter alia, a bag of marihuana and a bag of crack cocaine. That tangible property also was not subject to suppression inasmuch as the search resulting in the seizure of that property was incident to a lawful arrest (*see People v Johnson*, 71 AD3d 1521, 1522). Later, at the police station, defendant made the disputed statements to the police. Even assuming, arguendo, that the pursuit of defendant and his arrest were illegal, we would conclude that defendant's statements made three hours later at the police station were "sufficiently attenuated from the illegal arrest to be purged of the taint created by the illegality" (*People v Russell*, 269 AD2d 771, 772).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**956**

**KA 08-01670**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER PEAY, DEFENDANT-APPELLANT.

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JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

CHRISTOPHER PEAY, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (CATHERINE A. WALSH OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered September 12, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [b]). We reject the contention of defendant that the written and oral statements he made to the police while in custody and after waiving his *Miranda* rights were coerced and that County Court therefore erred in refusing to suppress them. "The voluntariness of a confession is to be determined by examining the totality of the circumstances surrounding the confession" (*People v Coggins*, 234 AD2d 469, 470; *see People v Scott*, 212 AD2d 1047, *affd* 86 NY2d 864). Here, the record of the suppression hearing supports the court's determination that the statements were not coerced, i.e., defendant received no promises in exchange for making the statements nor was he threatened in any way, and the court's determination is entitled to great deference (*see generally People v Prochilo*, 41 NY2d 759, 761). Contrary to the further contention of defendant in his main and pro se supplemental briefs, the sentence is not unduly harsh or severe. We have considered the remaining contention in defendant's pro se supplemental brief and conclude that it is without merit.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**957**

**KA 08-02546**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONNA L. ROY, DEFENDANT-APPELLANT.

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SIMONE M. SHAHEEN, UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered April 4, 2008. The judgment convicted defendant, upon her plea of guilty, of attempted grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the matter is remitted to Oneida County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting her upon a plea of guilty of attempted grand larceny in the third degree (Penal Law §§ 110.00, 155.35). Although the contention of defendant that her plea was not voluntarily, knowingly and intelligently entered survives her valid waiver of the right to appeal, defendant failed to move to withdraw her guilty plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see People v Zulian*, 68 AD3d 1731). We agree with defendant, however, that this is one of those rare cases where preservation is not required because "the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666). Thus, County Court had a "duty to inquire further to ensure that defendant's guilty plea [was] knowing and voluntary" (*id.*).

We conclude that the court failed to make the requisite inquiry to ensure that defendant's plea was voluntarily entered. "[A]t a minimum the record of the . . . plea proceedings must reflect . . . that defendant's responses to the court's subsequent questions removed the doubt about defendant's guilt" (*People v Ocasio*, 265 AD2d 675, 678). "Although [the court] made some further inquiries of defendant, none of them [was] even remotely sufficient to determine that the plea

was entered intelligently and with knowledge of the nature of the charge and with the requisite criminal intent" (*id.* at 677; *see People v Speed*, 13 AD3d 1083, 1084, *lv denied* 5 NY3d 795).

Based on our decision, we see no need to address defendant's remaining contentions.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**958**

**KA 07-01866**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LYNN HENDERSON, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered July 31, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree and assault in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of one count of burglary in the first degree (Penal Law § 140.30 [2]) and two counts of assault in the second degree (§ 120.05 [2]). Contrary to defendant's contention with respect to count three of the indictment, we conclude that the evidence is legally sufficient to establish that the victim sustained a physical injury (*see* § 10.00 [9]; § 120.05 [2]; *People v Chiddick*, 8 NY3d 445, 447-448). The evidence presented at trial established that defendant struck the victim repeatedly with a baseball bat, resulting in an injury to the victim's arm that caused the victim "more than slight or trivial pain" (*Chiddick*, 8 NY3d at 447). We further conclude that, when defendant moved for substitution of counsel, County Court made the requisite inquiry to determine whether defendant had good cause for substitution (*see People v Frayer*, 215 AD2d 862, 862-863, *lv denied* 86 NY2d 794). The record establishes that "the court afforded defendant the opportunity to express his objections concerning his . . . attorney, and the court thereafter reasonably concluded that defendant's . . . objections had no merit or substance" (*People v Singletary*, 63 AD3d 1654, *lv denied* 13 NY3d 839 [internal quotation marks omitted]; *see People v Reese*, 23 AD3d 1034, 1035, *lv denied* 6 NY3d 779).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**960**

**KA 07-00416**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE MENDEZ, DEFENDANT-APPELLANT.

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KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOSE MENDEZ, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Roy W. King, A.J.), rendered November 30, 2006. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, assault in the first degree, and robbery in the second degree (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the first degree (Penal Law § 140.30 [2]), assault in the first degree (§ 120.10 [4]), and four counts of robbery in the second degree (§ 160.10 [1], [2] [b]). We conclude that County Court did not err in refusing to suppress defendant's written statement that was given at the police station. Defendant was administered *Miranda* rights at approximately 9:30 P.M., at which time he waived those rights. Subsequently, defendant remained in police custody, and there is no evidence in the record before us that he invoked his right to counsel or had reason to believe that he was no longer under investigation. The police questioned defendant approximately three hours later, without readministering defendant's *Miranda* rights, and defendant gave the written statement at issue. We conclude, under the facts of this case, that there was no need for the police to readminister defendant's *Miranda* rights and thus that the court properly refused to suppress defendant's written statement (*see People v Dudley*, 31 AD3d 264, 265, *lv denied* 7 NY3d 866).

We further conclude that the court properly denied defendant's motion for a mistrial based on the single use by a police officer of the term "home invasion" during his trial testimony, despite the fact that the court had ruled that the term would be inadmissible. The

court issued a curative instruction to the jury, which the jury is presumed to have followed (*see generally People v Moore*, 71 NY2d 684, 688), and we cannot conclude that the single use of that term was so prejudicial that a fair and impartial verdict could not be reached (*see generally People v Collins*, 72 AD2d 431, 435-436).

We also reject the contention of defendant that he was denied effective assistance of counsel, inasmuch as defendant failed to show the absence of a strategic explanation for defense counsel's alleged shortcomings (*see People v Benevento*, 91 NY2d 708, 712; *see generally People v Baldi*, 54 NY2d 137, 147). Likewise, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**961**

**KA 06-02499**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS D. JONES, JR., DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered August 8, 2006. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject the contention of defendant that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "The jury was entitled to credit the testimony of [the victim and his father] rather than crediting the testimony of defendant denying that he had" assaulted the victim (*People v Martin*, 35 AD3d 1183, 1184-1185, *lv denied* 8 NY3d 924).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**962**

**KA 09-01048**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH VANLARE, DEFENDANT-APPELLANT.

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RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered March 31, 2009. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (two counts), course of sexual conduct against a child in the first degree, course of sexual conduct against a child in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, two counts of rape in the first degree (Penal Law § 130.35 [3]) and one count of course of sexual conduct against a child in the first degree (§ 130.75 [1] [b]), defendant contends that County Court erred in refusing to dismiss the two counts of rape pursuant to Penal Law § 130.75 (2). We reject that contention. Pursuant to section 130.75 (2), "[a] person may not be *subsequently* prosecuted for any other sexual offense involving the same victim unless the other charged offense occurred outside the time period charged under [that] section" (emphasis added). The purpose of that section is to protect defendants from subsequent prosecutions that would violate the prohibition against double jeopardy (*see* Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 130.00). Furthermore, Penal Law § 70.25 (2-e) provides that, "[w]henever a person is convicted of course of sexual conduct against a child in the first degree as defined in section 130.75 . . . and any other crime under article [130] committed against the same child and within the period charged under section 130.75 . . ., the sentences must run concurrently." To interpret section 130.75 (2) as prohibiting contemporaneously charged sexual offenses would render meaningless the word "subsequently," as well as section 70.25 (2-e). "It is an accepted rule that all parts of a statute are intended to be

given effect and that a statutory construction [that] renders one part meaningless should be avoided" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 98). To the extent that our decision in *People v Merrill* (55 AD3d 1333, *lv denied* 11 NY3d 928) stated that an indictment violated section 130.75 (2) where it charged course of sexual conduct against a child in the first degree, as well as a sexual offense that had occurred during the same time period, we disavow that statement.

Defendant failed to preserve for our review his further contention that he was denied a fair trial based on the statement of a witness, elicited by defense counsel on cross-examination, that most children tell the truth concerning sexual abuse (*see generally People v Giles*, 47 AD3d 88, 97, *mod on other grounds*, 11 NY3d 495; *People v Morales*, 246 AD2d 396, *lv denied* 91 NY2d 943). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's contention, the court properly admitted expert testimony concerning Child Sexual Abuse Accommodation Syndrome (*see People v Hernandez*, 71 AD3d 1501; *People v Martinez*, 68 AD3d 1757, *lv denied* 14 NY3d 803; *People v Gunther*, 67 AD3d 1477).

Defendant further contends that the verdict is against the weight of the evidence because the testimony of the victim was not credible. We reject that contention. Generally, "[w]e accord great deference to the resolution of credibility issues by the trier of fact 'because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record' " (*People v Ange*, 37 AD3d 1143, 1144, *lv denied* 9 NY3d 839, quoting *People v Lane*, 7 NY3d 888, 890; *see generally People v Bleakley*, 69 NY2d 490, 495). Indeed, we note that the victim's testimony was corroborated by an eyewitness to the sexual abuse (*see generally People v Bassett*, 55 AD3d 1434, 1435-1436, *lv denied* 11 NY3d 922). Contrary to the contention of defendant, the verdict with respect to the second count of the indictment, charging him with rape in the first degree, is not against the weight of the evidence based on the victim's alleged failure to testify that there was an act of penetration. Immediately after giving a detailed account of the rape incident upon which the first count of the indictment was based, the victim testified that the "same thing" happened the next day. "While it is clear that [such] testimony does not directly support each and every element of rape in the [first] degree, it is logical to conclude that the jury interpreted the victim's testimony to mean that defendant had raped her in the precise manner described only moments earlier" (*People v Butler*, 273 AD2d 613, 615, *lv denied* 95 NY2d 933).

Finally, the sentence is not unduly harsh or severe.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**963**

**KA 06-03432**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL B. SIMPSON, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW J. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered August 10, 2006. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on May 6, 2010 and by the attorneys for the parties on May 19 and 21, 2010,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**964**

**CA 10-00396**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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CHUCK TOMASELLI, DOING BUSINESS AS C. LEWIS TOMASELLI ARCHITECTS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ONEIDA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, GRIFFISS LOCAL DEVELOPMENT CORPORATION, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

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SAUNDERS, KAHLER, L.L.P., UTICA (GREGORY J. AMOROSO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COHEN & COHEN LLP, UTICA (DANIEL S. COHEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered December 9, 2009. The order, inter alia, granted the motion of plaintiff for summary judgment against defendants Oneida County Industrial Development Agency and Griffiss Local Development Corporation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and reinstating the answer of defendants Oneida County Industrial Development Agency and Griffiss Local Development Corporation and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a money judgment arising from a mechanic's lien filed by him based on money allegedly owed to him in connection with services he performed on property owned by Oneida County Industrial Development Agency and Griffiss Local Development Corporation (collectively, defendant owners). Supreme Court granted plaintiff's motion seeking summary judgment dismissing the answer of defendant owners and summary judgment granting the relief sought in the complaint against defendant owners. In addition, the court denied the cross motion of defendant owners for summary judgment dismissing the complaint against them. We agree with defendant owners that the court erred in granting the motion, and we therefore modify the order accordingly.

"As the proponent of the motion for summary judgment . . . based upon the mechanic's lien, plaintiff had the burden of presenting evidentiary facts showing the existence of a valid lien and that there

were funds due and owing from [defendant owners] to [plaintiff] to which the lien could attach" (*L & W Supply Corp. v A.D.F. Drywall, Inc.*, 55 AD3d 1026, 1027; *see* Lien Law § 4 [1]). With respect to the mechanic's lien at issue in this action, plaintiff was required to establish that he provided architectural and engineering services "for the improvement of real property with the consent or at the request of the owner[s] thereof, or of [their] agent" (§ 3; *see* § 2 [4]). The term "consent" within the meaning of Lien Law § 3 " 'is not mere acquiescence and benefit, but [it is] some affirmative act or course of conduct establishing confirmation . . . Such consent may be inferred from the . . . conduct of the owner[s]' " (*J.K. Tobin Constr. Co., Inc. v David J. Hardy Constr. Co., Inc.*, 64 AD3d 1206, 1208; *see Elliott-Williams Co., Inc. v Impromptu Gourmet, Inc.*, 28 AD3d 706; *GCDM Ironworks v GJF Constr. Corp.*, 292 AD2d 495, 496). Therefore, " 'the owner[s] must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises assent to the improvement in the expectation that [they] will reap the benefit of it' " (*Elliott-Williams*, 28 AD3d at 707, quoting *Rice v Culver*, 172 NY 60, 65-66; *see Paul Mock, Inc. v 118 E. 25th St. Realty Co.*, 87 AD2d 756). On the record before us, we conclude that there are triable issues of fact whether defendant owners or other defendants owed any money to plaintiff and, if so, the amount of any such money at the time plaintiff filed his mechanic's lien against the property, thus requiring denial of both the motion by plaintiff and the cross motion by defendant owners (*see Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 65 AD3d 533, 535; *see generally Zuckerman v City of New* York, 49 NY2d 557, 562). Indeed, defendant owners failed to submit evidence in support of their cross motion establishing as a matter of law that they or their agents did not consent to the work performed to improve the property that was subject to the mechanic's lien.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**965**

**CA 10-00649**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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TAG MECHANICAL SYSTEMS, INC.,
PLAINTIFF-RESPONDENT,

V ORDER

V.I.P. STRUCTURES, INC.,
DEFENDANT-APPELLANT.

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SHEATS & ASSOCIATES, PC, BREWERTON (JASON B. BAILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (SHELLY DIBENEDETTO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered September 9, 2009. The order granted the motion of plaintiff for a protective order.

Now, upon reading and filing the stipulation discontinuing action signed by the attorneys for the parties on May 13, 2010,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**967**

**CA 10-00049**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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JANE L. MARGOLIS AND JEROME E. MARGOLIS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

VOLKSWAGEN OF AMERICA, INC., ET AL., DEFENDANTS,
RAYMOND CASE AND RAY CASE FLOORS, INC.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

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BURKE, ALBRIGHT, HARTER & REDDY, LLP, ROCHESTER (MICHAEL A. REDDY OF COUNSEL), FOR DEFENDANT-APPELLANT RAYMOND CASE.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (FRANK G. MONTEMALO OF COUNSEL), FOR DEFENDANT-APPELLANT RAY CASE FLOORS, INC.

VALERIO & KUFTA, P.C., ROCHESTER (MARK J. VALERIO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeals from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered July 13, 2009 in a personal injury action. The order, insofar as appealed from, upon renewal granted the motion of plaintiffs for partial summary judgment on liability with respect to defendants Raymond Case and Ray Case Floors, Inc. and adhered to the court's prior decision denying the cross motions of those defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of plaintiffs' motion for partial summary judgment on liability against defendants Raymond Case and Ray Case Floors, Inc. and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Jane L. Margolis (plaintiff) when the vehicle she was operating was struck by a van operated by defendant Timothy P. Bosch. The registered owner of the van was defendant Raymond Case, the president and a shareholder of defendant Ray Case Floors, Inc. (RCF), and Bosch was an employee of RCF.

Plaintiffs moved for partial summary judgment on liability against, inter alia, Bosch, Case and RCF, and Case and RCF each cross-moved for summary judgment dismissing the amended complaint and cross claims against them. Supreme Court granted that part of plaintiffs'

motion with respect to Bosch but otherwise denied the motion and cross motions. Subsequently, plaintiffs moved and Case and RCF each cross-moved for leave to renew their motion and cross motions, respectively. Supreme Court granted the motion and cross motions insofar as they sought leave to renew and, upon renewal, granted those parts of plaintiffs' motion with respect to Case and RCF and adhered to its decision denying the cross motions of Case and RCF.

Case and RCF contend that the court erred in determining as a matter of law that Bosch was acting within the scope of his employment at the time of the accident and that the court instead should have determined as a matter of law that Bosch was not acting within the scope of his employment and that the doctrine of respondeat superior does not apply. We conclude on the record before us, however, that there is an issue of fact whether Bosch was acting within the scope of his employment at the time of the accident. The new evidence on which the moving and cross-moving parties relied upon renewal was the deposition testimony of Bosch, who had recently returned from military service. The parties also relied upon the previously submitted deposition testimony and affidavit of Case. The evidence establishes that, on the day of the accident, Bosch was operating the van for RCF business. Bosch finished his work at the client's home and intended to stop at a drugstore to purchase headache medication on his way back to RCF's garage. Bosch testified at his deposition that he took a wrong turn and decided that he would not stop at the drugstore but, rather, would return directly to the RCF garage. The accident occurred as Bosch was returning to the garage. Bosch further testified that, at the time of the accident, he was operating the van without permission. According to Case, there was no official company policy on the use of RCF vans for personal errands, and there were occasions on which he would allow employees to run personal errands with the RCF vans.

Generally, "the issue whether an employee is acting within the scope of his or her employment . . . is one of fact" (*Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1131, *lv denied* 11 NY3d 708). "Even if there has been a departure from the designated activity, consideration is to be given to the foreseeability of the occurrence arising from the deviation and employer responsibility in this area is broad 'particularly where employee activity may be regarded as *incidental to the furtherance of the employer's interest'* " (*Bazan v Bohne*, 144 AD2d 168, 170, quoting *Makoske v Lombardy*, 47 AD2d 284, 288, *affd on op of Kane, J.*, 39 NY2d 773; *see Davis v Larhette*, 39 AD3d 693, 694-695). We conclude that the trip to the drugstore by Bosch to purchase headache medication, while a departure from his designated activity, may have been foreseeable and could be deemed "*incidental to the furtherance of the employer's interest*" (*Makoske*, 47 AD2d at 288). Furthermore, in cases involving employment-related travel, an employer may be liable in the event that the employment created the "need to be on the particular route on which the accident occurred" (*Cicatello v Sobierajski*, 295 AD2d 974, 975). Case and RCF failed to establish as a matter of law that Bosch would have traveled the same route aside from any business purpose and thus failed to establish as a matter of law that they cannot be vicariously liable (*see id.*; *cf. Swierczynski*

*v O'Neill* [appeal No. 2], 41 AD3d 1145, *lv denied* 9 NY3d 812; *Matos v Depalma Enters.*, 160 AD2d 1163, 1164).

In addition, "[i]t is well settled that Vehicle and Traffic Law § 388 (1) creates a strong presumption that the driver of a vehicle is operating it with the owner's permission and consent, express or implied, and that presumption continues until rebutted by substantial evidence to the contrary" (*Liberty Mut. Ins. Co. v General Acc. Ins. Co.*, 277 AD2d 981, 981-982 [internal quotation marks omitted]). For the same reasons that Case and RCF failed to establish as a matter of law that they are not vicariously liable, we likewise conclude that Case and RCF failed to rebut the presumption that Bosch was operating the van with Case's permission (*see Cherry v Tucker*, 5 AD3d 422, 424; *cf. Liberty Mut. Ins. Co.*, 277 AD2d at 982; *Leonard v Karlewicz*, 215 AD2d 973, 974-975).

We note that Case originally contended on appeal that he established as a matter of law that he was not the owner of the van but, rather, that RCF was the actual owner. Plaintiffs, on the other hand, contended in response that both Case and RCF qualified as owners of the van. Subsequently, however, Case and plaintiffs withdrew their contentions that RCF was the actual owner of the van, and we therefore do not address those contentions.

Finally, we conclude that the court erred, upon renewal, in granting those parts of plaintiffs' motion for partial summary judgment on liability against Case and RCF. We therefore modify the order accordingly. Although it is undisputed that Bosch failed to stop for a red light, plaintiffs failed to establish as a matter of law that plaintiff was free from any negligence. "[A] driver who lawfully enters an intersection with a green light may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection" (*Siegel v Sweeney*, 266 AD2d 200, 202; *see generally Shea v Judson*, 283 NY 393, 398). The record establishes that at least one witness observed the van driven by Bosch approaching the intersection at a high rate of speed and anticipated the crash between plaintiff's vehicle and the van, and we thus conclude that "there is a question of fact whether [plaintiff] could have avoided or otherwise minimized the accident" (*LaForge v All Am. Car Rental* [appeal No. 1], 155 AD2d 873; *see Strasburg v Campbell*, 28 AD3d 1131, 1132-1133; *Siegel*, 266 AD2d at 201-202).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**968**

**CA 10-00342**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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OLGA KNOPE, PLAINTIFF-RESPONDENT,

V ORDER

GERARD S. KNOPE, DEFENDANT-APPELLANT.

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THE ODORISI LAW FIRM, EAST ROCHESTER (TERRENCE C. BROWN-STEINER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ALEXANDER KOROTKIN, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

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Appeal from a decision (denominated decision and order) of the Supreme Court, Monroe County (Philip B. Dattilo, Jr., R.), entered February 5, 2009 in a divorce action. The decision, inter alia, provided that plaintiff is entitled to an award of maintenance and counsel fees.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Kuhn v Kuhn*, 129 AD2d 967).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**969**

**CA 09-02266**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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IN THE MATTER OF JAMES E. RICHARDSON AND
ETHAN J. RICHARDSON, PETITIONERS-APPELLANTS,

V ORDER

MURRAY TOWN COURT, RESPONDENT-RESPONDENT.

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JAMES E. RICHARDSON, PETITIONER-APPELLANT PRO SE.

ETHAN J. RICHARDSON, PETITIONER-APPELLANT PRO SE.

JAMES D. BELL, BROCKPORT, FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James J. Punch, A.J.), entered August 24, 2009 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**970**

**CA 09-02320**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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JEFFREY M. CARSON AND PATRICIA A. CARSON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF OSWEGO, DEFENDANT-RESPONDENT.

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MITCHELL LAW OFFICE, OSWEGO (RICHARD C. MITCHELL, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (LISA M. ROBINSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered June 1, 2009. The order, insofar as appealed from, granted that part of the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action alleging that defendant failed to build an adequate sewage treatment plant for the subdivision in which real property owned by plaintiffs is situated and that, as a result, potential sales for two parcels owned by plaintiffs were "lost," thus resulting in an "indirect taking of the plaintiffs' property." Supreme Court properly granted that part of defendant's motion for summary judgment dismissing the complaint on the ground that the causes of action are not ripe for review, inasmuch as there was no application to defendant with respect to the sewage system and no denial of any application by defendant (*see Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520-521, *cert denied* 479 US 985). Further, even assuming, arguendo, that defendant's actions in question were ministerial (*cf. McLean v City of New York*, 12 NY3d 194, 203; *Weiss v Fote*, 7 NY2d 579, 584, *rearg denied* 8 NY2d 934), we conclude that defendant met its burden of establishing as a matter of law that it did not "violate[] a special duty to [them], apart from any duty to the public in general," a necessary element for the imposition of liability against a municipality with respect to ministerial actions (*McLean*, 12 NY3d at 203). Contrary to the further contention of plaintiffs, they failed to establish that the discovery they sought would produce evidence sufficient to defeat the motion, and thus denial of the motion was not warranted pursuant to CPLR 3212 (f) (*see Johnson v Bauer Corp.*, 71 AD3d 1586, 1587). Finally, although we

agree with plaintiffs that the court should not have considered the unrecorded meeting involving the court, the parties and the New York State Department of Environmental Conservation in determining defendant's motion, there nevertheless is ample evidence in the record before us to support the court's decision, and thus the court's error is of no moment.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**972**

**CA 08-02012**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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JANE L. MARGOLIS AND JEROME E. MARGOLIS,
PLAINTIFFS-RESPONDENTS,

V ORDER

VOLKSWAGEN OF AMERICA, INC., ET AL., DEFENDANTS,
RAYMOND CASE AND RAY CASE FLOORS, INC.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

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BURKE, ALBRIGHT, HARTER & REDDY, LLP, ROCHESTER (MICHAEL A. REDDY OF COUNSEL), FOR DEFENDANT-APPELLANT RAYMOND CASE.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (FRANK G. MONTEMALO OF COUNSEL), FOR DEFENDANT-APPELLANT RAY CASE FLOORS, INC.

VALERIO & KUFTA, P.C., ROCHESTER (MARK J. VALERIO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeals from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered December 4, 2007 in a personal injury action. The order, insofar as appealed from, denied the cross motions of defendants Raymond Case and Ray Case Floors, Inc. for summary judgment.

It is hereby ORDERED that said appeals are unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**973**

**CA 09-01405**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, PINE, AND GORSKI, JJ.

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ROBERTO ANGELICOLA AND LYNN ANGELICOLA,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PATRICK HEATING OF MOHAWK VALLEY, INC. AND
DAVID W. PATRICK, DEFENDANTS-RESPONDENTS.

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PETRONE & PETRONE, P.C., SYRACUSE (J. WILLIAM SAVAGE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

COHEN & COHEN LLP, UTICA (RICHARD A. COHEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered June 19, 2009. The order granted the cross motion of defendants for the preclusion of certain evidence.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: Plaintiffs appeal from an order that granted defendants' cross motion in limine seeking to preclude the admission of certain evidence. The appeal must be dismissed on the ground that an evidentiary ruling, "even when made 'in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission' " (*Winograd v Price*, 21 AD3d 956). Contrary to the contention of plaintiffs, the order on appeal does not limit the scope of the issues to be tried and thus is not appealable on that ground (*cf. Innovative Transmission & Engine Co., LLC v Massaro*, 63 AD3d 1506, 1508; *Rondout Elec. v Dover Union Free School Dist.*, 304 AD2d 808, 810).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**974**

**KA 05-00500**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISRAEL MIRANDA, DEFENDANT-APPELLANT.

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KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered April 23, 2004. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]) and criminal possession of a weapon in the fourth degree (§ 265.01 [1]). Contrary to defendant's contention, the evidence is legally sufficient to support the conviction of criminal possession of a weapon in the third degree (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that the evidence presented by the People was insufficient to establish that the possession by defendant of the loaded firearm did not take place at his home or place of business, defendant's own testimony was sufficient to do so (*see* § 265.02 [former (4)]). "[A] defendant who does not rest after the court [denies] a motion [for a trial order of dismissal] at the close of the People's case[] proceeds with the risk that he [or she] will inadvertently supply a deficiency in the People's case" (*People v Kirkpatrick*, 32 NY2d 17, 21, *appeal dismissed* 414 US 948; *see People v Lemma*, 273 AD2d 180, *lv denied* 95 NY2d 906, 96 NY2d 736; *People v Bertino*, 93 AD2d 972).

We reject defendant's further contention that County Court erred in allowing the People to cross-examine defendant with respect to a photograph of a tattoo on his arm showing a hand holding a smoking gun. That evidence was relevant with respect to defendant's credibility, particularly the testimony of defendant that he was not

familiar with guns before purchasing one for his protection shortly before the crimes occurred (*see People v Morgan*, 24 AD3d 950, 952-953, *lv denied* 6 NY3d 815; *see also People v Mendoza*, 5 AD3d 810, 813-814, *lv denied* 3 NY3d 644). The probative value of that evidence outweighed its potential for prejudice to defendant (*see People v Herr*, 203 AD2d 927, 928, *affd* 86 NY2d 638; *cf. Morgan*, 24 AD3d at 953). In any event, any error with respect to the People's cross-examination of defendant concerning his tattoo is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the People's questions concerning his tattoo (*see Morgan*, 24 AD3d at 953-954; *see also People v Buonincontri*, 18 AD3d 569, *affd* 6 NY3d 726; *Mendoza*, 5 AD3d at 813-814; *see generally People v Crimmins*, 26 NY2d 230, 241-242). Finally, the sentence is not unduly harsh or severe.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**975**

**KA 09-02569**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN WISNIEWSKI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 15, 2009. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree and offering a false instrument for filing in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law § 155.35) and offering a false instrument for filing in the first degree (§ 175.35) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of grand larceny in the second degree (§ 155.40 [1]). Pursuant to the plea agreement, sentencing would be deferred for eight months to allow defendant the opportunity to pay $60,000 in restitution. In the event that defendant tendered that amount at or prior to sentencing, he would be sentenced to a term of probation upon the further condition that he pay the balance of the restitution owed within five years. We agree with defendant in each appeal that Supreme Court erred in imposing the prison alternative pursuant to the plea agreement, inasmuch as defendant did not violate the terms thereof. An implicit term of the plea agreement was that defendant would remain at liberty from the time of the plea until sentencing to enable him to earn or otherwise obtain $60,000 in restitution. Defendant was apprehended on a bench warrant and returned to custody approximately five months after his plea was entered based on his failure to appear at a status conference and a presentence investigation interview. Defendant's presence at the conference and the interview, however, was not a condition of the plea agreement (*see generally People v Chapman*, 27

AD3d 1180; *People v Johnson*, 48 AD2d 643). The court revoked bail without conducting any inquiry to determine whether defendant intentionally violated a condition of his plea agreement, and defendant remained in custody until sentencing. Defendant thus did not receive the promised eight months in which to earn $60,000 in restitution, and it cannot be said that he violated the terms of the plea agreement.

We therefore modify the judgment in each appeal by vacating the sentence, and we remit each matter to Supreme Court to impose the promised sentence or to afford defendant the opportunity to withdraw his plea. In light of our determination, we do not address defendant's remaining contentions.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**976**

**KA 08-02001**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRETT H. THOMAS, DEFENDANT-APPELLANT.

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D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered October 29, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree (two counts) and grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of two counts of burglary in the third degree (Penal Law § 140.20) and one count of grand larceny in the third degree (§ 155.35). Contrary to the contention of defendant, his waiver of the right to appeal is valid inasmuch as the record of the plea proceedings establishes that County Court did not conflate the right to appeal with those rights automatically forfeited upon a guilty plea when it explained defendant's rights during the plea colloquy (*see People v Dozier*, 74 AD3d 1808; *People v Dillon*, 67 AD3d 1382). We conclude that defendant's waiver of the right to appeal was knowingly, intelligently, and voluntarily entered, and that it encompasses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256). The valid waiver by defendant of the right to appeal also encompasses his challenge to the amount of restitution ordered inasmuch as the exact amount of restitution was included in the plea agreement (*see People v Gordon*, 43 AD3d 1330, *lv denied* 9 NY3d 1006). Although the further contention of defendant that the plea was not voluntarily entered survives his waiver of the right to appeal, he failed to preserve that contention for our review because he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Diaz*, 62 AD3d 1252, *lv denied* 12 NY3d 924), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6]

[a]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**979**

**KA 09-01483**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRED HARRIS, JR., DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DAVID W. BENTIVEGNA OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered June 11, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]). Contrary to defendant's contention, County Court "expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not conflate that right with those automatically forfeited by a guilty plea" (*People v Pasha*, 36 AD3d 425, 426, *lv denied* 8 NY3d 989; *see People v Lopez*, 6 NY3d 248, 256-257). The valid waiver by defendant of his right to appeal encompasses his challenge to the court's denial of his request for youthful offender status (*see People v Porter*, 55 AD3d 1313, *lv denied* 11 NY3d 899; *People v Williams*, 37 AD3d 1193).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**980**

**KA 10-00711**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PAUL D. SINGH, DEFENDANT-APPELLANT.

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DEREK B. AKIWUMI, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered September 3, 2008. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**981**

**KA 09-02570**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN WISNIEWSKI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 15, 2009. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same Memorandum as in *People v Wisniewski* ([appeal No. 1] ___ AD3d ___ [Oct. 1, 2010]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**983**

**CAF 10-00735**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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IN THE MATTER OF EDUARDO R.,
RESPONDENT-APPELLANT. ORDER

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ERIE COUNTY ATTORNEY, PETITIONER-RESPONDENT.

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DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR RESPONDENT-APPELLANT.

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (MICHAEL J. LISZEWSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered September 9, 2009 in a proceeding pursuant to Family Court Act article 3. The order placed respondent with the Probation Department of Erie County upon an adjudication of juvenile delinquency.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**984**

**OP 10-00167**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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IN THE MATTER OF INNTEL MANAGEMENT CORPORATION
AND DANIEL HOMIK, PETITIONERS,

V ORDER

CITY OF CANANDAIGUA AND CITY OF CANANDAIGUA
CITY COUNCIL, RESPONDENTS.

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HISCOCK & BARCLAY, LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR PETITIONERS.

GILBERTI, STINZIANO, HEINTZ & SMITH P.C., SYRACUSE (KEVIN G. ROE OF COUNSEL), FOR RESPONDENTS.

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Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b]) to annul a determination of respondents to acquire certain real property by eminent domain.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties and filed June 2, 2010,

It is hereby ORDERED that said proceeding is unanimously dismissed without costs upon stipulation.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**985**

**CA 09-01686**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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GOD OF THUNDER PRODUCTIONS, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

ALESSANDRO STAROPOLI AND LUCA TURILLI,
INDIVIDUALLY AND AS MEMBERS OF THE MUSICAL
GROUP "RHAPSODY OF FIRE," FORMERLY KNOWN AS
"RHAPSODY," DEFENDANTS-APPELLANTS-RESPONDENTS.

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BOND, SCHOENECK & KING, PLLC, SYRACUSE (JOHN G. MCGOWAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

THE THURSTON LAW OFFICE, P.C., AUBURN (DAVID B. THURSTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

---

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Kenneth R. Fisher, J.), entered July 31, 2009 in a breach of contract action. The order denied the motion of defendants to dismiss the complaint and to vacate the default judgment against defendant Luca Turilli.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 3 and June 1, 2010,

It is hereby ORDERED that said appeal and cross appeal are unanimously dismissed without costs upon stipulation.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**986**

**CA 10-00710**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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IN THE MATTER OF JULIE PURCELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFERSON COUNTY DISTRICT ATTORNEY AND
ROBERT F. HAGEMANN, III, COUNTY ADMINISTRATOR,
AS FOIL OFFICER FOR JEFFERSON COUNTY,
RESPONDENTS-APPELLANTS.

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DAVID J. PAULSEN, COUNTY ATTORNEY, WATERTOWN, FOR
RESPONDENTS-APPELLANTS.

JULIE PURCELL, PETITIONER-RESPONDENT PRO SE.

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Appeal from a judgment (denominated judgment and order) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered June 3, 2009. The judgment awarded attorney's fees and costs to petitioner pursuant to the Freedom of Information Law.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents to comply with her request pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6) for documents relating to a criminal matter in which she was the complainant. Contrary to the contention of respondents, we conclude that Supreme Court properly denied their motion to dismiss the petition based on the alleged failure of petitioner to exhaust her administrative remedies. "Inasmuch as [respondents] failed to advise petitioner of the availability of an administrative appeal . . ., [they] cannot be heard to complain that petitioner failed to exhaust [her] administrative remedies" (*Matter of Barrett v Morgenthau*, 74 NY2d 907, 909; *see Matter of Rivette v District Attorney of Rensselaer County*, 272 AD2d 648, 649). In any event, the record establishes that petitioner exhausted her administrative remedies by sending a letter to respondents objecting to the denial of her FOIL request and asking respondents to consider her letter an appeal pursuant to Public Officers Law § 89 (4) (a) (*see generally Matter of Johnson Newspaper Corp. v Stainkamp*, 94 AD2d 825, 826, *mod on other grounds* 61 NY2d 958). We further conclude that the court properly denied that part of the motion with respect to respondent Jefferson County District Attorney (District Attorney) inasmuch as the District Attorney is an

"officer[] or other person . . . whose action may be affected by [this] proceeding" (CPLR 7802 [a]).

We reject respondents' contention that the court erred in awarding attorney's fees and costs to petitioner pursuant to FOIL. Petitioner moved for, inter alia, that relief by order to show cause dated September 2008. Contrary to respondents' contention, the June 2008 order did not preclude the court's subsequent award of attorney's fees inasmuch as the June 2008 order merely ordered respondents to disclose certain records following an in camera review thereof. Although we agree with respondents that petitioner's September 2008 order to show cause was moot to the extent that it sought to compel respondents to disclose various documents that had already been disclosed (*see Matter of Newton v Police Dept. of City of N.Y.*, 183 AD2d 621, 624; *see generally Matter of Fuentes v Fischer*, 56 AD3d 919, 920-921), the issue of attorney's fees remained in controversy. Contrary to the further contention of respondents, the record establishes that they "had no reasonable basis for denying access" to the majority of the records sought by petitioner (Public Officers Law § 89 [4] [c] [i]). Indeed, respondents offered to produce the majority of the records sought by petitioner if she agreed to withdraw her request for attorney's fees. Even assuming, arguendo, that respondents had a reasonable basis for withholding certain records, we conclude that an award of attorney's fees would nevertheless be appropriate inasmuch as respondents "failed to respond to [petitioner's] request or [her] appeal within the statutory time" (§ 89 [4] [c] [ii]). Finally, we conclude that, under the circumstances of this case, the court did not abuse its discretion in awarding attorney's fees and costs (*see Matter of Powhida v City of Albany*, 147 AD2d 236, 238-239).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**987**

**CA 10-00643**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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KELLY HAYES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NORSTAR APARTMENTS, LLC, AND SIARA MANAGEMENT, INC., DEFENDANTS-APPELLANTS.

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HANCOCK & ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (DOMINIC S. D'IMPERIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered June 18, 2009 in a personal injury action. The order denied defendants' motion for summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly slipped and fell on ice in the parking lot of an apartment building owned by defendant Norstar Apartments, LLC and managed by defendant Siara Management, Inc. We conclude that Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint. Although defendants met their initial burden of establishing as a matter of law that there was a storm in progress at the time of the accident (*see Chapman v Pyramid Co. of Buffalo*, 63 AD3d 1623; *Brierley v Great Lakes Motor Corp.*, 41 AD3d 1159, 1160), the evidence submitted by plaintiff, particularly the detailed affidavit from her expert meteorologist and the accompanying weather reports, raised an issue of fact whether the ice in question had formed prior to commencement of the storm (*see Schuster v Dukarm*, 38 AD3d 1358; *Williams v Patrick*, 30 AD3d 1059; *see also Bullard v Pfohl's Tavern, Inc.*, 11 AD3d 1026). We reject defendants' further contention that they are entitled to summary judgment because they established that plaintiff fell on snow that had recently fallen rather than ice previously formed. Plaintiff's deposition testimony was sufficient to raise an issue of fact in that regard as well.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**988**

**CA 10-00093**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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DAMON NICHOLSON AND SUZANNE NICHOLSON, INDIVIDUALLY AND AS PARENTS OF ERIKA NICHOLSON, TYLER NICHOLSON, AND TIMOTHY NICHOLSON, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

A. ANASTASIO & SONS TRUCKING CO., INC. AND JERRY SLYSTER, DEFENDANTS-RESPONDENTS.

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MICHAEL J. ROULAN, GENEVA, FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered October 2, 2009. The order granted the motion of defendants for partial summary judgment dismissing plaintiffs' causes of action for negligent infliction of emotional distress.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the claims for negligent infliction of emotional distress are reinstated.

Memorandum: Plaintiffs commenced this action, individually and as parents of their three children, alleging that they sustained damages to their property as well as "emotional harm and mental pain and suffering" as a result of an incident in which a tractor-trailer owned by defendant A. Anastasio & Sons Trucking Co., Inc. and operated by defendant Jerry Slyster crashed into their home while they were sleeping. Neither plaintiffs nor their children were physically injured but, according to plaintiffs, their property was extensively damaged and they were trapped inside the house for a period of time "because the doors were wedged tight." Plaintiffs further allege that they "have moments when they re[]live the terror, panic and shock of being trapped in their house and thinking that they would die."

We agree with plaintiffs that Supreme Court erred in granting defendants' motion for partial summary judgment dismissing the claims for negligent infliction of emotional distress. "[W]hen there is a duty owed by defendant[s] to plaintiff[s], breach of that duty resulting directly in emotional harm is compensable even though no

physical injury occurred" (*Kennedy v McKesson Co.*, 58 NY2d 500, 504; *see Battalla v State of New York*, 10 NY2d 237, 240-242). To recover damages for negligent infliction of emotional distress, however, plaintiffs must establish that, inter alia, defendants' negligence unreasonably endangered the physical safety of plaintiffs or caused them to fear for their safety (*see Moore v Melesky*, 14 AD3d 757, 761; *Sheila C. v Povich*, 11 AD3d 120, 130; *Dobisky v Rand*, 248 AD2d 903, 905).

Here, defendants failed to meet their initial burden on the motion of establishing that their conduct did not endanger the physical safety of plaintiffs or cause them to fear for their safety (*cf. Passucci v Home Depot, Inc.*, 67 AD3d 1470, 1471; *Graber v Bachman*, 27 AD3d 986, 987; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In support of the motion, defendants contended only that plaintiffs could not recover for negligent infliction of emotional distress arising from the destruction of their property. Although defendants submitted an additional affirmation from their attorney following oral argument of the motion, they still failed to address plaintiffs' allegation in the bill of particulars that, as a result of defendants' negligence, plaintiffs were trapped in their house and were afraid that they were going to die. Inasmuch as defendants failed to submit sufficient evidence establishing their entitlement to judgment as a matter of law, the court should have denied the motion, regardless of the sufficiency of plaintiffs' opposing papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Innovative Transmission & Engine Co., LLC v Massaro*, 37 AD3d 1199, 1202).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**991**

**CA 10-00510**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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MARGARET SNYDER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DONALD PLANK, JAMES H. ROSE AND SHERIFF JOHN N. YORK, DEFENDANTS-RESPONDENTS.

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LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (ANTHONY J. ZITNIK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (RYAN G. SMITH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered September 21, 2009. The order granted the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell while visiting her brother, an inmate at the Livingston County Jail (Jail). We conclude that Supreme Court properly granted defendants' pre-answer motion to dismiss the complaint as time-barred pursuant to CPLR 215 (1). That statute provides that a plaintiff shall commence "an action against a sheriff, coroner or constable, upon a liability incurred by him [or her] by doing an act in his [or her] official capacity or by omission of an official duty" within one year of the act or omission (CPLR 215 [1]). We reject the contention of plaintiff that the one-year limitations period set forth in CPLR 215 (1) does not apply here because maintenance of the floor in the visitor's lounge of the Jail is not an "official duty" of defendant Sheriff John N. York (Sheriff). Pursuant to Correction Law § 500-c (1), the sheriff of each county "shall have" custody of the county jail, which includes the duty to maintain those premises in a reasonably safe condition (*see Adams v County of Rensselaer*, 66 NY2d 725, 726-727; *see generally Basso v Miller*, 40 NY2d 233, 239-241). Contrary to plaintiff's further contention, a sheriff's duty to keep the county jail in a reasonably safe condition is not limited to prisoners, but extends to those who, like plaintiff, enter the premises with the permission of the sheriff. Indeed, Correction Law § 500-j provides that a sheriff, with certain exceptions not relevant here, has the authority to determine who may or may not visit a jail. Plaintiff mistakenly relies on a line of

cases holding that CPLR 215 (1) does not apply where a sheriff's deputy injures a plaintiff while negligently operating his or her vehicle (*see Eidman v County of Monroe*, 177 AD2d 996; *Brady v Woodworth*, 117 AD2d 995, 995; *Dixon v Seymour*, 62 AD2d 444). Here, the duty to maintain the Jail in a reasonably safe condition arises by virtue of the Sheriff's office, i.e., the Sheriff's custody of the Jail as conferred by statute (*see* Correction Law § 500-c [1]; *Adams*, 66 NY2d at 727). Finally, we reject plaintiff's contention that maintaining the floors of the Jail is not an official duty of the Sheriff because the inmates, not the Sheriff, mop the floors. Inasmuch as the Sheriff is vested with custody of the Jail and thus is the caretaker of that facility, it is irrelevant that inmates are assigned the task of cleaning the floors.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**992**

**CA 10-00388**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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AMERICAN DIABETES ASSOCIATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ABBEY, MECCA & CO., INC.,
DEFENDANT-RESPONDENT.

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LAW OFFICE OF STEVEN W. WELLS, ORCHARD PARK (STEVEN W. WELLS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WATSON BENNETT COLLIGAN & SCHECHTER LLP, BUFFALO (A. NICHOLAS FALKIDES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered May 21, 2009. The order, among other things, granted defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action, seeking to recover the cost of two full-page advertisements ordered by defendant, an advertising agency. The advertisements were included in a monthly magazine published by plaintiff and featured a product sold by one of defendant's clients, Incline Medical, LLC (Incline). Incline failed to pay for the advertisements following their publication and later became insolvent. Plaintiff did not require payment for the advertisements in advance, and defendant did not sign a guarantee. Supreme Court properly granted the motion of defendant for summary judgment dismissing the complaint on the ground that, in ordering the ads, it was acting as an agent on behalf of a disclosed principal. " 'When an agent acts on behalf of a disclosed principal, the agent will not be personally liable for a breach of contract unless there is clear and explicit evidence of the agent's intention to be personally bound' " (*Simmons v Washing Equip. Tech.*, 51 AD3d 1390, 1392). Defendant met its initial burden on the motion by submitting copies of e-mails demonstrating that it made it clear to plaintiff's sales representative that the ads were being ordered on behalf of Incline, and that defendant did not evince an intent to pay for the ads itself.

The burden of proof thus shifted to plaintiff, which failed to

raise a triable issue of fact (*see generally id.*). We reject plaintiff's contention that defendant is liable because the insertion order does not explicitly state that defendant was acting on behalf of Incline. Regardless of whether Incline was identified in the insertion order as defendant's principal, the agency relationship between defendant and Incline had previously been disclosed to plaintiff, and nothing in the insertion order suggested otherwise. In fact, the insertion order specifically refers to Incline in the subject line, and the invoices for the advertisements include a "15% [a]gency [d]iscount." Thus, it was clear that an advertising agency was involved in the ordering process. Contrary to plaintiff's further contention, the mere fact that the insertion order identifies defendant as the entity to be invoiced does not constitute " 'clear and explicit evidence' " of the intention of defendant to bind itself (*Simmons*, 51 AD3d at 1392).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**993**

**CA 10-00603**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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BANK OF UTICA, PLAINTIFF-APPELLANT,

V ORDER

CITY OF SYRACUSE, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

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KELLY & WALTHALL, P.C., UTICA (ANNE M. ZIELENSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JUANITA PEREZ WILLIAMS, CORPORATION COUNSEL, SYRACUSE (NANCY J. LARSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 30, 2009. The order and judgment dismissed the complaint on the motion of defendant City of Syracuse.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs for reasons stated at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**994**

**CA 10-00714**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

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THOMAS J. SMOLINSKI, PLAINTIFF-RESPONDENT,

V ORDER

MATTHEW A. SMOLINSKI, DEFENDANT,
AND FORD MOTOR CREDIT COMPANY,
DEFENDANT-APPELLANT.

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PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 8, 2010 in a personal injury action. The order settled the record for an appeal from an order and judgment entered October 1, 2008.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**996**

**KA 09-01554**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLIN J. HOUSE, DEFENDANT-APPELLANT.

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RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wayne County Court (Stephen R. Sirkin, J.), rendered November 21, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [3]). Contrary to the contention of defendant, we conclude that County Court properly denied his motion to withdraw the plea. The record of the plea colloquy establishes that the factual allocution was sufficient and that defendant's plea was voluntarily, knowingly and intelligently entered (*see People v Vogler*, 156 AD2d 932, *lv denied* 75 NY2d 872). We reject the further contention of defendant that he was improperly sentenced as a second felony offender. The record establishes that the court complied with CPL 400.21 (3) by asking defendant whether he wished to controvert any allegation in the People's predicate felony statement, and that defendant responded by admitting that the contents thereof were accurate.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**997**

**KA 09-01820**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD A. CRUMP, JR., DEFENDANT-APPELLANT.

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THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

RICHARD A. CRUMP, JR., DEFENDANT-APPELLANT PRO SE.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (HARMONY ANNE HEALY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered August 3, 2009. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree and aggravated harassment in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal contempt in the first degree (Penal Law § 215.51 [b] [iii]) and aggravated harassment in the second degree (§ 240.30 [1] [a]). At trial, the People presented evidence establishing that a no offensive contact order of protection had been issued in favor of the victim, the mother of defendant's child, and that defendant had violated the order of protection by making threatening telephone calls to the victim. Defendant failed to preserve for our review his present challenge to the alleged legal insufficiency of the evidence inasmuch as his motion for a trial order of dismissal at the close of the People's proof did not raise the ground now raised on appeal (*see People v Gray*, 86 NY2d 10, 19; *People v Joseph*, 63 AD3d 1658; *People v Taylor*, 19 AD3d 1100, *lv denied* 5 NY3d 810), and his general motion for a trial order of dismissal after he presented evidence is insufficient to preserve his present challenge for our review (*see Gray*, 86 NY2d at 19). Specifically, at the close of the People's proof, defendant contended that the evidence was legally insufficient to establish a "reasonable fear of physical injury, serious physical injury or death" on the part of the person for whose protection the order of protection was issued, a necessary element of criminal contempt in the first degree. On appeal, however, defendant contends that the evidence is legally insufficient to establish a necessary element of aggravated harassment, the crime

serving as the predicate offense for criminal contempt in the first degree.

In any event, we conclude that defendant's contention on appeal lacks merit. The evidence is legally sufficient to establish that defendant committed aggravated harassment in the second degree by telephoning the victim and stating in sum and substance that he was on his way to her house to "pound her head in" and making other threatening statements. Although defendant did not know exactly where the victim lived at the time, there is no requirement that his threats could have been carried out immediately (*see People v Prisinzano*, 170 Misc 2d 525, 534-535; *cf. People v Yablov*, 183 Misc 2d 880). Defendant had a history of violent conduct toward the victim and informed her that he was on his way to the town where she resided when he made the threats. Thus, the victim could reasonably have been fearful that defendant would track her down and carry out his threats.

Defendant also failed to preserve for our review his contention that County Court erred in allowing the People to present evidence of his prior acts of domestic violence against the victim (*see People v Woods*, 72 AD3d 1563). In any event, that evidence was properly admitted because it was relevant to the issues whether the victim had reason to be in fear of defendant, and whether defendant intended to harass or annoy her, and its probative value exceeded its potential for prejudice (*see People v Wemette*, 285 AD2d 729, 731, *lv denied* 97 NY2d 689; *see generally People v Molineux*, 168 NY 264, 293-294). For the same reasons, we reject the further contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to object to the admission of the evidence of defendant's prior bad acts, inasmuch as there is no denial of effective assistance based on the failure to "make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see People v Caban*, 5 NY3d 143, 152). Despite the remaining alleged deficiencies on the part of defense counsel set forth by defendant, we conclude that defendant received meaningful representation, viewing the record in totality and as of the time of the representation (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, we have reviewed the remaining contentions of defendant in his pro se supplemental brief and conclude that they are unpreserved for our review (*see* CPL 470.05 [2]) and, in any event, are lacking in merit.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**998**

**KA 09-01887**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COLLEEN PRATT, DEFENDANT-APPELLANT.

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KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

JASON L. COOK, DISTRICT ATTORNEY, PENN YAN (ALLISON O'NEILL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered September 1, 2009. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree and criminal possession of a forged instrument in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of one count of grand larceny in the third degree (Penal Law § 155.35) and two counts of criminal possession of a forged instrument in the second degree (§ 170.25). We reject the contention of defendant that her waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256). The responses of defendant to County Court's questions during the plea colloquy establish that she "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty," and that she voluntarily waived the right to appeal (*id.*; *see People v Tantao*, 41 AD3d 1274, *lv denied* 9 NY3d 882). The valid waiver by defendant of the right to appeal encompasses her challenge to the severity of the sentence (*see id.* at 255). To the extent that the further contention of defendant that she was denied effective assistance of counsel survives her plea and valid waiver of the right to appeal (*see People v Boyzuck*, 72 AD3d 1530), we conclude that her contention lacks merit. Defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404).

Finally, we reject the contention of defendant that the court erred in ordering that she pay a 10% surcharge pursuant to Penal Law § 60.27 (8) on the amount of restitution imposed, in light of the

evidence submitted by the Probation Department in support of the imposition of the surcharge (*see* § 60.27 [8]; CPL 420.10).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**999**

**KA 08-01365**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN P. LYON, DEFENDANT-APPELLANT.

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ROBERT TUCKER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered May 7, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree, resisting arrest, obstructing governmental administration in the second degree and harassment in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, robbery in the third degree (Penal Law § 160.05). Defendant contends that County Court erred in allowing the prosecutor, on two occasions, to question defendant in violation of the court's *Sandoval* ruling. First, defendant contends that the court erred in allowing the prosecutor to cross-examine defendant with respect to his prior dealings with the arresting officer, thereby revealing details with respect to misdemeanor traffic convictions. Although we agree with defendant that the identification by the prosecutor of those prior convictions improperly exceeded the scope of the *Sandoval* ruling (*see People v Beniquez*, 215 AD2d 678, 679-680), we conclude that the error is harmless (*see People v Grant*, 7 NY3d 421, 426). The proof of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see generally People v Crimmins*, 36 NY2d 230, 241-242; *People v Towsley*, 53 AD3d 1083, 1083-1084, *lv denied* 11 NY3d 795).

Second, defendant contends that the court erred in allowing the prosecutor, on re-cross-examination, to question defendant with respect to his entire criminal record. We reject that contention. Where, as here, a defendant's testimony conflicts with evidence precluded by a *Sandoval* ruling, "the defense 'opens the door' on the issue in question, and the [defendant] is properly subject to impeachment by the prosecution's use of the otherwise precluded

evidence" (*People v Fardan*, 82 NY2d 638, 646; *see People v Rodriguez*, 85 NY2d 586, 591).

The contention of defendant that he was deprived of a fair trial based on prosecutorial misconduct on summation is not preserved for our review (*see* CPL 470.05 [2]) and, in any event, is without merit. To the extent that the prosecutor vouched for the credibility of witnesses on summation, we conclude that such conduct, although improper, was not so egregious as to deny defendant a fair trial (*see People v White*, 291 AD2d 842, 843, *lv denied* 98 NY2d 656). The remaining instances of alleged prosecutorial misconduct on summation were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915). We reject the further contention of defendant that he was denied effective assistance of counsel. Defense counsel's failure to object to the allegedly improper comments by the prosecutor on summation does not constitute ineffective assistance of counsel. As previously noted, defendant was not denied a fair trial by those comments in which the prosecutor vouched for the credibility of witnesses, and the remaining instances of alleged prosecutorial misconduct on summation did not in fact constitute prosecutorial misconduct. With respect to the alleged ineffective assistance of counsel in connection with cross-examination concerning defendant's criminal history, we conclude that, when viewed as a whole, defense counsel's efforts reflect " 'a reasonable and legitimate strategy under the circumstances and evidence presented' " (*People v Tonge*, 93 NY2d 838, 840), and we thus conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147; *People v Workman*, 277 AD2d 1029, 1032, *lv denied* 96 NY2d 764).

Finally, viewing the evidence in light of the elements of the crime of robbery in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that count is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1000**

**KA 09-00003**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN NICHOLS, DEFENDANT-APPELLANT.

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SHIRLEY A. GORMAN, BROCKPORT, FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered July 29, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of stolen property in the third degree (Penal Law § 165.50). We reject the contention of defendant that the plea colloquy is insufficient to establish each element of the crime to which he pleaded guilty and thus that reversal is required. It is well settled that "an allocution based on a negotiated plea need not elicit from a defendant specific admissions as to each element of the charged crime" (*People v Goldstein*, 12 NY3d 295, 301). Here, defendant responded in the affirmative when he was asked whether he possessed a stolen vehicle and whether he knew that the vehicle was stolen. Under the circumstances, defendant's additional comment "at some point in time" in his response to the latter question did not require further inquiry by County Court inasmuch as that additional comment did not "cast significant doubt upon defendant's guilt of [the] crime" (*People v Farnham* [appeal No. 1], 254 AD2d 767, *lv denied* 92 NY2d 949). Rather, the "allocution shows that the defendant understood the charge[] and made an intelligent decision to enter a plea" (*Goldstein*, 12 NY3d at 301, citing *People v Fooks*, 21 NY2d 338, 350). Also contrary to the contention of defendant, he was not entitled to a hearing on his pro se motion to withdraw his guilty plea. The contentions of defendant that he was innocent and that the plea was coerced by defense counsel are belied by defendant's statements during the plea colloquy (*see People v Farley*, 34 AD3d 1229, 1230, *lv denied* 8 NY3d 880).

Finally, defendant was not denied effective assistance of counsel (*see generally People v Benevento*, 91 NY2d 708, 712; *People v Baldi*, 54 NY2d 137, 147). Although defense counsel requested a continuance to enable her to call a witness at a pretrial identification hearing who in fact would have provided testimony that was beneficial to the prosecution, the record establishes that she properly attempted to remedy that error when she did not ultimately call that witness to testify. Indeed, defense counsel objected when the prosecution requested permission to re-open the hearing in question to present the testimony of that witness.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1001**

**CAF 09-00699**

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF WHYTNEI B., JADA B., AND JEFFREY B.

---------- MEMORANDUM AND ORDER

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

JEFFREY B., RESPONDENT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR RESPONDENT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

LISA J. MASLOW, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR WHYTNEI B., JADA B., AND JEFFREY B.

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Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered March 10, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: On appeal from an order terminating his parental rights on the ground of permanent neglect, respondent father contends that petitioner failed to establish that it had exercised diligent efforts to encourage and strengthen the parent-child relationship both prior to and during the period of his incarceration as required by Social Services Law § 384-b (7) (a). We reject that contention. "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child[ren], providing services to the parent[] to overcome problems that prevent the discharge of the child[ren] into [his or her] care, and informing the parent[] of [the children's] progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901; *see* § 384-b [7] [f]). Petitioner is not required, however, to "guarantee that the parent succeed in overcoming his or her predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385; *see Matter of Jamie M.*, 63 NY2d 388, 393) but, rather, the parent must "assume a measure of initiative and responsibility" (*Jamie M.*, 63 NY2d at 393). Here, petitioner established, by the requisite clear and convincing evidence (*see* § 384-b [3] [g] [i]), that it fulfilled its duty to exercise diligent efforts to encourage and strengthen the father's

relationships with his children during the relevant time period (*see generally Matter of Star Leslie W.*, 63 NY2d 136, 142). Petitioner further established that, despite those efforts, the father "failed substantially and continuously or repeatedly to maintain contact with or plan for the future of the child[ren] although . . . able to do so" (*id.*; *see Matter of Justin Henry B.*, 21 AD3d 369).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1003**

**TP 09-01922**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF ROBIN DINATALE, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, GALEN D. KIRKLAND, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS, NEW YORK STATE INSURANCE FUND, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, AND NEW YORK STATE OFFICE OF STATE COMPTROLLER, DEPARTMENT OF AUDIT AND CONTROL, RESPONDENTS.

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ROBIN DINATALE, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS OF COUNSEL), FOR RESPONDENT NEW YORK STATE INSURANCE FUND.

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Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Kevin M. Dillon, J.], entered September 25, 2009) to review a determination of respondent Commissioner, New York State Division of Human Rights. The determination, after a hearing, dismissed the complaint of petitioner.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination that she failed to establish that respondent New York State Insurance Fund (NYSIF) discriminated against her based on a disability. Following its investigation of petitioner's complaint, respondent New York State Division of Human Rights (SDHR) found that probable cause existed to sustain the complaint, and the case was referred for a hearing before an administrative law judge (ALJ). Based upon the ALJ's recommendations, respondent Commissioner of SDHR concluded, inter alia, that petitioner did not establish that NYSIF failed to provide her with reasonable accommodations for her disability, as required by Executive Law § 296 (3). We now confirm that determination.

"Pursuant to Executive Law § 296 (3) (b), employers are required to make reasonable accommodations to disabled employees, provided that the accommodations do not impose an undue hardship on the employer. A reasonable accommodation is defined in relevant part as an action that

permits an employee with a disability to perform his or her job activities in a reasonable manner" (*Matter of New Venture Gear, Inc. v New York State Div. of Human Rights*, 41 AD3d 1265, 1266 [internal quotation marks omitted]; *see* § 292 [21-e]). "In reviewing the determination of SDHR's Commissioner, this Court may not substitute its judgment for that of the Commissioner . . ., and 'we must confirm the determination so long as it is based on substantial evidence' " (*New Venture Gear, Inc.*, 41 AD3d at 1266; *see Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106; *Matter of Mohawk Val. Orthopedics, LLP v Carcone*, 66 AD3d 1350, 1351). Reasonable conclusions "may not be set aside by the courts although a contrary decision may 'have been reasonable and also sustainable' " (*Matter of Imperial Diner v State Human Rights Appeal Bd.*, 52 NY2d 72, 79, quoting *Matter of Mize v State Div. of Human Rights*, 33 NY2d 53, 56). We conclude that the determination of respondent Commissioner is supported by substantial evidence.

Petitioner requested that she be allowed to work from home, but she conceded at the hearing before the ALJ that nothing in her work environment caused the symptoms from which she suffered. Rather, according to petitioner, the symptoms were aggravated by her drive to and from work. Petitioner admitted that she did not know if she would experience the same symptoms if she were merely riding in a car rather than driving the car, or if she were allowed to work from home.

Petitioner lived 22 miles from her place of employment and, for personal reasons, would not consider moving closer in order to reduce the length of her commute. She had tried carpooling with one person, but the carpooling was not convenient for that person. Petitioner had not asked anyone else, including family members or friends, to drive her to and from work. Although there was public transportation near her home, petitioner had not attempted to use it and did not think that it would alleviate her symptoms.

We conclude that NYSIF, as petitioner's employer, was not required to accommodate petitioner's difficulties in commuting to and from work (*see e.g. Metz v County of Suffolk*, 4 Misc 3d 914, 916; *Laresca v American Tel. & Tel.*, 161 F Supp 2d 323, 333-334; *Salmon v Dade County School Bd.*, 4 F Supp 2d 1157, 1163). An employee's commute "is an activity that is unrelated to and outside of [the] job[, and] an employer is required to provide reasonable accommodations that eliminate barriers *in* the work environment" (*Salmon*, 4 F Supp 2d at 1163).

We have reviewed petitioner's remaining contentions and conclude that they lack merit.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1004**

**CA 10-00391**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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PAULINE GALLO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MELINDA RIESKE, DEFENDANT-RESPONDENT.

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SPADAFORA & VERRASTRO, LLP, BUFFALO (RICHARD E. UPDEGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURGIO, KITA & CURVIN, BUFFALO (WILLIAM J. KITA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered October 1, 2009. The order and judgment granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when a vehicle driven by defendant collided with the vehicle in which plaintiff was a passenger. Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). With respect to two of the three categories of serious injury allegedly sustained by plaintiff, i.e., a permanent consequential limitation of use and a significant limitation of use, the Court of Appeals has held that "[w]hether a limitation of use or function is significant or consequential (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [internal quotation marks omitted]). In support of her motion, defendant submitted plaintiff's emergency room records, imaging tests that included X rays and an MRI, and records of plaintiff's treating neurologist and a physician who examined plaintiff on behalf of defendant, both of whom concluded that plaintiff did not suffer from any protracted limitations as a result of the accident. "Defendant thereby established that plaintiff sustained only a mild injury as a result of the accident and that there was no objective medical evidence that plaintiff sustained a significant or permanent injury" (*Beaton v Jones*, 50 AD3d 1500, 1501; *see Sewell v Kaplan*, 298 AD2d

840). Plaintiff failed to raise an issue of fact with respect to either of those two categories (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Defendant further established that plaintiff did not sustain a serious injury within the meaning of the 90/180 category, the third category of serious injury allegedly sustained by plaintiff. Defendant met her initial burden with respect to that category, and plaintiff failed to raise an issue of fact, i.e., she failed "to submit the requisite objective evidence of 'a medically determined injury or impairment of a non-permanent nature' . . . and to establish that the injury caused the alleged limitations on plaintiff's daily activities" (*Calucci v Baker*, 299 AD2d 897, 898; *see Beaton*, 50 AD3d at 1502).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1005**

**CA 10-00497**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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ROBERT M. CARPENTER AND DOROTHY J. CARPENTER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NY ADVANCE ELECTRIC, INC., THOMAS M. ROMAN,
DEFENDANTS-RESPONDENTS,
VILLAGE OF CANAJOHARIE, ITS AGENTS, SERVANTS
AND/OR EMPLOYEES, AND VILLAGE OF CANAJOHARIE
WASTEWATER TREATMENT FACILITY AND ITS AGENTS,
SERVANTS AND/OR EMPLOYEES, DEFENDANTS-APPELLANTS.

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MORRIS DUFFY ALONSO & FALEY, NEW YORK CITY (IRYNA KRAUCHANKA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PETER M. HOBAICA LLC, UTICA (GEORGE E. CURTIS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

KNYCH & WHRITENOUR, LLC, SYRACUSE (BRENDAN J. REAGAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered April 17, 2009. The order granted the motion of plaintiffs for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendants Village of Canajoharie (Village) and its Wastewater Treatment Facility, along with their respective agents, servants and/or employees (hereafter, Village defendants) appeal from an order granting plaintiffs' application for leave to serve a late notice of claim against the Village pursuant to General Municipal Law § 50-e (5). We reject at the outset the contention of the Village defendants that plaintiffs commenced this action in an improper venue and thus that Supreme Court should have denied plaintiffs' application on that ground. "[T]he venue provisions of CPLR article 5 are not jurisdictional" (*Iglesia v Iglesia*, 292 AD2d 424, 425), and thus an allegedly improper venue "is no jurisdictional impediment" (*Kurfis v Shore Towers Condominium*, 48 AD3d 300, 301). To the extent that the Village defendants contend that a different rule applies under CPLR 504 with respect to actions commenced against a municipality, that contention is likewise without merit. "CPLR 504 is no more jurisdictional than any other venue provision" (*Anzalone v City of New*

*York*, 32 AD3d 408, 408 [internal quotation marks omitted]). Accordingly, in the absence of a motion for a change of venue or the consent of the parties to change venue, the court properly decided plaintiffs' application (*see* CPLR 509; *Iglesia*, 292 AD2d at 425; *Agway, Inc. v Kervin*, 188 AD2d 1076).

We reject the further contention of the Village defendants that the court erred in granting the application on the merits. " 'The court is vested with broad discretion to grant or deny [an] application' " for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5) (*Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435), and we perceive no abuse of discretion in this case. Even assuming, arguendo, that the reasons set forth by plaintiffs for failing to serve a timely notice of claim were insufficient, we note that the failure to offer a reasonable excuse " 'is not fatal where, as here, actual notice was had and there is no compelling showing of prejudice' " to the Village (*Hale v Webster Cent. School Dist.*, 12 AD3d 1052, 1053; *see Joyce P. v City of Buffalo*, 49 AD3d 1268). Indeed, according to an affidavit of John Scott, the superintendent of the water treatment facility, he learned of the accident shortly after it occurred. The record also contains an affidavit of defendant Thomas M. Roman, the president of defendant NY Advance Electric, Inc., stating that his company was at the work site to assist in placing new electrical cables and that he informed Scott of the accident. He further stated that Scott saw Robert M. Carpenter (plaintiff) after the accident, at which time plaintiff had a cut on his head, and that Scott knew that plaintiff had been taken by ambulance to the hospital. The statement of Scott in his affidavit that he did not conduct an investigation into the cause of the October 2007 accident until January 2009, upon learning that there was a claim against the Village defendants, is insufficient to defeat plaintiffs' motion. In determining whether to grant an application for leave to serve a late notice of claim, the relevant inquiry is whether there was actual knowledge of the facts constituting the claim within a reasonable time after the underlying incident (*see* § 50-e [5]), not whether an investigation was conducted.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1007**

**CA 10-00074**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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BETTY SCHAEFER, AS EXECUTRIX OF THE ESTATE OF
WILLIAM F. SCHAEFER, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF VICTOR, DEFENDANT-RESPONDENT.

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KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE WOLFORD LAW FIRM LLP, ROCHESTER (SARAH SNYDER MERKEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Kenneth R. Fisher, J.), entered September 18, 2009. The order and judgment, among other things, granted defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff's decedent owned and operated the Genesee Sand & Gravel Landfill (Landfill) located in defendant Town of Victor (hereafter, Town) and, from approximately 1965 until 1981, the Town's residents and businesses were the sole depositors of waste in the Landfill. Pursuant to a 1992 consent order between plaintiff's decedent and the New York State Department of Environmental Conservation that, inter alia, addressed alleged violations of 6 NYCRR part 360, decedent agreed to close the Landfill and to develop both closure and post-closure plans for it. The Landfill was closed in accordance with those plans in November 1995, whereupon plaintiff's decedent commenced an action seeking to recover costs associated with closing the Landfill (*Schaefer v Town of Victor*, 457 F3d 188). The United States Court of Appeals for the Second Circuit agreed with the District Court that the federal causes of action were time-barred and thus were properly dismissed, but the Second Circuit remitted the remaining state law claims to the District Court (*id.*). The record contains an order of the District Court upon remittal in which the District Court declined to exercise supplemental jurisdiction over those claims and thus dismissed them.

Plaintiff thereafter commenced this action, asserting a single cause of action for "reimbursement and/or contribution for response

costs that plaintiff has expended for closure . . . and post-closure . . . care of [the Landfill] . . ., pursuant to a common law contribution theory." The Town moved to dismiss the complaint, contending, inter alia, that the cause of action was preempted by the Comprehensive Environmental Response, Compensation, and Liability Act ([CERCLA] 42 USC § 9601 *et seq.*), and that it was also barred under CPLR article 14 and General Obligations Law § 15-108. We conclude that Supreme Court properly granted the Town's motion.

Contrary to plaintiff's contention, "a court may grant summary judgment based upon an unpleaded defense where[, as here,] reliance upon that defense neither surprises nor prejudices the plaintiff" (*Olean Urban Renewal Agency v Herman*, 101 AD2d 712, 713; *see Herbert F. Darling, Inc. v City of Niagara Falls*, 69 AD2d 989, 990, *affd* 49 NY2d 855). Plaintiff failed to establish any prejudice or surprise with respect to the unpleaded defenses of preemption, CPLR article 14 and General Obligations Law § 15-108 and, therefore, the court properly considered those defenses despite the fact that they were not pleaded in the Town's answer.

Plaintiff correctly concedes that neither CPLR article 14 nor General Obligations Law § 15-108 applies to her claim for contribution, but she continues to contend in opposition to the Town's motion that she may nevertheless recover based on a common-law theory of contribution. Even assuming, arguendo, that plaintiff's cause of action is not preempted by CERCLA (*see generally Volunteers of Am. of W. N.Y. v Heinrich*, 90 F Supp 2d 252, 258), we conclude that plaintiff's cause of action lacks merit. Plaintiff contends that she may seek contribution from the Town because it had a legal duty to ensure closure and post-closure care of the Landfill. First, the reliance by plaintiff on the cases cited in her brief to support that contention is misplaced inasmuch as they are indemnification cases where the party from whom indemnity was sought had a statutory duty of care (*see State of New York v Stewart's Ice Cream Co.*, 64 NY2d 83; *City of New York v Lead Indus. Assn.*, 222 AD2d 119, 128). Second, the Town established that it was neither an operator nor an owner of the Landfill (*see* 6 NYCRR 360-1.2 [b] [113], [114]), and thus had no duty either to close the Landfill or to perform post-closure maintenance of it (*see generally* 6 NYCRR 360-1.14 [w]).

Plaintiff further contends that statutory or regulatory violations may serve as a predicate for contribution claims. Again, the reliance by plaintiff on the cases cited in her brief is misplaced because each is based on a personal injury and relies on CPLR 1401 (*see e.g. Zona v Oatka Rest. & Lounge*, 68 NY2d 824; *Herrick v Second Cuthouse*, 100 AD2d 952, 953, *affd* 64 NY2d 692; *Rook v 60 Key Ctr.*, 242 AD2d 872). Indeed, as plaintiff correctly concedes, CPLR article 14 does not apply where, as here, the claim is not founded upon personal injury, wrongful death or property damage (*see* CPLR 1401). We therefore reject plaintiff's contention.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1008**

**CA 10-00507**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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ROBERT BAKER AND DARLENE BAKER, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF DOMINICK BAKER, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF OSWEGO, DEFENDANT-APPELLANT, CARL F. ERIKSON AND DEBRA L. ERIKSON, AS PARENTS AND NATURAL GUARDIANS OF JOHN M. ERIKSON, AN INFANT, AND THERESA L. PROCTOR, DEFENDANTS-RESPONDENTS.

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WEBSTER SZANYI LLP, BUFFALO, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (KATHLEEN D. FOLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

CRAIG J. BILLINSON & ASSOCIATES, SYRACUSE (PETER M. HARTNETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CARL F. ERIKSON AND DEBRA L. ERIKSON, AS PARENTS AND NATURAL GUARDIANS OF JOHN M. ERIKSON, AN INFANT.

MELVIN & MELVIN, PLLC, SYRACUSE (MICHAEL R. VACCARO OF COUNSEL), FOR DEFENDANT-RESPONDENT THERESA L. PROCTOR.

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Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered May 19, 2009. The order, inter alia, denied the motion of defendant County of Oswego for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion insofar as it seeks leave to amend the answer of defendant County of Oswego upon condition that the amended answer is served within 20 days of service of a copy of the order of this Court with notice of entry and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this wrongful death action, individually and as administrators of the estate of their son, seeking damages for the fatal injuries he sustained when a vehicle driven by defendant Theresa L. Proctor collided with the all-terrain vehicle (ATV) upon which he was a passenger. The accident occurred at the intersection of Marsden Road and the Oswego County Recreational Trail.

Defendant County of Oswego (County) moved for summary judgment dismissing the complaint and all cross claims against it or, in the alternative, for leave to amend its answer. We conclude that Supreme Court properly denied the County's motion insofar as it sought summary judgment dismissing the complaint and any cross claims against the County. Contrary to the contention of the County, General Obligations Law § 9-103 does not confer immunity from liability for negligence upon it. That statute generally provides such immunity to landowners, lessees or occupants of premises who permit others to use their property for certain enumerated recreational activities (*see* § 9-103 [1] [a], [b]). "When the landowner is a government entity, however, the appropriate inquiry is the role of the landowner in relation to the public's use of the property in determining whether it is appropriate to apply the limited liability provision of [that statute]" (*Quackenbush v City of Buffalo*, 43 AD3d 1386, 1387 [internal quotation marks omitted]; *see Myers v State of New York*, 11 AD3d 1020; *see generally Ferres v City of New Rochelle*, 68 NY2d 446, 451-455). Here, statutory immunity does not apply to the County inasmuch as the trail is actively advertised, operated and maintained by the County "in such a manner that the application of such immunity would not create an additional inducement to keep the property open to the public for the specified recreational activities set forth in [the statute]" (*Quackenbush*, 43 AD3d at 1388; *see Ferres*, 68 NY2d at 451-455; *Rashford v City of Utica*, 23 AD3d 1000; *Keppler v Town of Schroon*, 267 AD2d 745, 747; *cf. Sega v State of New York*, 60 NY2d 183; *Myers*, 11 AD3d 1020).

We further conclude, however, that the court abused its discretion in denying the alternative request for relief sought by the County in its motion, i.e., leave to amend its answer to assert an affirmative defense based upon "the limited immunity with respect to injuries arising from the exercise of judgment and discretion in the governmental decisions of its officers and employees" (*Ufnal v Cattaraugus County*, 93 AD2d 521, *lv denied* 60 NY2d 554). We therefore modify the order accordingly. Generally, " '[l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit' " (*McFarland v Michel*, 2 AD3d 1297, 1300; *see* CPLR 3025 [b]; *Nastasi v Span, Inc.*, 8 AD3d 1011, 1013). Here, we perceive no prejudice to plaintiffs, the nonmoving parties, and we reject plaintiffs' contention that the proposed amendment is lacking in merit (*see generally Ufnal*, 93 AD2d 521).

Finally, we reject the further contention of the County that plaintiffs' son assumed the risk of injury by virtue of the alleged negligence of the son of defendants Carl F. Erikson and Debra L. Erikson, who was driving the ATV, or other third parties (*see Pelkey v Viger*, 289 AD2d 899, 900, *appeal dismissed* 98 NY2d 707).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1009**

**CA 09-02247**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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GABRIELLE KABALAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER HOGHOOGHI, DDS, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

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ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (GERALD GRACE, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 21, 2009 in a dental malpractice action. The judgment awarded plaintiff money damages against defendant Alexander Hoghooghi, DDS upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the post-trial motion in part and setting aside the award of damages for past pain and suffering and as modified the judgment is affirmed without costs, and a new trial is granted on damages for past pain and suffering only unless plaintiff, within 30 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for past pain and suffering to $130,000, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this dental malpractice action seeking damages arising from a third-degree burn to her face that she sustained while she was under anaesthesia during oral surgery for the removal of her wisdom teeth performed by defendant-appellant (defendant). The burn left a permanent scar located just below the right corner of plaintiff's lips. Although it is undisputed that the injury was caused by heat generated from an electric drill used by defendant, at trial different theories were advanced with respect to the precise manner in which the injury occurred. According to plaintiff, defendant inadvertently placed or brushed the hot tip of the drill against her lip, while defendant contended that he was not negligent because the injury occurred when a defective bur guard in the drill slipped out of place and overheated. The jury found defendant liable and awarded plaintiff damages in the amount of $207,255, which was almost entirely for plaintiff's past pain and

suffering.

We reject the contention of defendant that Supreme Court erred in denying that part of his motion in limine seeking to strike the videotaped testimony of one of plaintiff's dental experts. Contrary to defendant's contention, the court properly determined that the dentist in question was qualified to give expert testimony for plaintiff. The record establishes that he had removed thousands of wisdom teeth during his 25 years of practicing dentistry, and we conclude that his conceded lack of experience with using the particular drill in question went "to the weight of his . . . opinion as evidence, not its admissibility" (*Texter v Middletown Dialysis Ctr., Inc.*, 22 AD3d 831, 831; *see Williams v Halpern*, 25 AD3d 467, 468). Defendant further contends that the court erred in denying that part of his motion in limine seeking to strike the videotaped testimony because it was inconsistent with the expert disclosure provided by plaintiff pursuant to CPLR 3101. We reject that contention as well. Although the expert disclosure included certain assertions and opinions that were not included in the expert's videotaped testimony, the relevant assertions and opinions included in the videotaped testimony, including the assertion that defendant rested a hot part of the drill against plaintiff's face, were set forth in the expert disclosure, and thus the court properly denied that part of defendant's motion in limine based on alleged inconsistency between the expert disclosure and the videotaped testimony (*see Miller v Galler* [appeal No. 2], 45 AD3d 1325, 1326; *see generally Neumire v Kraft Foods*, 291 AD2d 784, 786, *lv denied* 98 NY2d 613).

Also contrary to the contention of defendant in his post-trial motion, the court did not abuse its discretion in redacting, at plaintiff's request, certain portions of the videotape in which counsel for defendant questioned plaintiff's expert concerning various statements contained in the expert disclosure to which the expert did not testify at trial. The expert disclosure was drafted by plaintiff's counsel, not the expert himself, and it therefore does not constitute a prior inconsistent statement of the expert (*see Veneski v Queens-Long Is. Med. Group*, 285 AD2d 369).

We further conclude that the court properly charged the jury on the theory of res ipsa loquitur over defendant's objection at the charge conference, and as contended by defendant in his post-trial motion. In his videotaped testimony, plaintiff's expert testified without contradiction that, in the absence of negligence by a dentist, a patient does not ordinarily sustain facial burns during the extraction of wisdom teeth. Also, there can be no dispute that the drill in question was in the exclusive control of defendant and that plaintiff was not in any way responsible for the injury. Thus, the three elements of res ispa loquitur were present, rendering the charge appropriate (*see Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226-227). The fact that defendant proffered a non-negligent explanation for the injury does not preclude a res ipsa loquitur charge. It is well settled that a plaintiff who requests such a charge "need not conclusively eliminate the possibility of all other

causes of the injury . . . Stated otherwise, all that is required is that the likelihood of other possible causes of the injury 'be so reduced that the greater probability lies at defendant's door' " (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494-495). We note that, although defendant testified at trial that the injury was likely caused when the drill's bur guard slipped out of place, he further testified that he never observed the bur guard in an improper position and, indeed, that it was in its proper place when he set it down after noticing the burn on plaintiff's face.

We further conclude that the court did not abuse its discretion in denying defendant's post-summation request for a jury charge on mitigation of damages. Defendant did not request that instruction during the pre-summation charge conference, and the issue was thus not addressed by plaintiff's counsel on summation. Under the circumstances, plaintiff would have been unduly prejudiced had the court granted defendant's request for the mitigation charge. We have examined defendant's remaining contentions with respect to the jury charge and conclude that they are without merit.

We agree with defendant, however, that the award of damages of $200,000 for past pain and suffering "deviates materially from what would be reasonable compensation" (CPLR 5501 [c]). Viewing the evidence in the light most favorable to plaintiff, we conclude that an award of $130,000 is the highest amount a jury could have awarded plaintiff for past pain and suffering. We therefore modify the judgment accordingly, and we grant a new trial on damages for past pain and suffering only unless plaintiff, within 30 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce that award to $130,000, in which event the judgment is modified accordingly.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1010**

**CA 10-00433**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF THE ESTATE OF MANJIT K. GILL,
ALSO KNOWN AS MANJIT KAUR GILL, DECEASED.
---------- ORDER
HARWANT DOSANJH, PETITIONER-RESPONDENT;
NARINDER SINGH JAKHER, RESPONDENT-APPELLANT.

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MELVIN & MELVIN, PLLC, SYRACUSE (RICHARD M. STORTO OF COUNSEL), FOR RESPONDENT-APPELLANT.

FRANKLIN A. JOSEF, FAYETTEVILLE, FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Surrogate's Court, Onondaga County (Ava S. Raphael, S.), entered March 25, 2009. The order denied the motion of respondent to vacate a decree entered July 31, 2008.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1012**

**CA 10-00582**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF SYRACUSE INDUSTRIAL
DEVELOPMENT AGENCY, JAMES SYRACUSE LLC,
AS LESSEE (1045 JAMES STREET),
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN C. GAMAGE, ASSESSOR, CITY OF SYRACUSE,
AND CITY OF SYRACUSE, RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

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JUANITA PEREZ WILLIAMS, CORPORATION COUNSEL, SYRACUSE (JOSEPH FRANCIS BERGH OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (JON E. COOPER OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 12, 2009. The order denied the motion of respondents to dismiss the tax certiorari petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these three tax certiorari appeals, respondents appeal from an order denying their pre-answer motions pursuant to CPLR 3211 (a) (1) and (7) to dismiss the respective petitions in each proceeding, based on documentary evidence establishing a defense to the petitions and for failure to state a cause of action. We affirm for reasons stated in the decision at Supreme Court. We add only that, at this early stage of the proceedings, we reject respondents' contention that petitioner waived its right to contest the assessments at issue. It is well settled that the allegations in the petitions must be accepted as true in the context of these pre-answer motions pursuant to CPLR 3211 (a), and petitioner must be afforded every favorable inference that may be drawn therefrom (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152). " '[T]he criterion is whether the proponent of the pleading has a cause of action, not whether [it] has stated one' " (*Leon v Martinez*, 84 NY2d 83, 88, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275). Furthermore, inasmuch as respondents contend that there has been a waiver of statutory rights, they must establish that the waiver does not violate public policy (*see generally Matter of Buffalo Police Benevolent Assn. [City of Buffalo]*, 4 NY3d 660, 663-664). In view of

the standard of review of the petitions at this pre-answer stage of the proceedings, we conclude that respondents failed to do so (*cf. North Fork Bank v Computerized Quality Separation Corp.*, 62 AD3d 973), and respondents thus failed to establish that "the documents relied upon . . . definitively dispose of [petitioner's] claim[s]" (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1013**

**CA 10-00583**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF SYRACUSE INDUSTRIAL
DEVELOPMENT AGENCY, JAMES SYRACUSE LLC,
AS LESSEE (1045 JAMES STREET),
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN C. GAMAGE, ASSESSOR, CITY OF SYRACUSE,
AND CITY OF SYRACUSE, RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

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JUANITA PEREZ WILLIAMS, CORPORATION COUNSEL, SYRACUSE (JOSEPH FRANCIS BERGH OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (JON E. COOPER OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 12, 2009. The order denied the motion of respondents to dismiss the tax certiorari petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Same Memorandum as in *Matter of Syracuse Indus. Dev. Agency v Gamage* ([appeal No. 1] ___ AD3d ___ [Oct. 1, 2010]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1014.1**

**CAF 09-01397**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF WILLIAM VANDUSEN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MELISSA L. RIGGS, RESPONDENT-RESPONDENT.

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JOHN T. NASCI, ROME, FOR PETITIONER-APPELLANT.

DOREEN M. ST. THOMAS, CLARK MILLS, FOR RESPONDENT-RESPONDENT.

KAREN STANISLAUS-FUNG, ATTORNEY FOR THE CHILD, CLINTON, FOR ALEXIS V.

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Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.), entered May 18, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: The father of the child at issue in these appeals is the petitioner in appeal No. 1 and a respondent in appeal No. 2. He appeals from an order in appeal No. 1 that, following a hearing, dismissed his petition seeking to modify a prior custody order, and he appeals from an order in appeal No. 2 that granted the petition of the Law Guardian for the subject child seeking to modify a prior visitation order.

The father contends in appeal No. 1 that Family Court erred in dismissing his petition following a hearing on the issues of both custody and visitation on the ground that he failed to demonstrate a significant change in circumstances to warrant a change in the existing custodial arrangement. We reject that contention (*see generally Matter of Atkins v Maynard*, 288 AD2d 878, *lv denied* 97 NY2d 609; *Matter of Irwin v Neyland*, 213 AD2d 773). It is well established that an existing custodial arrangement should not be altered "merely because of changes in marital status, economic circumstances or improvements in moral or psychological adjustment, at least so long as the custodial parent has not been shown to be unfit, or perhaps less fit, to continue as the proper custodian" (*Obey v Degling*, 37 NY2d 768, 770; *see Fox v Fox*, 177 AD2d 209, 211). Even assuming, arguendo, that the father established a significant change in circumstances, we conclude on the record before us that a change in custody would not be in the best interests of the child (*see generally Matter of Yaddow v*

*Bianco,* 67 AD3d 1430; *Matter of Maher v Maher*, 1 AD3d 987, 988-989).

With respect to the order in appeal No. 2, we reject the contention of the father that the Law Guardian failed to make a sufficient showing of a change in circumstances to warrant a modification of the prior visitation order. Such an order is not subject to modification unless there has been a sufficient change in circumstances since the entry of the prior order that, if not addressed, would have an adverse effect on the child's best interests (*see Matter of Neeley v Ferris*, 63 AD3d 1258, 1259; *Matter of Chase v Benjamin*, 44 AD3d 1130, 1130-1131). Here, the Law Guardian established at the joint custody and visitation hearing that, since the entry of the prior visitation order, the father had relocated from Virginia to Texas and that the directive in the prior visitation order requiring the child to spend six weeks of her summer vacation with the father at his residence presently interfered with the child's increasing participation in social and extracurricular activities at the child's primary physical residence. In addition, although the wishes of the 15-year-old child are not determinative, they nevertheless are entitled to great weight where, as here, the " 'age and maturity [of the child] would make [her] input particularly meaningful' " (*Veronica S. v Philip R.S.*, 70 AD3d 1459, 1460). In this case, the child expressed a desire to limit the amount of time she spent away from her primary physical residence during the summer months. We thus reject the father's contention that the court abused its discretion in determining that the best interests of the child would be served by reducing the amount of visitation with the father at his home in Texas during the child's summer vacation from six weeks to two weeks (*see generally Matter of Wojcik v Newton* [appeal No. 2], 11 AD3d 1011; *Matter of Rought v Palidar*, 6 AD3d 1112).

Contrary to the further contention of the father in each appeal, the court did not abuse its discretion in denying his request to have the child testify in court and instead conducting an in camera interview (*see Matter of Lincoln v Lincoln*, 24 NY2d 270, 272; *Matter of Farnham v Farnham*, 252 AD2d 675, 677). Finally, we reject the father's remaining contention in each appeal that the court erred in conducting the in camera interview before further evidence was presented at the hearing. The record demonstrates that, at the time of the interview, the court was aware of all issues presented by the parties, and that the evidence presented following the in camera interview did not raise any new issues (*cf. Kerfein v Bruno*, 23 AD2d 961, 962).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1014.2**

**CAF 10-00115**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF KAREN STANISLAUS-FUNG,
ON BEHALF OF ALEXIS V., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM VANDUSEN, RESPONDENT-APPELLANT,
AND MELISSA L. RIGGS, RESPONDENT-RESPONDENT.

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JOHN T. NASCI, ROME, FOR RESPONDENT-APPELLANT.

DOREEN M. ST. THOMAS, CLARK MILLS, FOR RESPONDENT-RESPONDENT.

KAREN STANISLAUS-FUNG, ATTORNEY FOR THE CHILD, CLINTON, PETITIONER-RESPONDENT PRO SE.

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Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.), entered October 2, 2009 in a proceeding pursuant to Family Court Act article 6. The order granted the petition for modification.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Same Memorandum as in *VanDusen v Riggs* (___ AD3d ___ [Oct. 1, 2010]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1014**

**CA 10-00584**

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF JAMES SYRACUSE LLC
(1055 JAMES STREET), PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN C. GAMAGE, ASSESSOR, CITY OF SYRACUSE,
AND CITY OF SYRACUSE, RESPONDENTS-APPELLANTS.
(APPEAL NO. 3.)

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JUANITA PEREZ WILLIAMS, CORPORATION COUNSEL, SYRACUSE (JOSEPH FRANCIS BERGH OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (JON E. COOPER OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 12, 2009. The order denied the motion of respondents to dismiss the tax certiorari petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Same Memorandum as in *Matter of Syracuse Indus. Dev. Agency v Gamage* ([appeal No. 1] ___ AD3d ___ [Oct. 1, 2010]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1015**

**KA 09-02346**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ERIK SIMMONS, DEFENDANT-APPELLANT.

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NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered August 27, 2009. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1016**

**KA 10-00766**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT C. FUREY, DEFENDANT-APPELLANT.

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MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 14, 2009. The judgment convicted defendant, upon a jury verdict, of kidnapping in the second degree, burglary in the second degree, menacing in the third degree, criminal mischief in the fourth degree and assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, kidnapping in the second degree (Penal Law § 135.20) and burglary in the second degree (§ 140.25 [2]), defendant contends that County Court erred in denying his challenges for cause to two prospective jurors. We reject that contention. When one of the prospective jurors was unable to state unequivocally that she could render an impartial verdict, the court conducted its own inquiry and elicited an unequivocal assurance of impartiality (*see People v Gladding*, 60 AD3d 1401, *lv denied* 12 NY3d 925; *see generally People v Chambers*, 97 NY2d 417, 419; *People v Arnold*, 96 NY2d 358, 362). With respect to the second prospective juror in question, the record establishes that her relationships with several of the police witnesses were not " 'likely to preclude' " her from rendering an impartial verdict, and thus it cannot be said that she was inherently biased (*People v Provenzano*, 50 NY2d 420, 424; *see* CPL 270.20 [1] [c]; *People v Cassidy*, 16 AD3d 1079, 1080, *lv denied* 5 NY3d 760).

Defendant failed to preserve for our review his further contention that the court erred in refusing to suppress evidence seized during the inventory search of his vehicle (*see People v Nix*, 192 AD2d 1116, *lv denied* 82 NY2d 757), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed

to preserve for our review his contention that the evidence is not legally sufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant contends that he was denied a fair trial based on three instances of alleged prosecutorial misconduct. He failed to preserve for our review his contention with respect to two of the alleged instances (*see People v Beers*, 302 AD2d 898, *lv denied* 99 NY2d 652), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to the third alleged instance of prosecutorial misconduct, we agree with defendant that the prosecutor improperly elicited testimony that defendant invoked his right to counsel during his interview with the police. We nevertheless conclude that the error is harmless (*see People v McLean*, 243 AD2d 756, 756-757, *lv denied* 91 NY2d 928).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1017**

**KA 09-00740**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHARMARKE SHIRE, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (BRIAN P. DASSERO OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered March 18, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts) and criminally using drug paraphernalia in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminally using drug paraphernalia in the second degree under count three of the indictment and dismissing that count of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and criminally using drug paraphernalia in the second degree (§ 220.50 [1], [2]). Defendant failed to preserve for our review his contention that the admission of testimony of a police detective on two occasions that defendant possessed the cocaine with the intent to sell it invaded the province of the jury. With respect to the first occasion, defendant objected to the testimony on a different ground from that raised herein (*see People v Huebert*, 30 AD3d 1018, *lv denied* 7 NY3d 813; *see generally People v Dawson*, 50 NY2d 311, 324) and, with respect to the second occasion, defendant made only a general objection to the testimony. "A party's failure to specify the basis for [his or her] general objection renders [the] argument unpreserved for [our] review" (*People v Everson*, 100 NY2d 609; *see People v Tevaha*, 84 NY2d 879, 880-881). In any event, even assuming, arguendo, that the court erred in admitting the testimony on both occasions, we conclude that any error is harmless (*see People v Ruffins*, 31 AD3d 1180; *People v Russell*, 2 AD3d 1455, 1457, *lv denied* 2 NY3d 745).

Defendant further contends that the search warrant for the apartment in question was not supported by probable cause. It is, however, "defendant's burden to establish, in the first instance, standing to challenge the search warrant" (*People v McCall*, 51 AD3d 822, 822, *lv denied* 11 NY3d 856). Inasmuch as defendant failed to demonstrate any legitimate expectation of privacy in the apartment, he has no standing to challenge the search of the apartment (*see People v Ortiz*, 83 NY2d 840, 842-843; *People v Gonzalez*, 45 AD3d 696, *lv denied* 10 NY3d 811; *People v Myers*, 303 AD2d 139, 142, *lv denied* 100 NY2d 585).

We agree with defendant, however, that the evidence is not legally sufficient to support the conviction of criminally using drug paraphernalia in the second degree under count three of the indictment. We therefore modify the judgment accordingly. A person is guilty of that crime when he or she "knowingly possesses or sells . . . [d]iluents, dilutants or adulterants, including but not limited to, any of the following: quinine hydrochloride, mannitol, mannite, lactose or dextrose, adapted for the dilution of narcotic drugs or stimulants under circumstances evincing an intent to use, or under circumstances evincing knowledge that some person intends to use, the same for the purpose of unlawfully mixing, compounding, or otherwise preparing any narcotic drug" (Penal Law § 220.50 [1]). Here, there was no evidence that the substance in question was one of the listed substances and, indeed, there was no evidence establishing the identity of the substance in question. In addition, there was no evidence indicating that the substance was actually being used to dilute the drugs that were found in the apartment.

We reject defendant's contention that the evidence was legally insufficient to support the conviction of criminally using drug paraphernalia in the second degree under count four of the indictment (Penal Law § 220.50 [2]; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the first, second and fourth counts of the indictment as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict with respect to those counts is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1018**

**KA 09-01917**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMAR MCDUFFIE, DEFENDANT-APPELLANT.

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THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered January 20, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends that he was denied his right to a fair trial based on the prosecutor's failure to correct the testimony of a police officer. "[A] prosecutor has a duty to correct trial testimony if he or she knows that it is false" (*People v Williams*, 61 AD3d 1383, *lv denied* 13 NY3d 751; *see People v Savvides*, 1 NY2d 554, 556-557). Here, the prosecutor sought to recall the officer to correct his testimony, but defendant objected and sought to resolve the issue by way of stipulation. County Court gave defendant the option of recalling the officer for the purpose of clarification or arguing on summation that the officer was mistaken, and defendant ultimately used the testimony on summation in an attempt to undermine the People's case. Consequently, we conclude that any error in failing to correct the testimony of that officer is harmless (*see People v Hendricks*, 2 AD3d 1450, *lv denied* 2 NY3d 762; *see generally People v Steadman*, 82 NY2d 1, 8-9; *People v Crimmins*, 36 NY2d 230, 241-242).

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his further contention that the conviction is not supported by legally sufficient evidence (*see People v Lane*, 7 NY3d 888, 889; *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Viewing the

evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, defendant contends that the court erred in charging the jury on the theory of constructive possession. We reject that contention inasmuch as the court properly charged the jury with the definition of "possess" set forth in Penal Law § 10.00 (8).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1019**

**KA 07-01909**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE M. RUSH, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered July 19, 2007. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree (two counts) and attempted robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of attempted robbery in the first degree and vacating the plea with respect to that crime and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the third count of the indictment only.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of attempted robbery in the first degree (§§ 110.00, 160.15 [4]). Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea colloquy by failing to move to withdraw the plea on that ground or to vacate the judgment of conviction, and this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665-666). Contrary to the contention of defendant, his factual recitation did not indicate that he had a potential defense to the intentional murder count, and thus Supreme Court had no duty to make a further inquiry into such a defense (*see id.* at 666; *People v Oldham*, 24 AD3d 1289, *lv denied* 6 NY3d 779). We reject the further contention of defendant that the court erred in denying his pro se motion to withdraw the guilty plea without conducting a hearing (*see generally People v Baret*, 11 NY3d 31, 33). The court gave defendant "ample opportunity to be heard" with respect to his contention that his decision to plead guilty was based upon a misunderstanding concerning his potential sentence (*People v Cross*, 262 AD2d 223, 223, *lv denied* 94 NY2d 902).

As defendant contends, and the People correctly concede, however, the plea with respect to attempted robbery in the first degree must be vacated because the court failed to advise defendant before he entered the plea that his sentence would include a period of postrelease supervision (*see People v Hill*, 9 NY3d 189, 191-192, *cert denied* 553 US 1048; *People v Catu*, 4 NY3d 242, 245). We therefore modify the judgment accordingly, and we remit the matter to Supreme Court for further proceedings on the third count of the indictment only.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1020**

**CAF 09-01735**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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IN THE MATTER OF DEONDRE M.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

CRYSTAL T., RESPONDENT-APPELLANT.

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ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR DEONDRE M.

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Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered August 17, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her son on the ground of mental illness. We note that this case was previously before us with respect to the mother's younger child (*Matter of Majerae T.*, 74 AD3d 1784). We conclude that petitioner met its burden of demonstrating by clear and convincing evidence that the mother is "presently and for the foreseeable future unable, by reason of mental illness . . ., to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4] [c]; *see* § 384-b [6] [a]; *Matter of Henry W.*, 31 AD3d 940, 941, *lv denied* 7 NY3d 711, 8 NY3d 816; *Matter of Roseanna X.*, 22 AD3d 993, 994). The fact that some of the records upon which the court-appointed psychologist relied to form his opinion of the mother's mental health were six years old does not render the evidence insufficient to meet petitioner's burden. The psychologist's opinion was based on all of the mother's records, which also included more recent psychological records, records from petitioner, and records from treatment programs that the mother failed to complete. Nor was the evidence rendered insufficient based on the fact that the psychologist prefaced his opinion by noting that it was based only on the mother's records and that he could not provide an exact diagnosis without a full examination of the mother (*see Matter of Demariah A.*,

72 AD3d 1592, *lv denied* 15 NY3d 701; *Matter of Demariah A.*, 71 AD3d 1469, *lv denied* 15 NY3d 701; *Matter of Dylan K.*, 269 AD2d 826, *lv denied* 95 NY2d 766). Finally, the possibility that the mother might be capable of caring for the child " 'at some indefinite point in the future does not warrant denial of the petition' " (*Matter of Diana M.T.*, 57 AD3d 1492, 1493, *lv denied* 12 NY3d 708; *see Matter of Alexander James R.*, 48 AD3d 820; *Matter of Dominique R.*, 38 AD3d 211, *lv denied* 8 NY3d 816).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1021**

**CAF 09-01877**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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IN THE MATTER OF RAFIQA ARIEL,
PETITIONER-APPELLANT,

V ORDER

DONALD ARIEL, JR., RESPONDENT-RESPONDENT.
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IN THE MATTER OF RAFIQA ARIEL,
PETITIONER-APPELLANT,

V

DONALD ARIEL, JR., RESPONDENT-RESPONDENT.
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IN THE MATTER OF DONALD ARIEL, JR.,
PETITIONER-RESPONDENT,

V

RAFIQA ARIEL, RESPONDENT-APPELLANT.
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IN THE MATTER OF DONALD ARIEL, JR.,
PETITIONER-RESPONDENT,

V

RAFIQA ARIEL, RESPONDENT-APPELLANT.

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TIMOTHY R. LOVALLO, BUFFALO, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

PAMELA THIBODEAU, ATTORNEY FOR THE CHILDREN, WILLIAMSVILLE, FOR ALIJAH A. AND CALISTA A.

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Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered June 10, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the petition of petitioner-respondent Rafiqa Ariel for primary residential custody.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1022**

**CAF 09-00541**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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IN THE MATTER OF ZANNA E. AND AUTUMN C.-E.

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STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ILA E., RESPONDENT,
AND ALAN E., RESPONDENT-APPELLANT.

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CHRISTINE M. VALKENBURGH, ESQ., ATTORNEY FOR
THE CHILD AUTUMN C.-E., APPELLANT.

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CHRISTINE M. VALKENBURGH, ATTORNEY FOR THE CHILD AUTUMN C.-E., BATH, APPELLANT PRO SE.

BONITA STUBBLEFIELD, PIFFARD, FOR RESPONDENT-APPELLANT.

WENDY S. SISSON, ATTORNEY FOR THE CHILD, GENESEO, FOR ZANNA E.

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Appeals from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered February 23, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Alan E. had abused Autumn C.-E. and derivatively neglected Zanna E.

It is hereby ORDERED that said appeal taken by the Attorney for the Child Autumn C.-E. is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondent father and the Attorney for the Child Autumn C.-E. (stepdaughter) each appeal from an order determining that the father abused his stepdaughter and derivatively neglected his daughter. We conclude at the outset that the appeal taken by the stepdaughter's attorney must be dismissed. The stepdaughter testified at the fact-finding hearing that she was sexually abused by the father, and she therefore is not aggrieved by the dispositional order determining that such abuse occurred (*see generally Matter of Kahlil S.*, 60 AD3d 1450, *lv dismissed* 12 NY3d 898). Further, even assuming, arguendo, that the daughter is aggrieved by the determination, we conclude that she is not entitled to seek affirmative relief inasmuch as her attorney did not take an appeal from the order (*see Matter of Simonds v Kirkland*, 67 AD3d 1481, 1483; *see also Bielli v Bielli*, 60 AD3d 1487, *lv dismissed* 12 NY3d 896; *see generally Hecht v City of New York*, 60 NY2d 57, 63).

Contrary to the contention of the father, the determination is supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Matter of Tammie Z.*, 66 NY2d 1, 3). "The determination of Family Court is entitled to great weight and should not be disturbed 'unless clearly unsupported by the record' " (*Matter of Stephanie B.*, 245 AD2d 1062, 1062; *see Matter of Merrick T.*, 55 AD3d 1318), which is not the case here. Indeed, the determination is supported by, inter alia, DNA evidence establishing that the father's sperm and seminal material were found on the stepdaughter's shorts.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1024**

**CA 10-00465**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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IN THE MATTER OF GENEVA CITY SCHOOL DISTRICT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANONYMOUS, A TENURED TEACHER,
RESPONDENT-RESPONDENT.

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FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (MILES G. LAWLOR OF COUNSEL), FOR PETITIONER-APPELLANT.

JAMES R. SANDNER, LATHAM (TIMOTHY S. TAYLOR OF COUNSEL), FOR RESPONDENT-RESPONDENT.

TIMOTHY G. KREMER, EXECUTIVE DIRECTOR, LATHAM (JAY WORONA OF COUNSEL), FOR NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC., AMICUS CURIAE.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (DENNIS G. O'HARA OF COUNSEL), FOR NEW YORK STATE ASSOCIATION OF MANAGEMENT ADVOCATES FOR SCHOOL LABOR AFFAIRS, AMICUS CURIAE.

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Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered April 23, 2009. The order denied the petition to vacate an arbitration award.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner filed 16 disciplinary charges pursuant to Education Law § 3020-a against respondent, a tenured teacher employed by petitioner as a high school librarian. Respondent requested a hearing, and the parties selected, "by mutual agreement," an arbitrator to serve as the Hearing Officer (§ 3020-a [3] [b] [ii]). At the commencement of the hearing, respondent moved for summary judgment dismissing 11 of the 16 charges. The Hearing Officer made an "interim award" granting the motion. Before the hearing reconvened on the remaining charges, petitioner commenced this proceeding seeking to vacate the interim award, contending that it was irrational and violated an important public policy. Supreme Court rejected those contentions and denied the petition.

We affirm, but for a different reason. The interim award was not "a final and definite award" resolving the matter submitted for arbitration (CPLR 7511 [b] [1] [iii]; *see Matter of Town of*

*Southampton v Patrolman's Benevolent Assn. of Southampton Town, Inc.*, 8 AD3d 580). Inasmuch as the interim award does not constitute a "final determination[] made at the conclusion of the arbitration proceedings" (*Mobil Oil Indonesia v Asamera Oil [Indonesia]*, 43 NY2d 276, 281), there is no authority for judicial intervention at this juncture (*see Town of Southampton*, 8 AD3d 580; *Matter of Adelstein v Thomas J. Manzo, Inc.*, 61 AD2d 933).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1025**

**TP 09-02097**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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IN THE MATTER OF BEST BATCHATEU, PETITIONER,

V MEMORANDUM AND ORDER

DAVID R. PETERS, DIRECTOR, NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, AND NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENTS.

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JAMES S. HINMAN, P.C., ROCHESTER (JAMES S. HINMAN OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR RESPONDENTS.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [John J. Ark, J.], entered June 12, 2009) to review a determination of respondents. The determination denied the petition to amend to unfounded an indicated report of child maltreatment maintained in the New York State Central Register of Child Abuse and Maltreatment.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination denying his application to amend an "indicated" report of child maltreatment in the New York State Central Register of Child Abuse and Maltreatment to be an "unfounded" report (*see* Social Services Law § 422 [8] [b]). Respondents determined that a preponderance of the evidence supported the conclusion that petitioner maltreated his children based on his acts of domestic violence against the children's mother in the presence of the children (*see generally* Social Services Law § 412 [2]; Family Ct Act § 1012 [f]; *Nicholson v Scoppetta*, 3 NY3d 357, 368). At the outset, we agree with petitioner that the proceeding is not time-barred (*see generally* CPLR 217 [1]; *Matter of Anonymous v New York State Off. of Children & Family Servs.*, 53 AD3d 810, 811, *lv denied* 11 NY3d 709), and we further agree with petitioner that he complied with the service provisions set forth in the order to show cause (*see generally Lobo v Soto*, 73 AD3d 1135; *Matter of Burke v Bezio*, 71 AD3d 1317; *Matter of Del Villar v Vekiarelis*, 59 AD3d 642). We conclude, however, that the determination is supported by substantial evidence,

i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see Matter of Richard R. v Carrion*, 67 AD3d 915; *Matter of Tonette E. v New York State Off. of Children & Family Servs.*, 25 AD3d 994, 995; *Matter of Stephen FF. v Johnson*, 23 AD3d 977, 978-979).

We reject the contention of petitioner that he was denied his right to due process at the fair hearing based on the failure of respondents to attach to their answer to the petition the progress notes made during the investigation of the maltreatment allegations. Such omission from the answer had no effect upon petitioner's right to due process at the hearing. Furthermore, because the progress notes were not admitted in evidence at the hearing but were only marked for identification and used to refresh a witness's recollection, it cannot be said that it was error not to attach them to the answer. We note that petitioner was given a copy of the progress notes at his initial appearance on the petition.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1026**

**CA 10-00858**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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JOHN W. KARCZ, JR., AND JENNIFER KARCZ,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KLEWIN BUILDING COMPANY, INC., ET AL.,
DEFENDANTS,
AND R.B. U'REN EQUIPMENT RENTAL, INC.,
DEFENDANT-APPELLANT.
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R.B. U'REN EQUIPMENT RENTAL, INC.,
THIRD-PARTY PLAINTIFF-APPELLANT,

V

MADER CONSTRUCTION COMPANY, THIRD-PARTY
DEFENDANT-RESPONDENT.

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GALLO & IACOVANGELO, LLP, ROCHESTER (JOHN PALERMO OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered June 19, 2009 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant-third-party plaintiff R.B. U'Ren Equipment Rental, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by John W. Karcz, Jr. (plaintiff) when his right arm was struck by a ceiling truss that he was attempting to lift up to a coworker standing on the aerial platform of a scissor lift. The scissor lift was owned by defendant-third-party plaintiff, R.B. U'Ren Equipment Rentals, Inc. (defendant), an equipment rental company, and leased to third-party defendant, Mader Construction Company (Mader), pursuant to a written agreement. Defendant commenced a third-party action against Mader seeking, inter alia, contractual indemnification. Defendant moved for summary judgment dismissing the complaint and the cross claim against

it and for summary judgment on the contractual indemnification cause of action. We conclude that Supreme Court properly denied that part of the motion with respect to the failure to warn claim against defendant because a triable issue of fact exists with respect thereto (*see generally Liriano v Hobart Corp.*, 92 NY2d 232, 243; *Johnson v Delta Intl. Mach. Corp.*, 60 AD3d 1307, 1309). We further conclude that the court properly denied that part of the motion with respect to the contractual indemnification cause of action because triable issues of fact exist concerning whether defendant was negligent in its failure to provide adequate warnings (*see generally Giglio v St. Joseph Intercommunity Hosp.*, 309 AD2d 1266, 1268, *amended* 2 AD3d 1485).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1027**

**CA 10-00761**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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GOVIND S. MUDHOLKAR, PLAINTIFF-APPELLANT,

V ORDER

THE UNIVERSITY OF ROCHESTER,
DEFENDANT-RESPONDENT.

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BILGORE, REICH, LEVINE & KANTOR LLP, ROCHESTER (THEODORE S. KANTOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURNS & SCHULTZ LLP, ROCHESTER (JILL K. SCHULTZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered August 25, 2009 in a breach of contract action. The order granted the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs for reasons stated in the decision at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1029**

**CA 10-00511**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, AND GREEN, JJ.

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KANDIS TIRADO AND DOUGLAS TIRADO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SARA H. KORITZ, M.D., HAMBURG OB/GYN GROUP, P.C., JEFFREY P. STEINIG, M.D., F.A.C.S., KENNETH ECKHERT, III, M.D., SOUTH TOWNS SURGICAL ASSOCIATES, MERCY HOSPITAL OF BUFFALO AND THOMAS RAAB, M.D.,
DEFENDANTS-APPELLANTS.

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GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS JEFFREY P. STEINIG, M.D., F.A.C.S., KENNETH ECKHERT, III, M.D., SOUTH TOWNS SURGICAL ASSOCIATES AND THOMAS RAAB, M.D.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANT-APPELLANT MERCY HOSPITAL OF BUFFALO.

RICOTTA & VISCO, BUFFALO (JOHN M. VISCO OF COUNSEL), FOR DEFENDANTS-APPELLANTS SARA H. KORITZ, M.D. AND HAMBURG OB/GYN GROUP, P.C.

GERARD A. STRAUSS, HAMBURG, FOR PLAINTIFFS-RESPONDENTS.

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Appeals from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered June 30, 2009 in a medical malpractice action. The order directed plaintiffs to disclose various medical records.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph and that part of the third ordering paragraph directing plaintiffs to provide an authorization permitting the release of certain medical records, and by directing plaintiffs to submit to Supreme Court a certified complete copy of the medical records of plaintiff Kandis Tirado from Daniel Leary, M.D. and a certified complete copy of the medical records of plaintiff Kandis Tirado from Community Blue and Empire Medical Services prior to October 15, 2007, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries allegedly sustained by Kandis Tirado (plaintiff) when her bowel was perforated

during a hysterectomy. After plaintiffs refused to comply fully with defendants' disclosure requests, defendants moved for, inter alia, an order compelling plaintiffs to provide medical authorizations in compliance with the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d *et seq*.), permitting the release of plaintiff's medical records from various providers.

In view of the injuries alleged by plaintiffs, we conclude that Supreme Court properly exercised its discretion in directing plaintiffs to submit to the court for in camera review a certified complete copy of plaintiff's records from Sadiqa Karim, M.D., Quest Diagnostic and X-Cell Laboratories of WNY (*see Tabone v Lee*, 59 AD3d 1021, 1022; *Mayer v Cusyck*, 284 AD2d 937; *Carter v Fantauzzo*, 256 AD2d 1189, 1190). "In bringing the action, plaintiff waived the physician[-]patient privilege only with respect to the physical and mental conditions affirmatively placed in controversy" (*Mayer*, 284 AD2d at 938). "That waiver, however, 'does not permit wholesale discovery of information regarding [plaintiff's] physical and mental condition. The waiver of the physician-patient privilege made by a party who affirmatively asserts a physical condition in its pleading does not permit discovery of information involving unrelated illnesses and treatments' " (*Carter*, 256 AD2d at 1190).

The court abused its discretion, however, in directing plaintiffs to provide authorizations permitting the release of plaintiff's medical records from Daniel Leary, M.D. and Sadiqa Karim, M.D. that "are related to any condition(s) or disease(s) of the abdomen or pelvis, as well as [to] those [conditions or diseases] that are gynecological or obstetrical in nature." The court, rather than those medical providers, is in the best position "to determine whether the records are material and related to any physical or mental condition placed in issue by plaintiffs" (*Tabone*, 59 AD3d at 1022). We therefore modify the order accordingly. The court properly directed plaintiffs to provide authorizations permitting the release of plaintiff's medical records from Community Blue and Empire Medical Services from October 15, 2007, the date of the hysterectomy, to the present. We conclude, however, that plaintiffs' "broad allegations of injury" also place the medical history of plaintiff predating the hysterectomy in controversy (*Geraci v National Fuel Gas Distrib. Corp*., 255 AD2d 945, 946). The court therefore should have directed plaintiffs to submit to the court for in camera review a certified complete copy of plaintiff's records from Community Blue and Empire Medical Services prior to October 15, 2007. We therefore further modify the order accordingly. We remit the matter to Supreme Court for an in camera review of plaintiff's medical records from Dr. Leary and plaintiff's medical records from Community Blue and Empire Medical Services prior to October 15, 2007 to determine whether they are material and related to any physical or mental condition placed in issue by plaintiffs.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1030**

**CA 10-00874**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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MARK TRANE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES R. HASTEE, DEFENDANT-APPELLANT,
AND MIRIS CASH AND CARRY, INC.,
DEFENDANT-RESPONDENT.

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BROWN & KELLY, LLP, BUFFALO (TARA WATERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF MARY A. BJORK, ROCHESTER (THOMAS P. DURKIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

CANTOR, LUKASIK, DOLCE & PANEPINTO, P.C., BUFFALO (FRANK J. DOLCE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 16, 2009 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant James R. Hastee for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant James R. Hastee is granted in its entirety and the complaint against that defendant is dismissed.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he lifted a bundle of shingles from a conveyor belt that was delivering shingles to the roof of a house owned by James R. Hastee (defendant). Defendant purchased the shingles from defendant Miris Cash and Carry, Inc. (Miris), and he also entered into a contract with Miris for rooftop delivery. Defendant contends that Supreme Court erred in denying those parts of his motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against him because plaintiff volunteered to help defendant and his son re-roof defendant's house. We reject that contention. Defendant's own submissions in support of the motion included the deposition testimony of plaintiff in which he stated that he understood he would receive "pocket change" for his help. We thus conclude that defendant failed to establish that plaintiff was a volunteer worker as a matter of law (*see generally Gibson v Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108, 1109; *Luthringer v Luthringer*, 59 AD3d 1028, 1029; *McNulty v*

*Executive Kitchens*, 294 AD2d 411, 412).

We nevertheless conclude that defendant established his entitlement to judgment as a matter of law with respect to the Labor Law § 200 and common-law negligence causes of action against him. Plaintiff alleged that his injuries resulted both from a dangerous condition on the premises, i.e., the position of the conveyor belt on the roof, and from the manner in which the work was performed. With respect to the allegedly dangerous condition, defendant established that he was not involved in the placement of the conveyor belt or the metal stabilizing leg on the roof of the house and that he did not instruct the driver of the Miris truck where to park the truck or how to load the shingles onto the conveyor belt. Defendant also established that he never instructed plaintiff how to unload the shingles from the conveyor belt or how to handle them thereafter and that he left the delivery of the shingles to the rooftop to the driver, plaintiff and his son because it "seemed like they [knew] what they were doing." Thus, defendant met his initial burden of establishing that he did not create the allegedly dangerous condition and that he had neither control over the work site nor actual or constructive notice of the allegedly dangerous condition (*see Astarita v Flintlock Constr. Servs., LLC*, 69 AD3d 888; *Schultz v Hi-Tech Constr. & Mgt. Servs., Inc.*, 69 AD3d 701; *Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349). Plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

With respect to the manner in which the work was performed, defendant established that he did not supervise any of plaintiff's work, including the unloading of the shingles off of the conveyor belt (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; *Lombardi v Stout*, 80 NY2d 290, 295; *Jenkins v Walter Realty, Inc.*, 71 AD3d 954), and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562). The fact that defendant, as the homeowner, generally oversaw the re-roofing project and was responsible for purchasing materials and scheduling their delivery did not constitute the requisite degree of direct supervision over the manner of plaintiff's work (*see generally McKee v Great Atl. & Pac. Tea Co.*, 73 AD3d 872, 874; *Feris v Port Auth. of N.Y. & N.J.*, 40 AD3d 276; *Riley v Stickl Constr. Co.*, 242 AD2d 936). We therefore reverse the order insofar as appealed from, grant defendant's motion in its entirety and dismiss the complaint against defendant. In view of our determination, we do not consider defendant's remaining contentions.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1032**

**CA 09-02560**

PRESENT: MARTOCHE, J.P., SMITH, FAHEY, AND GREEN, JJ.

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KIMBERLY A. SHROUT, AS THE ADMINISTRATRIX OF THE ESTATE OF RAYMOND SHROUT, DECEASED, AND KIMBERLY A. SHROUT, INDIVIDUALLY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER GAS & ELECTRIC CORPORATION, ET AL., DEFENDANTS, AND FRANK B. IACOVANGELO, AS THE PUBLIC ADMINISTRATOR OF THE ESTATE OF DALE FRAVEL, DECEASED, DEFENDANT-RESPONDENT.

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TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (VALERIE L. BARBIC OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF TAYLOR & SANTACROSE, BUFFALO (CHRIS TURNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered August 10, 2009. The judgment and order granted the motion of defendant Frank B. Iacovangelo, as the Public Administrator of the estate of Dale Fravel, deceased, for summary judgment dismissing the complaint and all cross claims against him.

It is hereby ORDERED that the judgment and order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first and fifth causes of action against defendant Frank B. Iacovangelo, as the Public Administrator of the estate of Dale Fravel, deceased, insofar as those causes of action, as amplified by the bill of particulars, allege that Dale Fravel permitted a dangerous condition to exist on the premises, and reinstating the ninth cause of action and the cross claims against that defendant and as modified the judgment and order is affirmed without costs.

Memorandum: Plaintiff commenced this action, as administratrix of the estate of Raymound Shrout (decedent) and individually, seeking damages for the wrongful death of decedent, who was electrocuted while installing siding on the home of Dale Fravel. The complaint, as amplified by the bill of particulars, alleges, inter alia, that Fravel failed to provide decedent with proper equipment and adequate supervision and allowed an unsafe condition to exist on the premises. Plaintiff appeals from a judgment and order granting the motion of

defendant Frank B. Iacovangelo, as the Public Administrator of Fravel's estate (hereafter, Public Administrator), for summary judgment dismissing the complaint and all cross claims against him. We agree with plaintiff that Supreme Court erred in granting those parts of the motion seeking summary judgment dismissing the first and fifth causes of action, for common-law negligence, against the Public Administrator insofar as those causes of action, as amplified by the bill of particulars, allege that Fravel permitted a dangerous condition to exist on the premises. We therefore modify the judgment and order accordingly.

In support of the motion and on appeal, the Public Administrator addressed only the issue whether Fravel exercised supervision and control over the work being performed by decedent at the time of his electrocution. Thus, we conclude that the Public Administrator failed to meet his burden of establishing as a matter of law that Fravel "neither created nor had actual or constructive notice of the [allegedly] dangerous condition on the premises" (*Perry v City of Syracuse Indus. Dev. Agency*, 283 AD2d 1017, 1017; *see Skinner v Oneida-Herkimer Solid Waste Mgt. Auth.*, 275 AD2d 890; *cf. McNabb v Oot Bros., Inc.*, 64 AD3d 1237, 1240). We have considered plaintiff's remaining contention and conclude that it is without merit.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1033**

**CA 10-00564**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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RENEE L. BREAN AND FRANCIS BERKLEY BREAN,
PLAINTIFFS-APPELLANTS,

V ORDER

RICK D. LOVE, DEFENDANT-RESPONDENT.

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FARACI LANGE, LLP, ROCHESTER (KATHRYN LEE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICES OF TAYLOR & SANTACROSE, BUFFALO (CHRIS TURNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered December 21, 2009 in a personal injury action. The order denied the motion of plaintiffs for partial summary judgment on the issue of liability.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1034**

**CA 10-00709**

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND GREEN, JJ.

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STEPHANIE D'ANGELO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANDREA S. LITTERER, DEFENDANT-RESPONDENT.

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BROWN CHIARI LLP, LANCASTER (BRADLEY D. MARBLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (VICTOR WRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 18, 2009. The order denied the motion of plaintiff seeking leave to amend the complaint and to compel disclosure.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle she was driving was struck by a vehicle driven by defendant. Supreme Court properly denied that part of plaintiff's motion seeking leave to amend the complaint to add a claim for punitive damages. "[T]he fact that defendant pleaded guilty to driving while intoxicated 'is insufficient by itself to justify the imposition of punitive damages' " (*Schragel v Juszczyk*, 43 AD3d 1375, 1375), and plaintiff failed to allege additional facts demonstrating that "defendant acted so recklessly or wantonly as to warrant an award of punitive damages" (*Deon v Fortuna*, 283 AD2d 388, 389). The court also properly denied that part of plaintiff's motion seeking to compel defendant to produce her hospital toxicology report from the date of the accident inasmuch as defendant has not waived the physician-patient privilege with respect to that report (*see Dillenbeck v Hess*, 73 NY2d 278, 287-288).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1037**

**KA 09-00921**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMIAN J. MATEO, DEFENDANT-APPELLANT.

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JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered April 15, 2005. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621) is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). As defendant correctly concedes, the People presented legally sufficient evidence establishing that his pit bull terrier constituted a dangerous instrument within the meaning of Penal Law § 10.00 (13) (*see People v Garraway*, 187 AD2d 761, 761-762, *lv denied* 81 NY2d 886), and that the pit bull caused the victim to sustain serious physical injury, here, "serious and protracted disfigurement," within the meaning of Penal Law § 10.00 (10) (*see People v Whyte*, 47 AD3d 852, 853-854; *People v Walos*, 229 AD2d 953). Defendant contends, however, that the evidence is legally insufficient to establish that he intended to cause such injury. We reject that contention (*see People v Truesdale*, 186 AD2d 496, *lv denied* 81 NY2d 766). In addition, viewing the evidence in light of the elements of the crime of assault as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, [we] must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, quoting *Bleakley*, 69 NY2d at 495). We see no reason to disturb the jury's determination to credit the testimony of the victim in this case (*see People v Flagg*, 59 AD3d 1003, *lv denied* 12 NY3d

853). Finally, the sentence is not unduly harsh or severe.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1038**

**KA 09-00533**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE M. MCMILLON, JR., DEFENDANT-APPELLANT.

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EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered February 26, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that County Court erred in denying his request for an adverse inference charge concerning the failure of the police to record defendant's interrogation. " '[T]his Court has repeatedly determined . . . that the failure to record a defendant's interrogation electronically does not constitute a denial of due process' . . ., and thus an adverse inference charge was not warranted" (*People v Holloway*, 71 AD3d 1486, 1487; *see People v Hammons*, 68 AD3d 1800, *lv denied* 14 NY3d 801). Defendant's reliance on cases involving lost or destroyed evidence and missing witnesses is misplaced (*see e.g. People v Joseph*, 86 NY2d 565, 572; *People v Gonzalez*, 68 NY2d 424). In those cases, it was established that there was in fact evidence that was not presented at trial. Here, however, the evidence at issue, an electronic recording of defendant's interrogation, never existed, nor were the police obligated to create such a recording.

Defendant failed to preserve for our review his further contention that he was deprived of his constitutional right to confront witnesses against him when the court allowed a police officer to testify that he confronted defendant with evidence that other witnesses had placed defendant at the scene of the homicide.

"Although the defendant objected to the testimony at issue, he did not specify the ground now raised on appeal. Therefore, the issue of whether he was deprived of his right of confrontation is unpreserved for appellate review" (*People v Perez*, 9 AD3d 376, 377, *lv denied* 3 NY3d 710; *see People v Rivera*, 33 AD3d 450, 450-451, *lv denied* 7 NY3d 928; *People v Mack*, 14 AD3d 517, *lv denied* 4 NY3d 833). To the extent that defendant contends that the court erred in failing to issue a limiting instruction with respect to that testimony, we conclude that defendant likewise failed to preserve that contention for our review (*see People v Martin*, 58 AD3d 519, *lv denied* 12 NY3d 818). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, the appellate court must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, quoting *Bleakley*, 69 NY2d at 495). Indeed, a jury is able to "assess [the] credibility and reliability [of the witnesses] in a manner that is far superior to that of reviewing judges[,] who must rely on the printed record" (*People v Lane*, 7 NY3d 888, 890). Here, although a finding that defendant was not the shooter would not have been unreasonable given the lack of physical evidence and the questionable reliability of the People's witnesses who implicated defendant, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1039**

**KA 05-00257**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATEIK MITCHELL, DEFENDANT-APPELLANT.

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KRISTIN SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LATEIK MITCHELL, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered January 14, 2005. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (four counts), criminal possession of a weapon in the third degree (ten counts), reckless endangerment and unlawful wearing of a body vest.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentences imposed on counts 1 through 4 of the indictment shall run concurrently with respect to each other, that the sentence imposed on count 9 of the indictment shall run concurrently with the sentences imposed on counts 1 through 4 of the indictment, that the sentence imposed on count 11 of the indictment shall run concurrently with the sentences imposed on counts 1 through 4 and count 9 of the indictment, and that the sentence imposed on count 16 of the indictment shall run concurrently with the sentences imposed on counts 1 through 4 and counts 9 and 11 of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, four counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]). Defendant failed to preserve for our review his contention that meaningful appellate review of his *Batson* challenge is foreclosed by the failure to make a stenographic record of the bench conferences during which peremptory challenges were discussed (*see* CPL 470.05 [2]). In any event, the record belies that contention inasmuch as the voir dire of prospective jurors was in fact transcribed, and a record of the *Batson* challenge by defendant was made at his request, thus

allowing meaningful appellate review of that challenge. Indeed, we do not review the propriety of County Court's denial of defendant's *Batson* challenge because defendant does not raise any such issue on appeal.

We reject defendant's further contention that the court erred in failing to charge criminal possession of a weapon in the fourth degree as a lesser included offense of the charges of criminal possession of a weapon in the second degree. Under the facts of this case, there is no reasonable view of the evidence that would support a finding, without "resort[ing] to sheer speculation," that defendant committed the lesser offense but not the greater offense (*People v Butler*, 84 NY2d 627, 632 [internal quotation marks omitted]; *see People v Johnson*, 24 AD3d 958, *lv denied* 6 NY3d 814; *cf. People v Pulley*, 302 AD2d 899, *lv denied* 100 NY2d 565; *see generally People v Glover*, 57 NY2d 61, 63).

We agree with defendant, however, that the court erred in directing that the sentences imposed for criminal possession of a weapon in the second degree under counts 1 through 4 of the indictment shall run consecutively with respect to each other, that the sentence imposed for criminal possession of a weapon in the third degree under count 9 shall run consecutively with the sentences imposed on counts 1 through 4, that the sentence imposed for criminal possession of a weapon in the third degree under count 11 shall run consecutively with the sentences imposed on counts 1 through 4 and count 9, and that the sentence imposed for unlawful wearing of a body vest (Penal Law § 270.20 [1]) under count 16 shall run consecutively with the sentences imposed on counts 1 through 4 and counts 9 and 11. We therefore modify the judgment accordingly. The evidence at trial established only that defendant constructively possessed the firearms with respect to the criminal possession of a weapon counts of which he was convicted, and thus the People proved only a single actus reus (*see People v Laureano*, 87 NY2d 640, 643; *People v Hunt*, 52 AD3d 1312, *lv denied* 11 NY3d 737; *People v Rogers*, 111 AD2d 665, *lv denied* 66 NY2d 614, 617). Further, the actus reus of the counts of criminal possession of a weapon is a material element of the offense of unlawful wearing of a body vest (*see generally Laureano*, 87 NY2d at 643). Thus, that sentence must also run concurrently with the sentences imposed on the criminal possession of a weapon counts. We have reviewed the remaining contentions of defendant, including those raised in his pro se supplemental brief, and conclude that they are without merit.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1041**

**KAH 10-00166**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.
GENERAL CARSON, PETITIONER-RESPONDENT,

V ORDER

MELVIN WILLIAMS, SUPERINTENDENT, WILLARD DRUG
TREATMENT CAMPUS, RESPONDENT-APPELLANT.

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ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF COUNSEL), FOR RESPONDENT-APPELLANT.

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Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered April 10, 2009 in a habeas corpus proceeding. The judgment granted the petition and directed release of petitioner to parole supervision.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed (*see People ex rel. Van Steenburg v Wasser*, 69 AD3d 1135, *lv denied in part and dismissed in part* 14 NY3d 883; *People ex rel. Muhammad v Bradt*, 68 AD3d 1391; *People ex rel. Almodovar v Berbary*, 67 AD3d 1419, *lv denied* 14 NY3d 703).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1042**

**TP 10-00790**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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IN THE MATTER OF EVELYN H. MONSAY, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, GALEN D. KIRKLAND, COMMISSIONER, NEW YORK STATE, STATE UNIVERSITY OF NEW YORK, AND STATE UNIVERSITY COLLEGE AT OSWEGO, RESPONDENTS.

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SUGARMAN LAW FIRM, LLP, SYRACUSE (LAURA L. SPRING OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENTS NEW YORK STATE, STATE UNIVERSITY OF NEW YORK, AND STATE UNIVERSITY COLLEGE AT OSWEGO.

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Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oswego County [James W. McCarthy, A.J.], entered April 8, 2010) to review a determination of respondent New York State Division of Human Rights. The determination dismissed the complaint of discrimination based on age and sex.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Contrary to the contention of petitioner, the determination that respondent State University College at Oswego (College) did not unlawfully discriminate against her on the basis of gender or age is supported by substantial evidence (*see generally Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331). Even assuming, arguendo, that petitioner established a prima facie case of gender or age discrimination, we conclude that the College rebutted the presumption of discrimination created by petitioner by presenting the requisite "legitimate, independent, and nondiscriminatory reasons to support its employment decision[s]" (*Matter of Miller Brewing Co. v State Div. of Human Rights*, 66 NY2d 937, 938).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1043**

**TP 10-00878**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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IN THE MATTER OF KYLE P. MCDONELL, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, ADMINISTRATIVE APPEALS BOARD AND DAVID J. SWARTS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, RESPONDENTS.

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DAVID L. OWENS, ROCHESTER, FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF COUNSEL), FOR RESPONDENTS.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Ann Marie Taddeo, J.], dated April 15, 2010) to review a determination of respondent Commissioner, New York State Department of Motor Vehicles. The determination suspended petitioner's license for refusal to submit to a chemical test.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the petition is granted.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination suspending his license. We agree with petitioner that the determination is not supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). Petitioner was stopped by a New York State Trooper after petitioner had turned onto an entrance ramp leading to an interstate highway and had accelerated, causing the vehicle to fishtail. The Trooper who observed the fishtailing stopped petitioner's vehicle based solely on his belief that petitioner had violated Vehicle and Traffic Law § 1162, which prohibits unsafely moving a stopped, standing or parked vehicle "unless such movement can be made with reasonable safety." Following further investigation, the Trooper took petitioner into custody based on the Trooper's belief that petitioner was operating the vehicle while under the influence of alcohol. Thereafter, petitioner refused to submit to a chemical test and, based on that refusal, his driver's license was suspended.

A refusal revocation hearing was held pursuant to Vehicle and Traffic Law § 1194 (2) (c), following which the Administrative Law

Judge (ALJ) concluded that the Trooper had lawfully arrested petitioner and that petitioner had refused to submit to a chemical test for the purpose of determining his blood alcohol content. Respondent subsequently confirmed that determination on petitioner's administrative appeal.

We agree with petitioner that he did not violate Vehicle and Traffic Law § 1162, inasmuch as it is undisputed that petitioner's vehicle had not been stopped, standing or parked before the Trooper stopped the vehicle. "A [trooper] is authorized to stop a motor vehicle on a public highway when the [trooper] observes or reasonably suspects a violation of the Vehicle and Traffic Law . . . Where[, as here, a trooper's] belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the [trooper] as a direct result of the stop are illegal" (*Matter of Byer v Jackson*, 241 AD2d 943, 944-945). Because the Trooper who stopped petitioner's vehicle testified at the hearing before the ALJ that his only basis for the traffic stop was the alleged violation of Vehicle and Traffic Law § 1162, we conclude that the determination must be annulled.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1044**

**TP 10-00767**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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IN THE MATTER OF SANDRA BOWLER, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
NIAGARA COUNTY, RESPONDENTS.

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LINDY KORN, BUFFALO, FOR PETITIONER.

DAMON MOREY LLP, BUFFALO (MOLLY L. MALLIA OF COUNSEL), FOR RESPONDENT NIAGARA COUNTY.

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Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Niagara County [Richard C. Kloch, Sr., A.J.], entered April 6, 2010) to review a determination of respondent New York State Division of Human Rights. The determination dismissed petitioner's complaint of discrimination.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: In this proceeding pursuant to Executive Law § 298, petitioner seeks to annul the determination of respondent New York State Division of Human Rights dismissing her complaint following a public hearing. Our review of the determination, which adopted the findings of the Administrative Law Judge (ALJ) who conducted the public hearing, is limited to the issue whether substantial evidence supports respondent agency's determination, i.e., whether there exists " 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' " (*Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331). We conclude that there is substantial evidence to support respondent agency's determination that petitioner was not subjected to sexual discrimination based on a hostile work environment. "An actionable hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the terms or conditions of employment" (*Vitale v Rosina Food Prods.*, 283 AD2d 141, 143 [internal quotation marks omitted]; *see Harris v Forklift Sys.*, 510 US 17, 21). Here, the two inappropriate comments found by the ALJ to be attributable to petitioner's immediate supervisor were neither sufficiently severe nor pervasive to alter the conditions of petitioner's employment, and we will not disturb the credibility

determinations of the ALJ with respect to any remaining allegations (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444; *Matter of Paolone v Ward*, 168 AD2d 234). Contrary to the contention of petitioner, it is of no moment that other evidence in the record could support her allegations. Courts " 'may not weigh the evidence or reject [respondent agency's] choice where the evidence is conflicting and room for a choice exists' " (*Rainer N. Mittl, Ophthalmologist, P.C.*, 100 NY2d at 331, quoting *Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69, 75). Finally, we conclude that there is substantial evidence to support respondent agency's determination that petitioner was not subjected to retaliation, inasmuch as petitioner failed to allege that any adverse employment action was taken based upon her having engaged in a protected activity (*see generally Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1046**

**CA 09-02586**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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DANIEL GUERESCHI, PLAINTIFF-APPELLANT,

V ORDER

FAMILY DOLLAR STORES OF NEW YORK, INC. AND THE CONLAN COMPANY, DEFENDANTS-RESPONDENTS.

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FAMILY DOLLAR STORES OF NEW YORK, INC. AND CONLAN COMPANY, THIRD-PARTY PLAINTIFFS,

V

WARD MANUFACTURING, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

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STANLEY LAW OFFICES, LLP, SYRACUSE (ROBERT A. QUATTROCCI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered July 24, 2009 in a personal injury action. The order and judgment, insofar as appealed from, denied the motion of plaintiff for partial summary judgment, granted the cross motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1047**

**CA 09-01404**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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JOHN J. BIRD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VICKIE L. BIRD, DEFENDANT-APPELLANT.

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MARK S. CARNEY, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), dated June 10, 2009. The order, insofar as appealed from, denied that part of the motion of defendant to vacate a default judgment of divorce.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in part and the default judgment of divorce is vacated.

Memorandum: Defendant, as limited by her brief on appeal, contends that Supreme Court abused its discretion in denying that part of her motion seeking to vacate the default judgment of divorce. We agree. "Although a party seeking to vacate a default judgment must demonstrate a reasonable excuse for the default and a meritorious defense, '[o]ur courts have embraced a liberal policy with respect to vacating default judgments in matrimonial actions' " (*Dunbar v Dunbar*, 233 AD2d 922, 922; *see De Pass v De Pass*, 42 AD3d 723, 724). In support of her motion, defendant submitted evidence that she was not represented by counsel and that plaintiff misled her with respect to his intention to pursue the divorce action (*see generally D'Alleva v D'Alleva*, 127 AD2d 732, 735). In addition, defendant established a meritorious claim to her distributive share of the marital property from the marriage of nearly 20 years' duration (*see Viner v Viner*, 291 AD2d 398). We thus conclude, particularly in light of the public policy favoring the disposition of matrimonial actions on the merits, that the court erred in denying defendant's motion insofar as it sought vacatur of the default judgment of divorce (*see id.* at 399; *see also Dunbar*, 233 AD2d 922).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1049**

**CA 10-00352**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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ADAM R. STEARNS AND KATHLEEN STEARNS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

IRENE O'BRIEN, DEFENDANT-APPELLANT.

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LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MERKEL AND MERKEL, ROCHESTER (CHARLES A. HALL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered May 11, 2009 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Adam R. Stearns (plaintiff) when the vehicle he was driving collided with a vehicle operated by defendant, as well as economic damages incurred by plaintiff Kathleen Stearns in connection with the vehicle driven by plaintiff, her son. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and Supreme Court granted those parts of the motion with respect to two of the four categories of serious injury alleged by plaintiffs. We affirm. Defendant failed to meet her initial burden on the motion with respect to the two remaining categories, i.e., permanent consequential limitation of use and significant limitation of use. In support of her motion, defendant failed to submit any competent medical evidence regarding the condition of plaintiff's jaw (*see Elmer v Amankwaah*, 2 AD3d 1350). Indeed, defendant herself raised a triable issue of fact whether plaintiff sustained a permanent consequential limitation of use or a significant limitation of use of his jaw as a result of the accident by submitting the deposition testimony of plaintiff concerning intermittent pain and audible clicking in his jaw, the limited ability to open his mouth and to chew certain foods, and the possible need for surgery (*cf. Guillaume v Reyes*, 22 AD3d 803, 803-804; *see generally Mancusi v Miller Brewing Co.*, 251 AD2d 265). Because defendant failed to meet her initial

burden, we do not examine the sufficiency of plaintiffs' opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1050**

**CA 10-00225**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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TRISHA BROWN, INDIVIDUALLY AND AS CO-EXECUTOR OF THE ESTATE OF LOYOLA MCCORMICK, DECEASED, AND GREG MCCORMICK, INDIVIDUALLY AND AS CO-EXECUTOR OF THE ESTATE OF LOYOLA MCCORMICK, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ARNOT MEDICAL CENTER, ET AL., DEFENDANTS, AND KEVIN D. O'SHEA, M.D., DEFENDANT-APPELLANT.

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SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRANDON R. KING OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered November 9, 2009 in a medical malpractice action. The order denied the motion of defendant Kevin D. O'Shea, M.D. for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Kevin D. O'Shea, M.D. (defendant) appeals from an order denying his motion for summary judgment dismissing the complaint in this medical malpractice action. We affirm. Even assuming, arguendo, that defendant met his initial burden on the motion, we conclude that plaintiffs raised issues of fact to defeat the motion by submitting the affidavit of their medical expert (*see Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436; *Ferlito v Dara*, 306 AD2d 874; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Among those issues of fact raised by the expert's affidavit are whether defendant deviated from the accepted standards of medical care by failing to take decedent's vital signs or to order a urinalysis test in a timely fashion, failing to ensure that decedent's care was transferred to another doctor when defendant left the hospital, and failing to have decedent's CT scan results reviewed and interpreted by a radiologist (*see Latona v Roberson*, 71 AD3d 1498; *Selmensberger*, 45 AD3d at 1436).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1051**

**CA 09-01605**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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JOANN RIPKA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBBIE RIPKA, DEFENDANT-RESPONDENT.

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HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered November 3, 2008 in a divorce action. The judgment, inter alia, equitably distributed the marital assets of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law without costs by providing in the fifth decretal paragraph that there shall be an upward adjustment of child support upon the termination of defendant's maintenance obligation and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Oswego County, to determine the amount of that upward adjustment in accordance with the following Memorandum: On appeal from a judgment of divorce, plaintiff contends that Supreme Court erred in determining that it would be "double counting" to award a portion of defendant's businesses to plaintiff where, as here, defendant's wages had not been capitalized in the valuation of those businesses (*see generally Grunfeld v Grunfeld*, 94 NY2d 696). We agree. We conclude, however, that the court rectified that error by awarding maintenance based solely upon defendant's income. "[P]roperty distribution and maintenance should not be treated as two separate and discrete items, but rather should each be considered 'with a view toward the other in an effort to arrive at a fully integrated and complete financial resolution that is best suited to the parties' particular financial situation' " (*Grunfeld*, 255 AD2d 12, 19, *mod on other grounds* 94 NY2d 696). Although plaintiff is correct that her overall award would have been greater had she received both maintenance and a portion of defendant's businesses, we conclude that, in that event, the amount of her award of maintenance would be insufficient to enable her to maintain her standard of living. Based on the impropriety of treating a distributive award as "an additional source of maintenance, rather than as a division of marital property" (*Buzzeo v Buzzeo*, 141 AD2d 490, 491; *see Lipovsky v Lipovsky*, 271 AD2d

658, 659, *lv dismissed* 95 NY2d 886, *lv denied* 96 NY2d 712; *Mullin v Mullin*, 187 AD2d 913, 914), we conclude that the court properly awarded maintenance to plaintiff based on defendant's income.

Contrary to plaintiff's contention, the court was not required to explain the reasons for its discretionary application of the $80,000 cap pursuant to Domestic Relations Law § 240 (1-b) (c) (former [2]) and (3), particularly in light of its finding that defendant's pro rata share of child support was appropriate and plaintiff's failure to contend that the amount of child support awarded was insufficient (*see generally id.*; *Matter of Michele M. v Thomas F.*, 42 AD3d 882). We conclude, however, that the court erred in failing to order that child support be adjusted upon the termination of maintenance, pursuant to Domestic Relations Law § 240 (1-b) (b) (5) (vii) (C) (*see Schiffer v Schiffer*, 21 AD3d 889, 890-891; *Smith v Smith*, 1 AD3d 870, 872-873; *Atweh v Hashem*, 284 AD2d 216, 216-217). We therefore modify the order and remit the matter to Supreme Court to determine, following a hearing if necessary, the proper amount of the upward adjustment of child support.

Also contrary to plaintiff's contention, we conclude that the court properly determined the values of defendant's businesses and the marital assets. Indeed, "valuation is an exercise properly within the fact-finding power of the trial courts, guided by expert testimony" (*Burns v Burns*, 84 NY2d 369, 375). Here, the court accepted the valuation of the businesses provided by defendant's expert, with which plaintiff's expert agreed, and the court was not required to accept plaintiff's unsupported allegations that the businesses were worth more than the amounts reported by defendant (*see Scala v Scala*, 59 AD3d 1042, 1043). Similarly, the court properly accepted defendant's valuation of the vehicles, where plaintiff " 'presented no expert testimony that would support a different valuation' " (*id.*). Finally, the court was entitled to credit the valuation of defendant's expert over that of plaintiff's with respect to the marital residence, using the "as repaired" valuation of the marital residence. Plaintiff admittedly used nearly $13,000 out of a $20,000 pendente lite award made specifically for house repairs and real property taxes for other personal expenses (*see Fuchs v Fuchs*, 276 AD2d 868, 869).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1053**

**CA 10-00136**

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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IN THE MATTER OF LAIDLAW ENERGY AND ENVIRONMENTAL, INC., PETITIONER-APPELLANT,

V ORDER

TOWN OF ELLICOTTVILLE, TOWN OF ELLICOTTVILLE ZONING BOARD OF APPEALS, JOHN E. KRAMER, IN HIS CAPACITY AS CHAIR OF TOWN OF ELLICOTTVILLE ZONING BOARD OF APPEALS, CYNTHIA DAYTON, IN HER CAPACITY AS CO-CHAIR OF TOWN OF ELLICOTTVILLE ZONING BOARD OF APPEALS, ALAN ADAMS, JOHN E. CADY, AND NORMAN WINKLER, IN THEIR RESPECTIVE CAPACITIES AS MEMBERS OF TOWN OF ELLICOTTVILLE ZONING BOARD OF APPEALS, RESPONDENTS-RESPONDENTS.

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JONATHAN ROBERT NELSON, P.C., NEW YORK CITY (JONATHAN R. NELSON OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered July 23, 2009 in a proceeding pursuant to CPLR article 78. The judgment denied the petition seeking to annul the determination of respondents.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1056**

**KA 07-02427**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW J. MILLER, DEFENDANT-APPELLANT.

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WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., LIVINGSTON COUNTY CONFLICT DEFENDERS, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Livingston County Court (Robert B. Wiggins, J.), entered November 2, 2007. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We reject the contention of defendant that County Court erred in assessing 10 points against him under risk factor 12, for his failure to accept responsibility. Although defendant pleaded guilty, the presentence report indicates that he stated that the 11-year-old victim, who had been vomiting into a toilet when defendant entered the bathroom, "grabbed him and stated that she wanted to [have sex]" and that the victim repeated that request several times. Defendant further claimed that he replied, "No way," and left the house, that nothing happened with the victim and that he pleaded guilty only to avoid the risk of losing at trial. Those statements constituted clear and convincing evidence of defendant's failure to accept responsibility for the crime (*see People v Ferrer*, 69 AD3d 513, 515, *lv denied* 14 NY3d 709; *People v Murphy*, 68 AD3d 832, *lv dismissed* 14 NY3d 812; *People v Lerch*, 66 AD3d 1088, *lv denied* 13 NY3d 715). Although the statements were made approximately 12 years prior to the court's SORA determination, the argument of defendant at the SORA hearing that he should be assessed points only under risk factor two, for contact under clothing, illustrates his continuing failure to accept responsibility for his conduct.

Defendant further contends that the court erred in assessing

points against him under risk factor 14, for his supervision following release from prison, based on the statement in the presentence report that defendant could benefit from sex offender and mental health counseling. We reject that contention. There is no evidence in the record demonstrating that the sentencing court ordered specialized supervision when imposing the sentence of probation and, at the time the court made the SORA determination, defendant was no longer under any supervision (*see generally People v Leeks*, 43 AD3d 1251).

Finally, defendant failed to preserve for our review his contention that the application of SORA to him 12 years after his conviction was penal in nature and violated his double jeopardy rights (*see generally People v McElhearn*, 56 AD3d 978, 978-979, *lv denied* 13 NY3d 706; *People v McLean*, 55 AD3d 973). In any event, that contention lacks merit inasmuch as SORA proceedings are not penal in nature, and thus they are not subject to the prohibition against double jeopardy (*see generally People v Szwalla*, 61 AD3d 1290).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1057**

**KA 09-00601**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEE O. MAY, DEFENDANT-APPELLANT.

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GAIL R. BREEN, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 23, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court's upward departure from his presumptive classification as a level two risk is not supported by clear and convincing evidence. We reject that contention (*see People v Gandy*, 35 AD3d 1163; *People v Seils*, 28 AD3d 1158, *lv denied* 7 NY3d 709). "A court may make an upward departure from a presumptive risk level when, 'after consideration of the indicated factors . . .[,] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines' " (*People v Cruz*, 28 AD3d 819, 819; *see People v Foley*, 35 AD3d 1240). Here, there is clear and convincing evidence that, over a three- to four-month period, defendant committed numerous sexual offenses against his stepdaughter, who was eight years old when the abuse began. In addition, defendant began abusing his stepdaughter within six months of his release from probation for a prior conviction arising from his sexual abuse of two female cousins, who were eight and nine years old at the time of the abuse. We conclude that both the ages of the victims and the gross abuse by defendant of the familial relationship that he had with those young children constituted proper aggravating factors not otherwise taken into account by the risk assessment guidelines (*see People v Hill*, 50 AD3d 990, *lv denied* 11 NY3d 701; *People v Ferrer*, 35 AD3d 297, *lv denied* 8

NY3d 807).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1058**

**KA 09-00496**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ORLANDO VICENS, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered February 3, 2009. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act following a redetermination hearing.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1059**

**KA 09-00720**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARRY OWENS, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered February 23, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [ii]). Defendant contends that County Court erred in sentencing him as a second felony offender because he had not previously been convicted of a felony pursuant to Penal Law § 70.06 (a). We agree. We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1060**

**KA 09-02414**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER VAILLANT, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JESSAMINE I. JACKSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 22, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 460.50 (5).

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of stolen property in the fifth degree (Penal Law § 165.40), defendant contends that Supreme Court erred in imposing an enhanced sentence without affording him an opportunity to withdraw his plea. That contention is not preserved for our review because defendant did not object to the enhanced sentence, nor did he move to withdraw the plea or to vacate the judgment of conviction (*see People v Fortner*, 23 AD3d 1058; *People v Sundown*, 305 AD2d 1075). In any event, that contention lacks merit. "When a defendant violates a condition of the plea agreement, the court is no longer bound by the agreement and is free to impose a greater sentence without offering [the] defendant an opportunity to withdraw his [or her] plea" (*People v Santiago*, 269 AD2d 770, 770; *see People v Figgins*, 87 NY2d 840, 841; *People v Cato*, 226 AD2d 1066, *lv denied* 88 NY2d 877). The court's "review of the presentence report provided a sufficient basis for the court to depart from the original sentencing promise" (*People v Barahona*, 51 AD3d 682), and we conclude that the court did not abuse its discretion in imposing an enhanced sentence (*see People v Bush*, 30 AD3d 1078, *lv denied* 7 NY3d 785).

Defendant also failed to preserve for our review his contention that the court abused its discretion in denying his request for youthful offender status (*see People v Fields*, 38 AD3d 1269, *lv denied*

8 NY3d 984; *People v Waleski*, 28 AD3d 1159). In any event, that contention lacks merit (*see People v Washpun*, 41 AD3d 1233, *lv denied* 9 NY3d 883; *People v Potter*, 13 AD3d 1191, *lv denied* 4 NY3d 889). Finally, the sentence is not unduly harsh or severe.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1061**

**CA 10-00206**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF THE PETITION OF LAWRENCE J. MATTAR, FOR AN ORDER AUTHORIZING THE SALE OF CERTAIN REAL PROPERTY BELONGING TO AIDA C., AN INCAPACITATED PERSON, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROSANNA E. HECKL, OLIVIA J. COREY, CHRISTOPHER M. COREY, AND THOMAS J. COREY, RESPONDENTS-APPELLANTS.

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LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (JONATHAN SCHAPP OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered April 13, 2009. The order, inter alia, granted the petition and approved the sale of certain real property.

It is hereby ORDERED that said appeal is unanimously dismissed with costs.

Memorandum: Respondents, the children of Aida C., an incapacitated person (hereafter, IP) (*Matter of Aida C.*, 66 AD3d 1344), appeal from an order that, inter alia, granted the petition of the guardian of the IP's property seeking to sell certain real property pursuant to Mental Hygiene Law § 81.21 (b). Respondents contend that Supreme Court erred in failing to set forth its reasons for granting the petition as required by section 81.21 (e), and they seek to have the contract of sale rescinded. The sale of the property in question to a third party closed more than one year before respondents perfected their appeal. " '[U]nder the well-established doctrine of merger, provisions in a contract for the sale of real estate merge into the deed and are thereby extinguished absent the parties' demonstrated intent that a provision shall survive transfer of title' " (*Arnold v Wilkins*, 61 AD3d 1236, 1236). Thus, the contract provisions have merged into the deed, and the contract may not be rescinded. Where, as here, "the rights of the parties cannot be affected by the determination of [the] appeal," the appeal must be

dismissed as moot (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1063**

**TP 10-00736**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF HELEN PETERSON, PETITIONER,

V MEMORANDUM AND ORDER

RICHARD F. DAINES, M.D., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, DAVID SUTKOWY, COMMISSIONER, ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, AND ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

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KOWALCZYK, TOLLES, DEERY & HILTON, LLP, UTICA (ROBERT K. HILTON, III, OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT RICHARD F. DAINES, M.D., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Anthony J. Paris, J.], entered March 29, 2010) to review a determination of respondents. The determination found that petitioner is not entitled to Medicaid for nursing facility services.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that she was not Medicaid-eligible for nursing facility services for a period of 13.643 months on the ground that she had made uncompensated transfers of assets during the "look-back" period (*see* 42 USC § 1396p [c] [1] [B]; Social Services Law § 366 [5] [a], [e] [1] [vi]). The determination of respondent Onondaga County Department of Social Services (DSS) that petitioner was not eligible for those services because she transferred assets for less than fair market value was affirmed by respondent Richard F. Daines, M.D., Commissioner, New York State Department of Health (DOH). The DOH concluded, however, that the penalty period of 13.643 months was incorrect and directed DSS to recalculate and modify the penalty period based upon the proven value of the uncompensated transfers.

In March 2006, petitioner transferred ownership of her home on Hills Street in Chittenango to her daughter, retaining a life estate in the property. In June 2007, petitioner transferred $20,000 to her

daughter for the purpose of repairs to the Hills Street home and the purchase of an automobile. Petitioner's daughter purchased a home on Manor Drive in East Syracuse and thereafter sold the Hills Street property for $53,000. Petitioner did not receive any compensation for the value of her life estate. On October 31, 2007, approximately one week prior to petitioner's permanent admission to the nursing home, she transferred $12,830 in cash to her daughter for "unknown reasons." In January 2008, petitioner applied for Medicaid, and DSS initially assessed a penalty period of 15.15 months, finding uncompensated transfers of assets totaling $101,461.19. In February 2008, a "corrective deed" was filed for the Manor Drive property, adding petitioner as a joint tenant with the right of survivorship.

Petitioner requested a fair hearing and, following a stipulated reduction in the amount of the penalty period to 13.643 months, the Administrative Law Judge (ALJ) upheld the determination of DSS that both transfers related to the Hills Street property, the $12,830 cash transfer, and certain monies expended for snowplowing services, constituted uncompensated transfers for purposes of determining her Medicaid eligibility. The ALJ concluded, however, that petitioner's residence was not sold for less than fair market value, and it directed DSS to recalculate the penalty period based on the value of the uncompensated transfers, using the Hills Street property sale price of $53,000.

We note at the outset that petitioner does not challenge the ALJ's determination that the funds used for snowplowing or the transfer of $12,830 in cash were uncompensated transfers, and we therefore deem abandoned any issues with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

When "reviewing a Medicaid eligibility determination made after a fair hearing, 'the court must review the record, as a whole, to determine if the agency's decisions are supported by substantial evidence and are not affected by an error of law' " (*Matter of Barbato v New York State Dept. of Health*, 65 AD3d 821, 822-823, *lv denied* 13 NY3d 712). Substantial evidence is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see Matter of Lundy v City of Oswego*, 59 AD3d 954). "The petitioner bears the burden of demonstrating eligibility" (*Matter of Gabrynowicz v New York State Dept. of Health*, 37 AD3d 464, 465), and the agency's determination should be upheld when it is "premised upon a reasonable interpretation of the relevant statutory provisions and is consistent with the underlying policy of the Medicaid statute" (*Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 658).

We conclude that the determination of DSS that the Hills Street property transfers were uncompensated was supported by substantial evidence and was not affected by an error of law. The record establishes that petitioner transferred ownership of the Hills Street property to her daughter at a time when her health was deteriorating.

Although petitioner retained a life estate in the property, she did not receive any compensation for the value of that life estate when the property was sold. We further conclude that the ALJ properly determined that the uncompensated transfers were not cured by the subsequent addition of petitioner as a joint tenant on the Manor Drive property. Pursuant to New York State Department of Social Services Administrative Directive 96 ADM-8, "transferred assets shall be considered to be returned if the person to whom they were transferred[] uses them to pay for nursing facility services for the [Medical Assistance] applicant/recipient[] or provides the [Medical Assistance] applicant/recipient with an equivalent amount of cash or other liquid assets." Contrary to the contention of petitioner, Administrative Directive 96 ADM-8 is based on a rational interpretation of the Medicaid statute that is consistent with the underlying policies of the Medicaid program. Here, neither the Manor Drive property nor petitioner's interest as a joint tenant in that property have been sold. Inasmuch as the nursing facility in which petitioner resides has not been paid and her daughter has not provided her with cash or other liquid assets, it cannot be said that the transferred assets have been returned. We further note that, pursuant to the terms of the joint tenancy, petitioner will acquire the right to the entire estate only if she survives her daughter. Given that contingency, petitioner derived no direct benefit from the tenancy at the time it was created (*see Matter of Williams v Weiner*, 42 AD3d 901, 902-903).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1064**

**TP 10-00459**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF PHILLIP DRURY, PETITIONER,

V MEMORANDUM AND ORDER

VILLAGE OF NORTH SYRACUSE AND JOHN HEINDORF,
MAYOR OF VILLAGE OF NORTH SYRACUSE, RESPONDENTS.

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D. JEFFREY GOSCH, SYRACUSE, FOR PETITIONER.

THE WLADIS LAW FIRM, P.C., SYRACUSE (HEATHER M. COLE OF COUNSEL), FOR RESPONDENTS.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Brian F. DeJoseph, J.], entered February 17, 2010) to review a determination of respondents. The determination terminated petitioner's employment.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating his employment as Code Enforcement Officer and Fire Marshall of respondent Village of North Syracuse following a hearing pursuant to Civil Service Law § 75. We conclude that the determination is supported by substantial evidence, i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see* CPLR 7803 [4]; *see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231). We further conclude that, under the circumstances of this case, the penalty of termination of employment does not constitute an abuse of discretion as a matter of law because it is not " 'so disproportionate to the offense as to be shocking to one's sense of fairness' " (*Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854; *see Matter of Smeraldo v Rater*, 55 AD3d 1298, 1299).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1065**

**TP 10-00363**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF PHYLLIS G. OGDEN, PETITIONER,

V ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
COUNTY OF ONONDAGA, RESPONDENTS.

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JASON A. RICHMAN, BLOOMFIELD, FOR PETITIONER.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MICHAEL J. GAUZZA OF COUNSEL), FOR RESPONDENT COUNTY OF ONONDAGA.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Deborah H. Karalunas, J.], entered February 10, 2010) to review a determination of respondent New York State Division of Human Rights. The determination dismissed the complaint of retaliatory discriminatory practices related to employment.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed for reasons stated in the decision of respondent New York State Division of Human Rights.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1069**

**CA 10-00651**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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DONALD LEONE AND LORI LEONE,
PLAINTIFFS-RESPONDENTS,

V ORDER

DAVID BRASON AND JESSICA BRASON,
DEFENDANTS-APPELLANTS.

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DAVID BRASON, DEFENDANT-APPELLANT PRO SE.

JESSICA BRASON, DEFENDANT-APPELLANT PRO SE.

LAW OFFICE OF RICHARD C. SLISZ, BUFFALO (RICHARD C. SLISZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Erie County Court (Thomas P. Franczyk, J.), entered October 23, 2009. The order modified a judgment of Buffalo City Court (Daniel Grasso, J.), entered May 29, 2009 in favor of plaintiffs in a small claims action.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1072**

**CA 10-00227**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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GAETANO J. POLIZZI, DDS, DOING BUSINESS AS
ALLBRITE DENTAL, PLLC, PLAINTIFF-RESPONDENT,

V ORDER

ANTHONY J. IPPOLITO, MS, DDS,
DEFENDANT-APPELLANT.

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KEENAN LAW CENTRE, P.C., HAMBURG (JOHN J. KEENAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FLAHERTY & SHEA, BUFFALO (MICHAEL J. FLAHERTY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered May 6, 2009. The order granted the motion of plaintiff to enforce a stipulated settlement.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1073**

**CA 09-01685**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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WINDSONG LANE FARMS, PLAINTIFF-APPELLANT,

V ORDER

TELMARK, LLC AND RONALD J. POPE,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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HISCOCK & BARCLAY, LLP, SYRACUSE (ELLEN K. EAGEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Jefferson County (Joseph D. McGuire, J.), entered July 13, 2009. The order, inter alia, denied the motion of plaintiff to set aside the verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1074**

**CA 09-01972**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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WINDSONG LANE FARMS,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

TELMARK, LLC, WELLS FARGO FINANCIAL LEASING, INC. AND RONALD J. POPE,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

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HISCOCK & BARCLAY, LLP, SYRACUSE (ELLEN K. EAGEN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

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Appeal and cross appeal from a judgment of the Supreme Court, Jefferson County (Joseph D. McGuire, J.), entered August 27, 2009. The judgment, inter alia, found for plaintiff on its third cause of action and awarded no damages.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, defendants' allegedly negligent misrepresentations with respect to several lease agreements entered into between plaintiff and defendant Telmark, LLC (Telmark). Plaintiff leased three buildings and a manure spreader from Telmark, which expended $1.9 million for the construction of the buildings and the equipment. Plaintiff paid $693,907 in monthly lease payments before the leases were bought out by plaintiff and a third party. Supreme Court denied defendants' motion for summary judgment dismissing the complaint and plaintiff's cross motion for partial summary judgment on six causes of action. A jury trial was conducted, and the court granted those parts of defendants' motion for a trial order of dismissal with respect to the three fraud causes of action, the cause of action alleging a violation of General Business Law § 349 and the claim for punitive damages. The remaining causes of action were for negligent misrepresentation, breach of fiduciary duty, unjust enrichment and constructive trust, and the court submitted the two equitable causes of action to the jury for an advisory determination (*see* CPLR 4212). The jury found that defendants were liable for negligent misrepresentation and apportioned 30% of the fault to them and 70% to plaintiff. In response to the

question asking the jury to "[s]tate separately the amount of damages, if any, awarded to [p]laintiff for [d]efendants' negligent misrepresentation," the jury indicated, "None." The advisory jury found that defendants were not unjustly enriched but that plaintiff was entitled to a constructive trust "over any money received by [d]efendants in connection with the financing between [plaintiff] and Telmark . . . ."

Plaintiff subsequently moved, inter alia, to "amend" or to set aside the verdict or for a new trial pursuant to CPLR 4404 based upon juror confusion inasmuch as the affidavits of all six jurors obtained after the trial indicated that they were confused by the question on the verdict sheet that asked them to "[s]tate separately" the amount of damages. According to the juror affidavits, the jury intended to award plaintiff 30% of $693,907, which was the amount plaintiff paid in monthly lease payments before the leases were bought out. Plaintiff also moved for a new trial on the ground that the court erred in charging the jury on comparative fault with respect to the negligent misrepresentation cause of action.

We conclude that the court properly charged the jury with respect to comparative fault of plaintiff's principals in relying upon representations made by defendant Ronald J. Pope and thus that the court properly denied plaintiff's post-trial motion on that ground. "[T]he determination . . . whether defendant[s], by negligent misrepresentation, breached a duty to plaintiff and proximately caused the injury turns on the reasonableness of [the] parties' conduct. Defendant[s] must have imparted the information under circumstances and in such a way that it would be reasonable to believe plaintiff would rely upon it; plaintiff must rely upon it in the reasonable belief that such reliance is warranted" (*Heard v City of New York*, 82 NY2d 66, 75, *rearg denied* 82 NY2d 889). Here, the court properly determined that the charge was warranted inasmuch as the evidence established that plaintiff's principals signed the lease agreements without reading them and that the financial institution with which plaintiff had a long-term relationship had advised against an extensive expansion project.

Even assuming, arguendo, that the court erred in refusing to consider the juror affidavits, we nevertheless conclude that plaintiff is not entitled to a new trial on damages inasmuch as plaintiff failed to establish that it was damaged by defendant's negligent representation, and thus the award of zero damages is not against the weight of the evidence. The court charged the jury that, if it determined that "[p]laintiff is entitled to recover from the [d]efendants, [it] must render a verdict for the actual pecuniary loss sustained as a result of a wrong. [That] must be the difference between the value of what [p]laintiff parted with and the value of what [p]laintiff received" (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421). Thus, plaintiff's alleged damages would be the difference between the amount that it paid for the leases, i.e., $693,907, and the value that it received from the leases, e.g., the value of the use of the buildings and equipment and the tax benefits of the lease. Plaintiff's expert testified only with respect to the

valuation that he prepared before plaintiff entered into the leases, which determined the value of the farm before and after the expansion, and he did not testify with respect to the value of the leases themselves. Thus, plaintiff failed to establish that its payments on those leases exceeded their actual value.

We have reviewed the remaining contentions of plaintiff on its appeal and the contentions of defendants on their cross appeal and conclude that they are without merit.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1075**

**CA 09-01973**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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WINDSONG LANE FARMS, PLAINTIFF-RESPONDENT,

V ORDER

TELMARK, LLC, WELLS FARGO FINANCIAL LEASING, INC. AND RONALD J. POPE, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

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MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (ELLEN K. EAGEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Jefferson County (Joseph D. McGuire, J.), entered September 26, 2007. The order, insofar as appealed from, denied the motion of defendants for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1076**

**CA 09-01908**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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JAN EBERLE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS F. HUGHES, III, M.D., ET AL., DEFENDANTS,
RITE AID OF NEW YORK, INC. AND THOMAS SIEJKA,
DEFENDANTS-APPELLANTS.

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FELDMAN KIEFFER, LLP, BUFFALO (CHRISTOPHER E. WILKINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ROBERT B. NICHOLS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 9, 2009. The order denied the motion of defendants Rite Aid of New York, Inc. and Thomas Siejka for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action against, inter alia, Rite Aid of New York, Inc. (Rite Aid), a pharmacy, and pharmacist Thomas Siejka (hereafter, defendants) alleging that they were negligent in dispensing a certain medication to plaintiff and in advising her about the medication. In her bill of particulars and amended bill of particulars, plaintiff further alleged that defendants were negligent in, inter alia, failing to take into account plaintiff's medical history; failing to adhere to pharmaceutical recommendations regarding the drug, including contraindications and warnings; failing to contact plaintiff's treating physician regarding medication contraindications; and failing to offer suggestions for pharmaceutical substitutes to plaintiff's physician.

Supreme Court properly denied the motion of defendants for summary judgment seeking dismissal of the complaint against them. "The standard of care which is imposed on a pharmacist is generally described as ordinary care in the conduct of his [or her] business. The rule of ordinary care as applied to the business of a druggist means the highest practicable degree of prudence, thoughtfulness and vigilance commensurate with the dangers involved and the consequences which may attend inattention" (*Hand v Krakowski*, 89 AD2d 650, 651; *see Willson v Faxon, Williams & Faxon*, 208 NY 108, 114). In support of

their motion, defendants submitted the deposition testimony of plaintiff in which she stated that she filled a prescription for Clindamycin at Rite Aid but that, before taking the medication, she returned to Rite Aid to speak to a pharmacist because she was concerned about warnings for the drug listed in the patient information sheet. The record establishes that, in particular, the patient information sheet included the warning that a person with a history of ulcerative colitis should notify his or her physician or pharmacist before taking the medication, and plaintiff had such a history. Plaintiff testified that defendant pharmacist told her that the warnings on the patient information sheet were applicable to extreme cases and that she should not be "paranoid" and should take the medication. We conclude under the circumstances of this case that a trier of fact could determine that defendants thereby breached their duty of ordinary care (*see Hand*, 89 AD2d at 651; *see also Raynor v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 12 AD3d 298). Because defendants failed to meet their initial burden on their motion, we do not consider their contentions concerning plaintiff's opposing papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1078**

**CA 10-00770**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF MICHAEL J. CRAVATTA AND CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF TRANSPORTATION, AND ASTRID C. GLYNN, AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF TRANSPORTATION, RESPONDENTS-APPELLANTS.

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ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered May 15, 2009 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted in part the petition.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs and the petition is dismissed in its entirety.

Memorandum: Supreme Court erred in granting in part the petition seeking to annul the determination terminating petitioner Michael J. Cravatta from the position of Highway Maintenance Worker 2 by reinstating Cravatta to that position for the period of August 16, 2008 until September 22, 2008. As a condition of his employment, Cravatta was required to maintain a New York State Class B Commercial Driver License (CDL). Cravatta was properly terminated after his CDL was suspended because he lacked one of the credentials required for his position. Cravatta's termination was not disciplinary in nature and thus was subject to neither the arbitration clause in the collective bargaining agreement nor the provisions of Civil Service Law § 75 (*see Matter of New York State Off. of Children & Family Servs. v Lanterman*, 14 NY3d 275, 280-282; *Matter of Felix v New York City Dept. of Citywide Admin. Servs.*, 3 NY3d 498, 505-506).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1079.1**

**CA 10-00776**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL FLAGG, RESPONDENT-RESPONDENT.

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ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR PETITIONER-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (LISA L. PAINE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered April 2, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order directed that respondent be released from detention at the Onondaga County Correctional Facility under the oversight of the New York State Division of Parole.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the petitions are granted to the extent that they seek a determination that respondent is a dangerous sex offender requiring confinement and an order for confinement pursuant to Mental Hygiene Law § 10.11 (d).

Memorandum: On a prior appeal, we affirmed an order determining that respondent is a detained sex offender who suffers from a mental abnormality pursuant to Mental Hygiene Law article 10 (*see* § 10.06 [k]; § 10.07 [a]), but that he was not a dangerous sex offender requiring confinement (*Matter of State of New York v Flagg* [appeal No. 1], 71 AD3d 1528; *see* § 10.07 [f]). Also on a prior appeal, we modified an order discharging respondent to a regimen of strict and intensive supervision ([SIST] § 10.11), adding certain conditions to the SIST regimen (*Matter of State of New York v Flagg* [appeal No. 2], 71 AD3d 1528). While those appeals were pending, petitioner filed several petitions alleging that respondent had violated the conditions and terms of his SIST regimen. Following hearings on the petitions seeking, inter alia, a determination that respondent is a dangerous sex offender requiring confinement (*see* § 10.11 [d] [2], [4]; *see also* § 10.07 [f]), Supreme Court denied the petitions and released respondent pursuant to the prior order, as modified on appeal (*Flagg* [appeal No. 2], 71 AD3d 1528), imposing a regimen of SIST. We agree with petitioner that the court erred in doing so inasmuch as

petitioner established by clear and convincing evidence that respondent is a dangerous sex offender requiring confinement (*see* § 10.11 [d] [4]). We therefore conclude that the regimen of SIST should be revoked and that respondent should be confined.

Pursuant to Mental Hygiene Law § 10.11 (d) (1), a regimen of SIST may be revoked if a person violates a condition of that regimen. Where, as here, the petitioner seeks to confine the respondent based on violations of his or her SIST regimen (§ 10.11 [d] [2]), the court must conduct a hearing at which the petitioner has the burden of establishing by clear and convincing evidence that the respondent is a dangerous sex offender requiring confinement (*see* § 10.11 [d] [4]). The court's determination is made pursuant to the standards set forth in section 10.07 (f) for the initial determination whether a respondent is a dangerous sex offender requiring confinement (*see* § 10.11 [d] [4]).

"No dispute exists that respondent is a sex offender requiring civil management as previously determined by [the c]ourt . . ., or that [his] conduct . . . involved violations of his SIST program, authorizing petitioner to seek confinement" (*Matter of State of New York v Donald N.*, 63 AD3d 1391, 1392). The record establishes that respondent consumed alcohol or drugs on at least four occasions; refused to sign necessary releases of personal information; failed to follow the directions of his parole officer; was arrested for promoting prison contraband and for failing to register his internet service as required by the Sex Offender Registration Act (Correction Law § 168 *et seq.*); had pornographic images on the computer he was known to use; and was discharged multiple times from sex offender treatment. Based on the fact that respondent continued to engage in high risk behavior and failed to complete any treatment, petitioner's psychiatric expert concluded that respondent posed a high risk for sexual recidivism and that he was a dangerous sex offender requiring confinement.

Although respondent did not engage in any sexually inappropriate conduct when he violated the conditions of his SIST regimen, we conclude that the evidence presented at the hearings established that respondent could not "be adequately controlled by modifying the conditions of [that] regimen" (*Donald N.*, 63 AD3d at 1393; *see* Mental Hygiene Law § 10.11 [d] [4]). Despite the fact that alcohol and pornography were identified as triggers for respondent's prior sexual offenses, respondent continued to consume alcohol and to view pornography on a regular basis. "Thus, although respondent's SIST violations were not sexual in nature, they remain highly relevant regarding the level of danger that respondent poses to the community with respect to his risk of recidivism" (*Donald N.*, 63 AD3d at 1394). Further, respondent's "blatant disregard for [the] parole officer's authority and advice seriously undermines [the] contention[] [of respondent] that more intense SIST monitoring . . . would be sufficient to control his behavior" (*id.*).

Based on our determination, we see no need to address

petitioner's remaining contention.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1079**

**CA 10-00094**

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF THE ARBITRATION BETWEEN
NEW YORK STATE NURSES ASSOCIATION, INC.,
PETITIONER-RESPONDENT,

ORDER

AND

COUNTY OF ERIE, RESPONDENT-APPELLANT.

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CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (BRIAN R. LIEBENOW OF COUNSEL), FOR RESPONDENT-APPELLANT.

SPIVAK LIPTON LLP, NEW YORK CITY (DENIS P. DUFFEY, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered June 29, 2009 in a proceeding pursuant to CPLR article 75. The judgment, among other things, granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1080**

**KA 09-01502**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE R. TRACY, DEFENDANT-APPELLANT.

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 12, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree, petit larceny and criminal mischief in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the third degree (Penal Law § 140.20), petit larceny (§ 155.25) and criminal mischief in the fourth degree (§ 145.00 [1]). We reject the contention of defendant that he was denied effective assistance of counsel. Contrary to the contention of defendant, defense counsel did not make any statements to County Court that were against defendant's interests and thus did not place himself in an adverse position to that of defendant (*see People v Coleman*, 294 AD2d 843). Also contrary to the contention of defendant, he was not denied effective assistance of counsel by defense counsel's incorrect citation to CPL 440.10 rather than CPL 220.60 (3) in support of defendant's motion to withdraw the plea. The incorrect statutory reference is of no moment inasmuch as the record establishes that the court decided the motion on its merits (*see generally People v Baldi*, 54 NY2d 137, 147). Further, the court did not abuse its discretion in denying defendant's motion to vacate the plea (*see generally People v Dozier*, 74 AD3d 1808). Finally, we reject defendant's challenge to the severity of the sentence.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1081**

**KA 09-00349**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES WATKINS, DEFENDANT-APPELLANT.

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SIMONE M. SHAHEEN, UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered January 5, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a guilty plea, of robbery in the first degree (Penal Law § 160.15 [3]). Although the contention of defendant that his plea was not knowing, intelligent, or voluntary survives his waiver of the right to appeal, "defendant failed to preserve that contention for our review because . . . he failed to move to withdraw the plea or to vacate the judgment of conviction" (*People v Connolly*, 70 AD3d 1510, 1511, *lv denied* 14 NY3d 886). In any event, defendant's contention lacks merit. During the plea colloquy, defendant denied having any mental or physical impairments, and the record establishes that defendant understood the nature and consequences of his actions (*see id.*; *People v Sonberg*, 61 AD3d 1350, *lv denied* 13 NY3d 800). Similarly, the record establishes that defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256).

We reject the further contention of defendant that County Court erred in failing to rule on his pro se motion for substitution of counsel or to engage in further inquiry into the nature of his dispute with his attorney. Although the court should have expressly denied defendant's motion on the record, we conclude that the record is sufficient to establish conclusively that the motion was implicitly denied. With respect to defendant's contention that the court should have engaged in further inquiry into the nature of the dispute between defendant and his attorney, we conclude that defendant's conclusory assertion that defense counsel was not "sufficiently do[ing] his job"

failed to "suggest a serious possibility of good cause for substitution [of counsel]" (*People v Randle* [appeal No. 2], 21 AD3d 1341, 1341 [internal quotation marks omitted], *lv denied* 6 NY3d 757; *see People v Linares*, 2 NY3d 507, 511; *People v Frayer*, 215 AD2d 862, 863, *lv denied* 86 NY2d 794).

The contention of defendant that he was denied his right to testify before the grand jury "is 'foreclosed by defendant's valid waiver of the right to appeal as well as by defendant's plea of guilty' " (*People v Frazier*, 63 AD3d 1633, 1633, *lv denied* 12 NY3d 925). In addition, defendant's conclusory allegations that the grand jury was improperly constituted are insufficient to raise a due process claim because defendant offered no evidence that the Oneida County Court systematically engaged in discriminatory practices during the selection of grand juries (*see People v Vasquez*, 61 AD3d 1109, 1111; *People v McFadden*, 244 AD2d 887, 889). To the extent that the contention of defendant that he did not receive effective assistance of counsel survives his plea of guilty and valid waiver of the right to appeal (*see People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912), we conclude that it is lacking in merit. Defense counsel secured a plea offer that included a sentence that was at the lower end of the sentencing guidelines, and "nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404). Although defendant further contends that he was denied effective assistance of counsel based on defense counsel's failure to investigate further both into defendant's mental state and the constitutionality of defendant's predicate felony conviction, we note that defendant has provided no indication that any such investigation would have produced a successful result, and "[i]t is well established that [t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to make a motion or argument that has little or no chance of success" (*People v Washington*, 39 AD3d 1228, 1230, *lv denied* 9 NY3d 870 [internal quotation marks omitted]).

The request by defendant that we exercise our "interest-of-justice authority" to reduce his sentence is foreclosed by his waiver of the right to appeal (*Lopez*, 6 NY3d at 256). We reject defendant's request for a reduction in mandatory surcharges, crime victim assistance fees, and DNA databank fees. We agree with defendant that the court erred in stating during the plea colloquy that it would impose fees in the amount of $320 rather than in the amount of $375 (*see* Penal Law § 60.35 [1] [a] [i], [v]; Executive Law § 995). Nevertheless, the Court of Appeals has made clear that such fees are not "components of a defendant's sentence" (*People v Hoti*, 12 NY3d 742, 743), and we thus conclude that the court's imposition of the correct amount of fees at the time of sentencing rectified the court's erroneous statement during the plea colloquy.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1082**

**KA 09-00698**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PATRICK MEDLER, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered January 12, 2009. The judgment convicted defendant, after a nonjury trial, of failure to register change of address.

Now, upon reading and filing the authorization to discontinue appeal sworn to by defendant on May 18, 2010, and the stipulation of discontinuance signed by the attorneys for the parties on May 26, 2010,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1083**

**CAF 09-01914**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF MICHELE S. CHILBERT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ARCANGEL L. SOLER, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-APPELLANT.

ALEXANDRA BURKETT, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

VICTORIA L. KING, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR ABIGAIL S.

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Appeal from an order of the Family Court, Ontario County (Maurice E. Strobridge, J.H.O.), entered August 12, 2009 in a proceeding pursuant to Family Court Act article 6. The order awarded petitioner sole custody of the parties' child, with supervised visitation with respondent.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In appeal No. 1, respondent father appeals from an order awarding petitioner mother sole custody of the parties' child, with supervised visitation with the father. In making an initial custody determination, "Family Court was required to consider the best interests of the child by reviewing such factors as 'maintaining stability for the child, . . . the home environment with each parent, each parent's past performance, relative fitness, ability to guide and provide for the child's overall well-being, and the willingness of each parent to foster a relationship with the other parent' " (*Kaczor v Kaczor*, 12 AD3d 956, 958). Contrary to the contention of the father, those factors weigh heavily in the mother's favor, and the court's determination that the child's best interests will be served by an award of sole custody to the mother has a sound and substantial basis in the record (*see Matter of Shaw v Antes*, 274 AD2d 679, 680-681; *see also Matter of Tompkins v Holmes*, 27 AD3d 846, 847). The further determination "whether visitation should be supervised is a matter 'left to Family Court's sound discretion and it will not be disturbed as long as there is a sound and substantial basis in the record to support it' " (*Matter of Taylor v Fry*, 47 AD3d 1130, 1131). Here, the record establishes that the father committed acts of domestic violence against the mother, often in the child's presence,

and that he threatened to kill the mother and leave with the child. In addition, the conduct of the father during the hearing demonstrated his inability to control his behavior (*see Matter of Simpson v Simrell*, 296 AD2d 621). Thus, "[a]lthough there is no direct evidence that [the father] had ever directed his anger at his daughter or had harmed her in any way . . ., his inability to control his anger in the presence of his daughter is detrimental to the child's best interest[s] . . .[, and] the record provides no basis to disturb Family Court's conclusion that limiting [the father] to supervised visitation was in the child's best interest[s]" (*id.* at 621-622).

In appeal No. 2, the father appeals from an amended order of protection pursuant to Family Court Act article 8, entered upon the court's determination following a fact-finding hearing that he committed the family offense of harassment in the second degree (*see* § 832; Penal Law § 240.26 [1], [3]). The record does not support the father's contention that the court based its determination on facts not alleged in the family offense petition (*cf. Matter of Felicia W. v Chandler C.*, 9 AD3d 830). Rather, a fair preponderance of the credible evidence supports the court's determination sustaining the allegations of the petition that the father committed acts constituting the family offense of harassment in the second degree and warranting the issuance of an order of protection (*see Matter of Kaur v Singh*, 73 AD3d 1178).

We reject the further contention of the father in appeal No. 2 that he received ineffective assistance of counsel at the fact-finding hearing on the family offense petition. " 'It is not the role of this Court to second-guess the attorney's tactics or trial strategy' . . . and, based on our review of the record, we conclude that the [father] received meaningful representation" (*Matter of Derrick C.*, 52 AD3d 1325, 1326, *lv denied* 11 NY3d 705; *see Matter of Nagi T. v Magdia T.*, 48 AD3d 1061).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1084**

**CAF 09-02613**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF BRIAN MILLER,
PETITIONER-APPELLANT,

V ORDER

JENNIFER MILLER, ALSO KNOWN AS JENNIFER
SCHLAFFER, RESPONDENT-RESPONDENT.

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JERI N. WRIGHT, GRAND ISLAND, FOR PETITIONER-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (JAMES A. VALENTI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.), entered March 24, 2009 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objections of petitioner to the order of the Support Magistrate and confirmed that order.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1085**

**CAF 09-01777**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF JUSTYCE M. AND AAHMYL E.

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MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

SHAVON E., RESPONDENT-RESPONDENT.

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WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (ALECIA J. SPANO OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET SOMES OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered August 3, 2009 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, dismissed the petition.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law and facts without costs, the petition is granted insofar as it alleges that Justyce M. is a neglected child as defined in Family Court Act § 1012 (f) (i) (B), and the matter is remitted to Family Court, Monroe County, for a dispositional hearing.

Memorandum: Petitioner appeals from an order in this neglect proceeding against respondent mother that dismissed the petition following a fact-finding hearing. Petitioner alleged therein that, inter alia, the mother had neglected her two children by once using excessive corporal punishment against Justyce M. and by failing to provide adequate supervision for the children. On appeal, petitioner contends only that Family Court erred in dismissing the petition with respect to Justyce M. (hereafter, child), and we therefore do not address the court's dismissal of the petition with respect to the derivative neglect of the child's sibling.

" 'Notwithstanding the deference we must accord to the court's findings' " (*Matter of Breanna R.*, 61 AD3d 1338, 1340), we conclude that petitioner met its burden of establishing by a preponderance of the evidence that the mother neglected the child (*see* Family Ct Act § 1046 [b] [i]). Although the court found that the mother struck the child on her buttocks, the court further found that the mother thereby "accidentally struck [the child] in the face." We find, however, that the evidence presented by petitioner at the hearing established otherwise. Petitioner presented evidence establishing that the mother

admitted to a Rochester police officer that she had hit the six-year-old child in the face with a belt after the child failed to watch her younger brother. The child corroborated that admission by informing a caseworker for petitioner that the mother had hit her in the face with a belt, and the child further informed the caseworker that the mother had thrown a toy at her that struck her lips. The caseworker observed that the child's cheek had a small cut and was red, and that there was a cut just above her lips. When the caseworker made an unannounced visit to the mother's house later that same day, the mother informed the caseworker through a screen door that she "whooped" the child with belts because she had not picked up some clothes. In addition, the mother refused to refrain from "whooping" the child, and the mother implied in a statement to the caseworker that she had removed the child from school at noon after the child lost her car keys but that she did not physically hurt the child because she knew that the caseworker would be visiting the home. Based on that evidence, we conclude that the mother neglected the child by inflicting excessive corporal punishment (*see* § 1012 [f] [i] [B]; *see generally Matter of Jazmyn R.*, 67 AD3d 495; *Matter of Alysha M.*, 24 AD3d 255, *lv denied* 6 NY3d 709). "Indeed, this Court has stated that 'a single incident of excessive corporal punishment is sufficient to support a finding of neglect' " (*Matter of Dustin B.*, 71 AD3d 1426, 1426).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1086**

**CAF 08-02490**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF AARON S. SLADE,
PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

V

TONYA S. HOSACK, RESPONDENT-APPELLANT.

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NATHANIEL L. BARONE, II, JAMESTOWN, FOR RESPONDENT-APPELLANT.

SAMUEL A. DISPENZA, JR., EAST ROCHESTER (TERRENCE G. BARKER OF COUNSEL), FOR PETITIONER-RESPONDENT.

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILD, FREDONIA, FOR XANDER K.S.

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Appeal from an order of the Family Court, Cattaraugus County (Paul B. Kelly, J.H.O.), entered November 17, 2008 in a proceeding pursuant to Family Court Act article 6. The order granted the parties joint child custody.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent mother appeals from an order that, inter alia, denied her cross petition seeking primary physical custody of the parties' child and continued the existing award of primary physical custody with petitioner father. That arrangement had been in place for over a year prior to the instant proceeding. It is well settled that a prior custody award arrangement "should be changed based only upon countervailing circumstances on consideration of the totality of circumstances" (*Fox v Fox*, 177 AD2d 209, 210-211 [internal quotation marks omitted]), and we conclude that the mother failed to establish the requisite countervailing circumstances to warrant such a change. The child had been involved in early intervention based on cognitive and physical limitations, and he was to be a full-time student in the upcoming academic year. Although the prior custody order specified that the change in schooling could constitute a change in circumstances warranting modification of the prior custody arrangement, it further specified that the decisive factor would be whether the modification would serve the best interests of the child. We conclude on the record before us that there is a sound and substantial basis in the record to support Family Court's determination that the child's best interests would be served by continuing primary physical custody with the father (*see generally Matter of Green v Mitchell*, 266 AD2d 884). Finally, contrary to the

contention of the mother, the presence of half siblings of the child in her home is not dispositive, although it is a factor to be considered in making custody determinations (*see Eschbach v Eschbach*, 56 NY2d 167, 173). Here, however, "both parties have other children, [and thus] an award of custody to either party would necessarily separate the child at issue from some of [his] siblings" (*Matter of Brown v Marr*, 23 AD3d 1029, 1030).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1087**

**CAF 09-02190**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF SAHRINA H. RAUCH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN W. KELLER, RESPONDENT-RESPONDENT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT OF COUNSEL), FOR PETITIONER-APPELLANT.

WEISBERG, ZUKHER & DEL GUERCIO, PLLC, SYRACUSE (DAVID E. ZUKHER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

JULIE A. CERIO, ATTORNEY FOR THE CHILD, SYRACUSE, FOR TAYLOR C.K.

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Appeal from an order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered August 28, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petition for modification of a custody order to allow petitioner to relocate with subject child to another state.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner mother appeals from an order granting the motion of respondent father and the Attorney for the Child to dismiss her petition seeking permission for the parties' child to relocate with her to Florida. We affirm. As the parent seeking permission to relocate with the child, the mother had the burden of establishing by a preponderance of the evidence that the proposed relocation was in the child's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 741; *Matter of Dukes v McPherson*, 50 AD3d 1529), and the determination that she failed to meet that burden has a sound and substantial basis in the record (*see Matter of Cunningham v Sudduth*, 50 AD3d 1623). Although the motion to dismiss was made before completion of the hearing on the petition, the mother had finished testifying on direct examination and indicated that she had no further proof to offer.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1088**

**CAF 09-01915**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF MICHELE S. CHILBERT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ARCANGEL L. SOLER, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-APPELLANT.

ALEXANDRA BURKETT, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

VICTORIA L. KING, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR ABIGAIL S.

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Appeal from an amended order of the Family Court, Ontario County (Maurice E. Strobridge, J.H.O.), entered September 16, 2009 in a proceeding pursuant to Family Court Act article 8. The amended order granted the application of petitioner for an order of protection.

It is hereby ORDERED that the amended order so appealed from is unanimously affirmed without costs.

Same Memorandum as in *Matter of Chilbert v Soler* ([appeal No. 1] ___ AD3d ___ [Oct. 1, 2010]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1089**

**CAF 09-01293**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF ALFONZO H.
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ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

CASSIE L. AND ALFONZO H.,
RESPONDENTS-RESPONDENTS.

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GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF COUNSEL), FOR PETITIONER-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR RESPONDENT-RESPONDENT CASSIE L.

JAMES E. CORL, JR., ATTORNEY FOR THE CHILD, CICERO, FOR ALFONZO H.

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Appeal from an order of the Family Court, Onondaga County (Bryan R. Hedges, J.), entered May 12, 2009 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the petition against respondent Alfonzo H. insofar as the petition alleges that his alcohol abuse impairs his ability to safely care for the subject child and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, to reopen the fact-finding hearing on that part of the petition.

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, petitioner contends on appeal that Family Court erred in granting the motion of respondent parents to dismiss the petition at the close of petitioner's proof on the ground that petitioner failed to establish a prima facie case of neglect. Contrary to the contention of petitioner, we conclude that petitioner failed to establish by a preponderance of the evidence that the subject child's "physical, mental or emotional condition ha[d] been impaired or [was] in imminent danger of becoming impaired" as a result of the alleged incidents of domestic violence between the child's parents (*Nicholson v Scoppetta*, 3 NY3d 357, 368; *see Matter of Ravern H.*, 15 AD3d 991, 992, *lv denied* 4 NY3d 709). We agree with petitioner, however, that the court erred in dismissing the petition against respondent father insofar as the petition alleges that his "alcohol abuse impairs his ability to safely care for [the child]"

(*see generally* Family Ct Act § 1046 [a] [iii]), and we therefore modify the order accordingly. Petitioner submitted evidence that police intervention was required on several occasions during which the father engaged in violence against respondent mother while he was intoxicated (*see Matter of Department of Social Servs. v Janna C.*, 237 AD2d 603, 604; *cf. Matter of Anna F.*, 56 AD3d 1197). Viewing the evidence in the light most favorable to petitioner, we conclude that petitioner established a prima facie case with respect to that issue (*see generally Matter of Ryan D.*, 125 AD2d 160, 166).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1091**

**CA 10-00354**

PRESENT: FAHEY, J.P., LINDLEY, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF ALFRED F. MARRIOTT,
PETITIONER-APPELLANT,

V ORDER

TOWN AND VILLAGE OF LOWVILLE ZONING BOARD OF
APPEALS AND SCOTT B. MILLER, INDIVIDUALLY AND
DOING BUSINESS AS MILLER'S SMALL ENGINE,
RESPONDENTS-RESPONDENTS.

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CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF COUNSEL), FOR PETITIONER-APPELLANT.

HRABCHAK, GEBO & LANGONE, P.C., WATERTOWN (MARK G. GEBO OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN AND VILLAGE OF LOWVILLE ZONING BOARD OF APPEALS.

SLYE & BURROWS, WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR RESPONDENT-RESPONDENT SCOTT B. MILLER, INDIVIDUALLY AND DOING BUSINESS AS MILLER'S SMALL ENGINE.

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Appeal from a judgment (denominated judgment and order) of the Supreme Court, Lewis County (Joseph D. McGuire, J.), entered July 10, 2009 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1092**

**CA 10-00099**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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GARY S. ROLL AND CAROL J. ROLL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ASHLEIGH A. GAVITT, DEFENDANT-APPELLANT.

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LEVENE GOULDIN & THOMPSON, LLP, VESTAL (JOHN L. PERTICONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF JACOB P. WELCH, CORNING (ANNA CZARPLES OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered October 23, 2009 in a personal injury action. The order denied the motion of defendant for summary judgment and granted the cross motion of plaintiffs for partial summary judgment on the issue of negligence.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Gary S. Roll (plaintiff) when the vehicle he was driving was rear-ended by a vehicle operated by defendant. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and plaintiffs cross-moved for partial summary judgment on the issue of negligence. Supreme Court properly denied defendant's motion and granted plaintiffs' cross motion. With respect to defendant's motion, we agree with defendant that she met her initial burden by submitting evidence that plaintiff did not sustain a permanent consequential limitation of use or a significant limitation of use, the two categories of serious injury in Insurance Law § 5102 (d) set forth in plaintiffs' bill of particulars. Defendant submitted an "affirmed report" of a physician who, upon conducting an examination of plaintiff at defendant's request, indicated that the injury to plaintiff's cervical spine was only " 'minor, mild or slight . . .[, which is] classified as insignificant within the meaning of' " Insurance Law § 5102 (d) (*Gaddy v Eyler*, 79 NY2d 955, 957). Indeed, the physician opined that, although plaintiff "may have sustained soft tissue injuries to the cervical spine in the accident, . . . his current symptoms are minimal and intermittent," and he has preexisting

"mild degenerative and hypertrophic changes" in his cervical spine. We further conclude, however, that plaintiffs raised a triable issue of fact in opposition to the motion by submitting two independent medical examination (IME) reports from a physician who examined plaintiff in connection with his workers' compensation claim, as well as an affidavit from his treating physician. The IME reports and affidavit contain the requisite objective medical findings that raise issues of fact whether plaintiff sustained a serious injury under both categories alleged by plaintiffs (*see generally Toure v Avis Rent A Car*, 98 NY2d 345, 350; *Chmiel v Figueroa*, 53 AD3d 1092). Contrary to defendant's contention, although plaintiff may have had a preexisting degenerative disc condition, the IME physician opined that the accident aggravated plaintiff's preexisting condition (*see generally Ellis v Emerson*, 34 AD3d 1334, 1335; *Evans v Mendola*, 32 AD3d 1231, 1232-1233).

Finally, contrary to defendant's remaining contention, the court properly granted plaintiffs' cross motion for partial summary judgment on the issue of negligence. "Plaintiffs met their initial burden of establishing a prima facie case of negligence by submitting evidence that defendant's vehicle rear-ended plaintiff's stopped vehicle" (*Ruzycki v Baker*, 301 AD2d 48, 50), and defendant failed to submit any evidence of negligence on the part of plaintiff sufficient to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1094**

**CA 10-00414**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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JAMES F. FANTIGROSSI, JR. AND TERRY FANTIGROSSI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BRANNON HOMES, INC., DOING BUSINESS AS BRANNON HOMES AT CANDLEWOOD PARK, DEFENDANT-RESPONDENT.

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LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PHILIPPONE LAW OFFICES, ROCHESTER (ALEX F. PHILIPPONE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered August 31, 2009. The order, insofar as appealed from, granted in part the motion of defendant for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs entered into a contract with defendant for the purchase of residential property and the construction of a home and thereafter commenced this action seeking damages for, inter alia, breach of contract and fraud. Contrary to plaintiffs' contention, Supreme Court properly granted that part of defendant's motion for partial summary judgment dismissing the breach of contract cause of action insofar as it is based on the allegation that defendant was required by the contract to install nine-foot-wide garage doors but instead installed eight-foot-wide garage doors. Even assuming, arguendo, that nine-foot-wide garage doors were required by the contract, we conclude that plaintiffs are deemed to have waived the right to assert that defendant breached the parties' contract based on defendant's deviation from that contractual specification inasmuch as such a deviation would have been obvious during plaintiffs' pre-closing inspection of the home. Indeed, plaintiffs "could surely see the size of the garage [doors] when title was accepted, and they should be presumed to have intended to have . . . garage [doors] of that size" (*Ting-Wan Liang v Malawista*, 70 AD2d 415, 420). Also contrary to plaintiffs' contention, the court properly granted that part of defendant's motion for partial summary judgment dismissing the fraud cause of action because it "arises out of the same facts that serve as the basis of the breach of contract cause of

action and may not be independently asserted" (*Schunk v New York Cent. Mut. Fire Ins. Co.*, 237 AD2d 913, 915).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1096**

**CA 09-01527**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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GEOFF CANNON AND SANDRA CANNON,
PLAINTIFFS-APPELLANTS,

V ORDER

COR RIDGE ROAD COMPANY, LLC,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

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ALEXANDER & CATALANO, LLC, ROCHESTER (TIMOTHY R. MANDRONICO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CASCONE & KLUEPFEL, LLP, BUFFALO (MICHAEL C. LANCER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered July 10, 2009 in a personal injury action. The order, insofar as appealed from, granted in part the motion of defendant COR Ridge Road Company, LLC for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1097**

**CA 09-02159**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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JOHN WEBB, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHARLES A. BOCK, DEFENDANT-RESPONDENT.

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STANLEY LAW OFFICES, LLP, SYRACUSE (PAUL STYLIANOU OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), dated October 14, 2009 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when the vehicle he was driving was rear-ended by a vehicle operated by defendant. We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). On appeal, plaintiff contends that he sustained a neck injury solely within the meaning of the significant limitation of use category of serious injury. It is well settled that, in order to qualify as a serious injury under that category, "[a]ny demonstrated limitation must be significant, not minor, mild or slight" (*Kithcart v Mason*, 51 AD3d 1162, 1163; *see Gaddy v Eyler*, 79 NY2d 955, 957). Defendant met his initial burden on the motion by submitting, inter alia, the affirmed report of a physician who examined plaintiff at defendant's request. The physician concluded, based on his examination of plaintiff as well as his review of plaintiff's medical records, that plaintiff sustained only minor, temporary injuries to his cervical spine, consisting of soft tissue injuries with minor whiplash. The burden thus shifted to plaintiff to raise a triable issue of fact, and he failed to do so (*see Caldwell v Grant* [appeal No. 2], 31 AD3d 1154; *Wiegand v Schunck*, 294 AD2d 839). Although plaintiff presented evidence establishing that he is disabled based on injuries to his lumbar spine, it is undisputed that those injuries were sustained in several prior accidents. Indeed, plaintiff seeks recovery in this

case only for a neck injury, and his "submissions in opposition to the motion did not 'adequately address how [the neck injury], in light of [his] past medical history, [is] causally related to the subject accident' " (*Anania v Verdgeline*, 45 AD3d 1473, 1474).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1098**

**CA 10-00395**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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SUE Y. LEWIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF RICHLAND, DEFENDANT,
AND ROBERT NORTH, IN HIS INDIVIDUAL CAPACITY
AND IN HIS OFFICIAL CAPACITY AS TOWN CLERK
FOR THE TOWN OF RICHLAND, DEFENDANT-APPELLANT.

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THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered July 30, 2009. The order, insofar as appealed from, denied that part of the motion of defendants to dismiss the assault cause of action against defendant Robert North, in his individual capacity and in his official capacity as Town Clerk for the Town of Richland.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained as the result of the actions of Robert North (defendant) in his individual capacity and in his official capacity as Town Clerk for defendant Town of Richland. The sole issue raised on appeal is whether Supreme Court erred in denying that part of defendants' motion seeking dismissal of that part of the second cause of action alleging that defendant assaulted plaintiff. We affirm. According to defendants, that part of the second cause of action against defendant is barred by the one-year statute of limitations set forth in CPLR 215 (3). "In support of their motion to dismiss, [however,] defendants failed even to allege, much less establish, that [defendant] was not acting within the scope of his employment" when he committed the alleged assault (*Ruggiero v Phillips*, 292 AD2d 41, 44-45). Defendants "thus failed to establish that CPLR 215 (3), rather than [the period of one year and 90 days set forth in] General Municipal Law § 50-i (1) (c), applies" to that part of the second cause of action against defendant (*id.* at 45). Defendants did not seek dismissal of the second cause of action against defendant on the ground that it fails to state a cause of

action against defendant for assault, "and that ground cannot be considered for the first time on appeal" (*Resnick v Doukas*, 261 AD2d 375, 376).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1099**

**CA 10-00868**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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TOWNSEND OIL CORPORATION, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY L. MARINI, ET AL., DEFENDANTS,
AND EDWARD A. DUFFY, DEFENDANT-RESPONDENT.

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DAVIDSON FINK LLP, ROCHESTER (DENNIS J. ANNECHINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (PAUL S. GROSCHADL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered October 2, 2009 in a breach of contract action. The judgment granted the cross motion of defendant Edward A. Duffy for summary judgment dismissing plaintiff's complaint against him.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for the alleged breach of a Branded Dealer Supply Agreement (agreement) by defendants. We conclude that Supreme Court properly granted the motion of Edward A. Duffy (defendant) seeking summary judgment dismissing the complaint against him, although our reasoning differs from that set forth in the court's decision and order. The agreement provides, in relevant part, that "[plaintiff] shall sell and the [defendants] shall purchase during the term of this [a]greement and any extensions or renewals, the gasoline petroleum products and other products marketed and used by [plaintiff], all as shall be determined by [plaintiff]." Contrary to the determination of the court, the agreement is not a requirements agreement within the meaning of UCC 2-306 inasmuch as it is not exclusive on its face (*see Harvey v Fearless Farris Wholesale, Inc.*, 589 F2d 451, 461; *see generally Feld v Henry S. Levy & Sons*, 37 NY2d 466, 469-470). Nevertheless, we agree with the contention raised by defendant in Supreme Court, and as an alternative ground for affirmance on appeal (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), that the agreement is not enforceable because no quantity term appears therein (*see* UCC 2-201 [1]; *International Commercial Resources, Ltd. v Jamaica*

*Pub. Servs. Co., Ltd.*, 612 F Supp 1153, 1155, *affd* 805 F2d 390).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1100**

**KA 09-00495**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY SCHENK, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Patrick M. Carney, A.J.), rendered February 23, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [4]), defendant contends that his waiver of the right to appeal was not knowingly, intelligently, and voluntarily entered because County Court failed to conduct a sufficient inquiry. We reject that contention. "[T]here is no requirement that the . . . court engage in any particular litany" when accepting a defendant's waiver of the right to appeal (*People v Callahan*, 80 NY2d 273, 283) and, here, the record establishes that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Lopez*, 6 NY3d 248, 256). The waiver by defendant of the right to appeal encompasses his challenge to the court's suppression rulings (*see People v Kemp*, 94 NY2d 831, 833; *People v Gordon*, 42 AD3d 964, *lv denied* 9 NY3d 876), as well as his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1101**

**KA 08-02522**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL M. COOPER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS WESTIN-SWAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered December 1, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, robbery in the first degree, robbery in the second degree, grand larceny in the third degree (two counts), endangering the welfare of a child and criminal mischief in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the DNA databank fees and the mandatory surcharges imposed under counts three and four of the indictment and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of grand larceny in the third degree (Penal Law § 155.35) and one count each of burglary in the first degree (§ 140.30 [4]) and robbery in the first degree (§ 160.15 [4]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant failed to preserve for our review his contention in appeal No. 1 that his conviction of grand larceny in the third degree under the fifth count of the indictment is not supported by legally sufficient evidence inasmuch as his motion for a trial order of dismissal was not specifically directed at the alleged error on appeal (*see People v Gray*, 86 NY2d 10, 19; *People v Tillman*, 273 AD2d 913, *lv denied* 95 NY2d 939). In any event, that contention is without merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a

reasonable doubt" (*People v Steinberg*, 79 NY2d 673, 682; *see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the failure of County Court to refer to all of the items of stolen property in its charge to the jury does not render the conviction of grand larceny in the third degree under the fifth count of the indictment unlawful or based upon insufficient evidence (*see generally People v Acosta*, 80 NY2d 665, 672). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention in appeal No. 1 that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention in appeal No. 1, we conclude that the court meaningfully responded to the jury's request for a photograph of defendant at the time of his arrest (*see People v Malloy*, 55 NY2d 296, 298, *cert denied* 459 US 847; *People v Jones*, 52 AD3d 1252, *lv denied* 11 NY3d 738). As defendant contends, and the People correctly concede, however, the court erred in imposing a $270 surcharge and a $50 DNA databank fee under counts three and four of the indictment in appeal No. 1 (*see* Penal Law § 60.35 [2]). Although defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]), we exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v McCullen*, 63 AD3d 1708). We therefore modify the judgment in appeal No. 1 accordingly.

The sentence in each appeal is not unduly harsh or severe. In light of our determination, there is no need to address the contention of defendant in appeal No. 2 that he should be permitted to withdraw his guilty plea if this Court reverses the judgment in appeal No. 1.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1102**

**KA 08-02521**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL M. COOPER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS WESTIN-SWAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered December 1, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same Memorandum as in *People v Cooper* ([appeal No. 1] ___ AD3d ___ [Oct. 1, 2010]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1103**

**KA 09-00604**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS MORGAN, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered March 10, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). We reject the contention of defendant that he received ineffective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). Defense counsel's failure to ask further questions of the potential jurors who indicated that they knew law enforcement officers but could remain impartial was a "tactical decision[] entrusted to [defense] counsel, and defendant[ did] not retain a personal veto power over [defense] counsel's exercise of professional judgment[]" (*People v Colon*, 90 NY2d 824, 826; *see also People v Turner*, 37 AD3d 874, 876-877, *lv denied* 8 NY3d 991). Defense counsel also was not ineffective for refusing to call defendant's proposed witness. The grand jury testimony of that witness established that, although she may have provided some exculpatory testimony at the trial, she would also have provided testimony to corroborate the People's eyewitness. Thus, "the record demonstrates that there were legitimate strategic reasons for defense counsel's refusal to call that proposed witness" (*People v Safford*, 74 AD3d 1835, 1837). We further conclude that County Court did not abuse its discretion in denying defendant's CPL 330.30 (1) motion to set aside the verdict on the ground of ineffective assistance of counsel without conducting a hearing (*see People v Hardy*, 49 AD3d 1232, 1233, *affd* 13 NY3d 805).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Here, the jury was aware that one of the witnesses was a jailhouse informant and another was hoping to receive favorable treatment with respect to a different criminal matter in exchange for his testimony against defendant, and we perceive no basis to disturb the jury's credibility determinations (*see People v Smith*, 73 AD3d 1469, 1470; *see also People v Monk*, 57 AD3d 1497, 1499, *lv denied* 12 NY3d 785). The sentence is not unduly harsh or severe.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1104**

**KA 08-02355**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. SMIELECKI, DEFENDANT-APPELLANT.

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MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 22, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [9]) and endangering the welfare of a child (§ 260.10 [1]), arising out of an incident in which he fractured the arm of his girlfriend's three-week-old daughter. We reject the contention of defendant that Supreme Court erred in refusing to suppress the statements that he made to the police before he was advised of his *Miranda* rights. Although defendant was at the police station when the statements were made, he was not in custody at that time, and the questioning was investigatory rather than accusatory in nature (*see People v Nunez*, 51 AD3d 1398, 1400, *lv denied* 11 NY3d 792). The mere fact that the police may have suspected defendant of having caused the child's injuries prior to questioning him at the station does not compel a finding that defendant was in custody (*see People v Neil*, 24 AD3d 893). In our view, a reasonable person, innocent of any crime, would not have thought he or she was in custody if placed in defendant's position (*see People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851; *People v Lunderman*, 19 AD3d 1067, 1068, *lv denied* 5 NY3d 830).

Contrary to the further contention of defendant, his "admission of guilt in the parallel Family Court proceeding was properly received in[] evidence against [him]" (*People v Walden*, 236 AD2d 779, 779, *lv denied* 90 NY2d 865; *see* Prince, Richardson on Evidence §§ 8-201, 8-215

[Farrell 11th ed]). Counsel for the petitioner in the Family Court proceeding outlined the evidence against defendant, who, upon questioning by the court, indicated that he would not be able to dispute the allegations. Defendant was represented by counsel at that time, and he indicated that he understood that his failure to dispute the evidence against him would be tantamount to an admission.

We also reject the contention of defendant that the admissions he made to the police were not sufficiently corroborated (*see* CPL 60.50; *People v Harewood*, 34 AD3d 1254, 1255, *lv denied* 8 NY3d 846). The medical evidence of the child's injuries provided sufficient assurance that defendant had not admitted to crimes where no crime had been committed (*see People v Chico*, 90 NY2d 585, 589-590). In addition, defendant's admissions were sufficiently corroborated by the testimony of the child's mother, who left the child alone with defendant so that she could take a shower. According to the mother, the child appeared to be fine when she got in the shower. When she got out of the shower, however, the child was screaming and crying. Defendant, who was also crying, explained that something was wrong with the child's arm, which was limp. The mother's testimony satisfies the minimal corroboration requirement of CPL 60.50 that some "additional proof that the offense[s] charged [have] been committed" (*see People v Lipsky*, 57 NY2d 560, 571, *rearg denied* 58 NY2d 824; *People v Lyons*, 4 AD3d 549, 553). Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1105**

**CAF 10-00864**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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IN THE MATTER OF CAROL ANN TODD,
PETITIONER-APPELLANT,

V ORDER

ALISTAIR CHARLES MORRISON,
RESPONDENT-RESPONDENT.

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LINDA M.H. DILLON, COUNTY ATTORNEY, UTICA (RAYMOND F. BARA OF COUNSEL), FOR PETITIONER-APPELLANT.

ALISTAIR CHARLES MORRISON, RESPONDENT-RESPONDENT PRO SE.

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Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered August 14, 2009 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of petitioner to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1106**

**CAF 09-00890**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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IN THE MATTER OF IVOIRE LAVANN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JACOB BELL, RESPONDENT-APPELLANT.

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DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered March 5, 2009 in a proceeding pursuant to Family Court Act article 8. The order granted an order of protection through March 5, 2011.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent contends in this family offense proceeding pursuant to Family Court Act article 8 that Family Court lacked subject matter jurisdiction because his alleged actions that gave rise to the finding of harassment in the second degree and thus the order of protection in question occurred prior to the effective date of the amendment to Family Court Act § 812 (1), which expanded the definition of the term "members of the same family or household." We reject that contention. Family Court Act § 812 (1), which limits the jurisdiction of Family Court in family offense proceedings to certain proscribed acts occurring between specified individuals, was amended effective July 21, 2008 to include persons such as respondent, i.e., those "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time" (§ 812 [1] [e], as amended by L 2008, ch 326, § 7). Contrary to respondent's contention, the date of entry of the order of protection controls, rather than the date of respondent's actions underlying the order of protection. Indeed, the legislative history of the statute as amended expressly provides that the statute as amended applies to orders of protection that were "entered on or after such effective date" (L 2008, ch 326, § 16, as amended by L 2009, ch 17, § 1), i.e., July 21, 2008, and here the order of protection was entered in 2009.

Finally, we conclude that the court properly determined that petitioner and respondent had been in an intimate relationship within

the meaning of section 812 (1) (e), and the court therefore had jurisdiction to issue the order of protection against respondent. The evidence presented at the hearing on the petition established that the parties had been in a sexual relationship and that petitioner was pregnant with respondent's child. Furthermore, petitioner had previously given respondent a key to her apartment, and she described respondent as her "ex-partner" and had ended their relationship in early August 2008.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1107**

**CAF 09-01596**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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IN THE MATTER OF ELEYDIE R.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

MARIA R., RESPONDENT-APPELLANT.

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BERNADETTE M. HOPPE, BUFFALO, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR ELEYDIE R.

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Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered July 14, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Family Court properly granted the petition seeking to terminate the parental rights of respondent mother with respect to her youngest child on the ground of permanent neglect. The mother admitted that she permanently neglected the child, and the record of the dispositional hearing supports the court's determination that the best interests of the child would be served by terminating the mother's parental rights and freeing the child for adoption (*see Matter of Saafir A.M.*, 28 AD3d 1217). Contrary to the mother's contention, "where, as here, a parent admits to permanent neglect, there is no need for the [petitioner] to put forth evidence establishing–nor is it necessary for the court to determine–that the [petitioner] had exercised diligent efforts to strengthen the parental relationship" (*Matter of Aidan D.*, 58 AD3d 906, 908; *see Matter of Nestor H.O.*, 68 AD3d 1733).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1108**

**CAF 10-00128**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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IN THE MATTER OF GREGORY BRADBURY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GENEVA MONAGHAN, RESPONDENT-RESPONDENT.
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IN THE MATTER OF GENEVA MONAGHAN,
PETITIONER-RESPONDENT,

V

GREGORY BRADBURY, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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LINDA M. CAMPBELL, SYRACUSE, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

MICHAEL DONNELLY, SYRACUSE, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

DARLENE O'KANE, ATTORNEY FOR THE CHILDREN, SYRACUSE, FOR ELVIS M.-B. AND LELAND M.-B.

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Appeal from an amended order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered June 11, 2009 in a proceeding pursuant to Family Court Act article 6. The amended order granted the parties joint legal custody.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Onondaga County, for a hearing in accordance with the following Memorandum: In appeal No. 1, petitioner father appeals from an amended order that, following a hearing, awarded the parties joint custody, with primary physical custody of the children to respondent mother and visitation to the father. We agree with the father that "Family Court erred in failing 'to set forth those facts essential to its decision' " (*Matter of Williams v Tucker*, 2 AD3d 1366, 1367, *lv denied* 2 NY3d 705). "Effective appellate review, whatever the case but especially in child . . . custody . . . proceedings, requires that appropriate factual findings be made by the [hearing] court——the court best able to measure the credibility of the witnesses" (*Matter of Jose L. I.*, 46 NY2d 1024, 1026; *see Matter of Austin v Austin*, 254 AD2d 703). Inasmuch as "the record is not

sufficient to enable this Court to make the requisite findings of fact," the matter must be remitted to Family Court for a new hearing (*Austin*, 254 AD2d at 703-704; *see Matter of Miller v Miller*, 220 AD2d 133, 137). "The focus of that hearing must be the best interests of the children" (*Austin*, 254 AD2d at 704).

In light of our determination with respect to appeal No. 1, we dismiss appeal No. 2 as moot.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1109**

**CAF 10-00129**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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IN THE MATTER OF GREGORY BRADBURY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GENEVA MONAGHAN, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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LINDA M. CAMPBELL, SYRACUSE, FOR PETITIONER-APPELLANT.

MICHAEL DONNELLY, SYRACUSE, FOR RESPONDENT-RESPONDENT.

DARLENE O'KANE, ATTORNEY FOR THE CHILDREN, SYRACUSE, FOR ELVIS M.-B. AND LELAND M.-B.

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Appeal from an order of the Family Court, Onondaga County (David J. Roman, J.H.O.), entered November 18, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the application of petitioner to vacate an order entered June 11, 2009.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same Memorandum as in *Matter of Bradbury v Monaghan* [appeal No. 1] ___ AD3d ___ [Oct. 1, 2010]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1110**

**CAF 10-00297**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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IN THE MATTER OF FRANCIS PAGE,
PETITIONER-APPELLANT,

V ORDER

JEAN ELLEN PAGE, RESPONDENT-RESPONDENT.

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FREID AND KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR PETITIONER-APPELLANT.

TERRANCE C. BRENNAN, BUFFALO, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered October 19, 2009 in a proceeding pursuant to Family Court Act article 4. The order denied the objection of petitioner to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1111**

**CA 10-00576**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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DENITA SCHRADER, PLAINTIFF-APPELLANT,

V ORDER

DANIEL SCHRADER, DEFENDANT-RESPONDENT.

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FREID AND KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEONARD G. TILNEY, JR., LOCKPORT, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 26, 2009. The order denied the application of plaintiff for a determination that the early supplemental retirement benefits of defendant are marital property.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1112**

**CA 10-00729**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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MAGIC CIRCLE MUSIC, LTD., AND JOEY DEMAIO,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

ALESSANDRO STAROPOLI AND LUCA TURILLI,
INDIVIDUALLY AND AS MEMBERS OF THE MUSICAL
GROUP "RHAPSODY OF FIRE," FORMERLY KNOWN AS
"RHAPSODY," DEFENDANTS-APPELLANTS-RESPONDENTS.

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BOND, SCHOENECK & KING, PLLC, SYRACUSE (JOHN G. MCGOWAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

DAVID B. THURSTON, AUBURN, FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

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Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Kenneth R. Fisher, J.), entered July 31, 2009. The order denied the motion of defendants to dismiss the complaint and to vacate the default judgment against defendant Luca Turilli.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 3 and June 1, 2010,

It is hereby ORDERED that said appeal and cross appeal are unanimously dismissed without costs upon stipulation.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1113**

**CA 09-01282**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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LANCE SPINOSA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHARLES F. BECK AND ELEANOR G. BECK,
DEFENDANTS-RESPONDENTS.

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PETRONE & PETRONE, P.C., UTICA (MARK O. CHIECO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF EPSTEIN & HARTFORD, NORTH SYRACUSE (SHEILA FINN SCHWEDES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered May 15, 2009 in a personal injury action. The order granted the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was bitten by a dog in an apartment owned by defendants. We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. Defendants established their entitlement to judgment as a matter of law by demonstrating that they neither knew nor had reason to know of the dog's allegedly vicious propensities (*see Francis v Becker*, 50 AD3d 1507), and plaintiff failed to raise a triable issue of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Charles F. Beck (defendant) testified at his deposition that he never received any complaints about the dog, never heard of any incidents in which the dog had injured someone and never observed the dog acting in an aggressive manner by growling, chasing, jumping or barking (*see Smedley v Ellinwood*, 21 AD3d 676; *LePore v DiCarlo*, 272 AD2d 878, *lv denied* 95 NY2d 761). Plaintiff testified at his deposition that he did not inform defendants of a prior incident where the dog bit his sleeve, and the dog's owner likewise testified at his deposition that he did not inform defendants of any prior incidents involving the dog. Contrary to plaintiff's contention, the deposition testimony of the dog's owner concerning an incident in which defendant knocked on the apartment door and was allegedly scared when the dog barked and came to the door was insufficient to raise a triable issue of fact with respect to defendants' knowledge of the

allegedly vicious propensities of the dog. The dog's actions in barking and approaching the door in response to a stranger's knock "are consistent with normal canine behavior" (*Collier v Zambito*, 1 NY3d 444, 447; *see also Williams v City of New York*, 306 AD2d 203, 204; *Gill v Welch*, 136 AD2d 940).

We reject plaintiff's further contention that a triable issue of fact exists with respect to whether defendants had knowledge of the dog's allegedly vicious propensities based on the fact that the dog's owner kept the dog behind a gate in the apartment. Plaintiff failed to present evidence establishing that the dog was confined because the owners feared that he would attack or injure their visitors (*see Collier*, 1 NY3d at 447; *Sers v Manasia*, 280 AD2d 539, *lv denied* 96 NY2d 714). Indeed, plaintiff testified at his deposition that the gate was used because the dog's owners "didn't want to have the dog bothering anyone," and defendant testified at his deposition that he presumed the gate was used to keep the dog out of his way. Finally, even assuming, arguendo, that defendants were aware of the breed of the dog, we conclude that the dog's breed, i.e., bull terrier, is insufficient by itself to raise a triable issue of fact whether defendants had knowledge of the dog's allegedly vicious propensities (*see Loper v Dennie*, 24 AD3d 1131, 1133; *Mulhern v Chai Mgt.*, 309 AD2d 995, 997, *lv denied* 1 NY3d 508).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1114**

**CA 10-00397**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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PENNY ROGERS, DONALD ROGERS AND DOUGLAS WOLINSKY, ESQ., AS TRUSTEE OF THE BANKRUPTCY ESTATE OF PENNY ROGERS, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ALVIN MALONEY, M.D., ET AL., DEFENDANTS, AND WILLIAM SHERMAN, M.D., DEFENDANT-APPELLANT.

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GALE & DANCKS, LLC, SYRACUSE (THÉRÈSE WILEY DANCKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. SEIDBERG, LLC, SYRACUSE (DANIEL R. SEIDBERG OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered August 11, 2009 in a medical malpractice action. The order denied the motion of defendant William Sherman, M.D. for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this medical malpractice action to recover damages for injuries sustained by Penny Rogers (plaintiff), allegedly as a result of postsurgical care and treatment provided by defendants. The surgery was performed by defendant Alvin Maloney, M.D., a gynecologist. While plaintiff was still hospitalized after the surgery, she developed a urologic complication involving her right kidney. Maloney discussed plaintiff's urologic condition with defendant William Sherman, M.D., a urologist. Following that discussion, Maloney prepared a progress note in plaintiff's hospital chart stating that he had "discussed the right [kidney complication] with Dr. Sherman, urologist, who advised that nothing need be done immediately - do IVP in one month." At his deposition, Sherman testified that any conversation he had with Maloney regarding plaintiff would have been a "curbside consultation," i.e., a "very brief, informal consult." Maloney consulted with Sherman while he was at the hospital as an attending physician making rounds on his own admitted patients. Sherman also testified that he intended that Maloney would rely upon the information he provided concerning plaintiff's care and treatment. Maloney testified at his own deposition that he relied upon Sherman's advice in developing a treatment plan for plaintiff.

Sherman moved for summary judgment dismissing the complaint against him on the ground that his involvement with plaintiff's case, through his discussion with Maloney, was insufficient to create a physician-patient relationship that would support a finding of medical malpractice liability. We conclude that Supreme Court properly denied the motion. We note at the outset that " '[w]hether the physician's giving of advice furnishes a sufficient basis upon which to conclude that an implied physician-patient relationship had arisen is ordinarily a question of fact for the jury' " (*Cogswell v Chapman*, 249 AD2d 865, 866). We reject Sherman's contention that the absence of a "formal consultation" conclusively establishes that no physician-patient relationship was created. Such a relationship may be established by evidence demonstrating that a physician gave advice to a patient by communicating through another health care professional (*see Campbell v Haber*, 274 AD2d 946, 946-947).

Here, Sherman communicated advice through Maloney, another physician, and Sherman intended that such advice would be relied upon by Maloney in the care and treatment of plaintiff (*see generally Cogswell*, 249 AD2d at 866). Indeed, Maloney did rely upon Sherman's advice. We note that Sherman never met plaintiff or conducted a physical examination of her, and he never reviewed her medical history, hospital chart, lab work or radiologic studies. We nevertheless conclude, however, that "the totality of the [evidence] before [the c]ourt" demonstrated that Sherman "had more than an informal interest and involvement in plaintiff's condition and that an issue of fact exists" with respect to the creation of an implied physician-patient relation between Sherman and plaintiff, especially in light of Sherman's expertise in the field of urology and Maloney's lack of expertise in that area (*id.* at 867).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1117**

**CA 09-01655**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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RUBEN PARR AND DENISE PARR,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANDREW J. MONGARELLA, DEFENDANT-APPELLANT.

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HISCOCK & BARCLAY, LLP, SYRACUSE (TIMOTHY J. DEMORE OF COUNSEL), FOR DEFENDANT-APPELLANT.

CONWAY & KIRBY, LLP, LATHAM (ANDREW W. KIRBY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered July 9, 2009 in a personal injury action. The order granted plaintiffs' motion to set aside the jury verdict and granted a new trial.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the verdict is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries they sustained when the vehicle operated by Ruben Parr (plaintiff) and in which plaintiff Denise Parr was a passenger was struck by a vehicle operated by defendant. Following a trial, the jury returned a verdict finding that defendant was not negligent. Supreme Court erred in granting plaintiffs' motion to set aside the verdict and in ordering a new trial. "A motion to set aside a jury verdict as against the weight of the evidence . . . should not be granted 'unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence' . . . That determination is addressed to the sound discretion of the . . . court, but if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720; *see McLoughlin v Hamburg Cent. School Dist.*, 227 AD2d 951, *lv denied* 88 NY2d 813; *Greene v Frontier Cent. School Dist.*, 214 AD2d 947, 948). "Where varying inferences from the evidence are possible, the issue of negligence is left to the jury" (*Harris v Armstrong*, 97 AD2d 947, *affd* 64 NY2d 700).

Here, the court erred in substituting its judgment for that of

the jury and thereby usurped the jury's duty (*see Pecora v Lawrence*, 41 AD3d 1212, 1213; *Ruddock*, 307 AD2d at 720-721; *Durante v Frishling*, 81 AD2d 631, *appeal dismissed* 54 NY2d 833). The jury credited the testimony of defendant and found that he was not following plaintiffs' vehicle too closely and thus that he was not negligent. The jury further found that the actions of defendant in driving on the shoulder of the road and losing control of his vehicle did not constitute negligence. According to defendant, when plaintiffs' vehicle slowed down while traveling in front of him in the same lane, he switched to the passing lane in order to pass the vehicle. When defendant was approximately even with the bumper of plaintiffs' vehicle, plaintiff drove into the passing lane, forcing defendant to drive onto the shoulder of the road. Defendant testified at trial that he believed that he could safely avoid a collision with plaintiffs' vehicle by driving onto the shoulder, but he lost control of his vehicle, and it spun around and struck plaintiffs' vehicle. After hearing the conflicting evidence concerning whether plaintiff entered defendant's lane of travel, a reasonable jury could accept defendant's version of the accident as true and find that defendant was not negligent in losing control of his vehicle because plaintiff's actions forced him to take the course of action that led him to do so. "[T]he divergent accounts [of the accident] raised a question of credibility to be resolved by the jury" (*Ahr v Karolewski*, 48 AD3d 719, 719). The jury's finding that defendant was not negligent is one that could reasonably have been rendered upon the conflicting evidence presented by the parties at trial (*see McLoughlin*, 227 AD2d 951), and it was not " 'palpably irrational or wrong' " (*American Linen Supply Co. v M.W.S. Enters.*, 6 AD3d 1079, 1080, *lv dismissed* 3 NY3d 702).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1118**

**CA 10-00526**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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JAMIE W. SHARLOW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. SHARLOW, DEFENDANT-APPELLANT.

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ABBIE GOLDBAS, UTICA, FOR DEFENDANT-APPELLANT.

TODD D. BENNETT, HERKIMER, FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Oneida County (Bernadette T. Romano, J.), entered May 14, 2009 in a divorce action. The judgment, inter alia, equitably distributed the marital property of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from a judgment of divorce that, inter alia, directed him to pay $825.90 per month in child support and $650 per month in maintenance for a period of 36 months, distributed the parties' debts and assets and ordered him to pay counsel fees to plaintiff in the amount of $1,000. We conclude that Supreme Court did not abuse its discretion in imputing income of $45,000 to defendant for the purposes of calculating his maintenance and child support obligations. Contrary to defendant's contention, "a court is not required to find that a parent deliberately reduced his or her income to avoid a child support obligation before imputing income to that parent" (*Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1180), and a "court may properly find a true or potential income higher than that claimed where the party's account of his or her finances is not credible" (*Matter of Strella v Ferro*, 42 AD3d 544, 545). Here, the record establishes that defendant consistently underreported his income as a plumber, and the testimony of defendant and documentary evidence presented at trial concerning his income was less than credible. For example, defendant failed to list any income on his 2007 Statement of Net Worth, despite the fact that he earned wages and collected employment benefits during that year. The $45,000 in imputed income was based upon the average salaries of plumbers as reported by the New York State Department of Labor, defendant's history of earnings, and the evidence that defendant worked "under the table." Inasmuch as the record supports the court's imputation of $45,000 in income to defendant, we see no basis to disturb that determination (*see Matter of Rubley v Longworth*, 35 AD3d 1129, 1130-

1131, *lv denied* 8 NY3d 811; *Matter of Johnson v Robusto*, 254 AD2d 828, 829-830).

We further conclude that the court's maintenance award did not constitute an abuse of discretion (*see Oliver v Oliver*, 70 AD3d 1428, 1430). Contrary to defendant's contention, the record establishes that the court considered the factors set forth in Domestic Relations Law § 236 (B) (6) (a) and based its award on the length of the marriage, the age of the parties, the disparate incomes of the parties and defendant's superior earning capacity as compared to that of plaintiff. Plaintiff, who was 44 years old at the time of the trial, had been out of the workforce for more than a decade because of a disability and her responsibilities as caretaker of the parties' children. In 2006 plaintiff obtained a job as a clerk at a rate of $10 per hour, but she testified that it was difficult to work full-time because of her child care responsibilities and her inability to afford daycare. The monthly expenses of plaintiff exceed her monthly income, and she has substantial debts, including approximately $7,000 to $10,000 in medical bills from periods when she and the parties' children were uninsured.

Defendant's further contention that the court erred in its valuation of real property located at West Court Street in Utica is without merit. Marital assets may be valued at "anytime from the date of commencement of the action to the date of trial" (Domestic Relations Law § 236 [B] [4] [b]), and "the appropriate date for measuring the value of marital property [is] left to the sound discretion of the . . . court[]" (*McSparron v McSparron*, 87 NY2d 275, 287, *rearg dismissed* 88 NY2d 916; *see Weissman v Weissman*, 8 AD3d 264, 265). Here, the court properly exercised its discretion in valuing the property as of approximately two months before trial (*see generally Collins v Donnelly-Collins*, 19 AD3d 356; *Boardman v Boardman*, 300 AD2d 1110). We further conclude that the court properly valued the property at $24,900 in accordance with the testimony of plaintiff's expert, a licensed real estate agent with over 20 years of experience, who based her valuation on comparable sales over a six-month period and a visual inspection of the property (*see Griffin v Griffin*, 115 AD2d 587, 588). Contrary to defendant's contention, the court properly calculated plaintiff's share of the equity in the property.

We conclude that the court did not abuse its discretion in requiring defendant to pay a portion of plaintiff's counsel fees (*see generally Bushorr v Bushorr*, 129 AD2d 989). Defendant contends that the court erred in awarding counsel fees without conducting a hearing because the parties did not consent to a determination of that issue upon written submissions. That contention is not preserved for our review inasmuch as defendant failed to request a hearing with respect to the ability of plaintiff to pay her own counsel fees or the extent and value of the legal services rendered to her (*see generally Petosa v Petosa*, 56 AD3d 1296, 1298). In any event, defendant's contention lacks merit. Unlike the case relied upon by defendant (*see Redgrave v Redgrave*, 304 AD2d 1062, 1066-1067), the court awarded counsel fees in

this case after a trial in which the financial condition of the parties was amply explored and documented. Moreover, we conclude that "the evidence presented by the parties concerning their respective financial conditions supports the award of [counsel] fees to plaintiff" (*Lewis v Lewis*, 70 AD3d 1432, 1433).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1119**

**CA 10-00775**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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NAHSHON AARON COUNCIL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UTICA FIRST INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

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ALEXANDER LAW OFFICE, PLLC, SYRACUSE (RALPH S. ALEXANDER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FABER BROCKS & ZANE, LLP, MINEOLA (SHERRI N. PAVLOFF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered September 24, 2009 in a declaratory judgment action. The judgment, insofar as appealed from, granted the motion of defendant for summary judgment, declared that defendant is not obligated to defend and indemnify its insured and denied the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a declaration that, inter alia, defendant is obligated to defend and indemnify its insured, a nightclub against which plaintiff obtained a default judgment. In the underlying action, plaintiff sought damages for injuries he sustained during an altercation with an employee of the nightclub. Supreme Court, inter alia, granted defendant's motion for summary judgment dismissing the complaint in this action and denied plaintiff's cross motion for summary judgment on the complaint. We affirm.

At the outset, we agree with plaintiff that the court erred in determining that he failed to plead a cause of action for negligence against the nightclub in the underlying action. Plaintiff alleged that he suffered an "assault" and that the nightclub was "negligent." It is well settled that "an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest . . . a reasonable possibility of coverage' . . . 'If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured,' " and that is the case here (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137; *see*

*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 648; *Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 669-670, *rearg denied* 54 NY2d 753; *see also Melito v Romano*, 160 AD2d 1081, 1082).

We conclude, however, that defendant established its entitlement to judgment as a matter of law dismissing the complaint. Plaintiff testified during the hearing preceding the default judgment that he was injured when he was "tackled" by a bouncer at the nightclub during a discussion with the bar manager. Although plaintiff alleges that he was injured as a result of the "negligence" of the bouncer, the record demonstrates that the attack was an unprovoked assault, and thus the event falls within the "Assault and Battery" exclusion of the nightclub's insurance policy with defendant (*see Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352; *U.S. Underwriters Ins. Co v Val-Blue Corp.*, 85 NY2d 821, 822-823; *Mark McNichol Enters. v First Fin. Ins. Co.*, 284 AD2d 964).

Contrary to plaintiff's contention, "[d]efendant is not estopped from asserting that its insured acted intentionally by virtue of the finding of negligence in the [underlying] action. Because the judgment was entered on default, the issue of negligence was not actually litigated in [that] action, and the finding of negligence therefore has no collateral estoppel effect" (*Rourke v Travelers Ins. Co.*, 254 AD2d 730, 731; *see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456-457; *Robbins v Michigan Millers Mut. Ins. Co.*, 236 AD2d 769, 771).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1121.1**

**CA 10-01062**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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EASTMAN KODAK COMPANY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT CARMOSINO, DEFENDANT-RESPONDENT.

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WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (ERIC J. WARD OF COUNSEL), AND JONES DAY, PITTSBURGH, PENNSYLVANIA, FOR PLAINTIFF-APPELLANT.

COZEN O'CONNOR, NEW YORK CITY (MARK J. FOLEY, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND BILGORE, REICH, LEVINE & KANTOR, LLP, ROCHESTER, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered May 3, 2010. The order denied the motion of plaintiff for injunctive relief.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to enforce the restrictive covenants contained in an employment agreement that defendant signed while he was employed by plaintiff. Approximately four months after plaintiff notified defendant that his position had been eliminated as a result of a corporate reorganization, defendant began working for Hewlett Packard (HP), a competitor of plaintiff. Plaintiff appeals from an order denying its motion seeking a preliminary injunction enjoining defendant from commencing employment with HP.

We conclude that Supreme Court did not abuse its discretion in refusing to issue the preliminary injunction. " 'Preliminary injunctive relief is a drastic remedy [that] is not routinely granted' " (*Sutherland Global Servs., Inc. v Stuewe*, 73 AD3d 1473, 1474). In order to prevail on a motion for a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury in the absence of injunctive relief, and (3) a balance of equities in its favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839; *Emerald Enters. of Rochester v Chili Plaza Assoc.*, 237 AD2d 912).

In this case, plaintiff failed to demonstrate by clear and

convincing evidence that the employment agreement was enforceable and thus that there was a likelihood of success on the merits. It is well established that agreements by an employee not to compete with his or her employer upon the termination of employment are judicially disfavored because " 'powerful considerations of public policy . . . militate against sanctioning the loss of a [person's] livelihood' " (*Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307, *rearg denied* 40 NY2d 918; *see Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499). Thus, "[a] restrictive covenant against a former employee 'will be enforced only if reasonably limited temporally and geographically . . ., and then only to the extent necessary to protect the employer from unfair competition [that] stems from the employee's use or disclosure of trade secrets or confidential customer lists' " (*IVI Envtl. v McGovern*, 269 AD2d 497, 498, quoting *Columbia Ribbon & Carbon Mfg. Co.*, 42 NY2d at 499; *see Riedman Corp. v Gallager*, 48 AD3d 1188, 1189).

Here, plaintiff failed to establish that the information to which defendant was exposed during his tenure as plaintiff's "Vice President, Sales, Global and Strategic Accounts" qualifies as a trade secret or that specific enforcement of the employment agreement is necessary to protect plaintiff's legitimate interests (*see Natural Organics, Inc. v Kirkendall*, 52 AD3d 488, 489-490, *lv denied* 11 NY3d 707). Although plaintiff alleged that defendant downloaded confidential company documents after his termination, plaintiff failed to set forth evidence establishing that defendant misappropriated confidential information. Plaintiff also failed to establish that its customer lists, pricing information, and "product roadmaps" constitute trade secrets (*see Buhler v Michael P. Maloney Consulting*, 299 AD2d 190, 191; *Briskin v All Seasons Servs.*, 206 AD2d 906; *Walter Karl, Inc. v Wood*, 137 AD2d 22, 27). Moreover, "mere knowledge of the intricacies of a business" does not qualify as a trade secret (*Marietta Corp. v Fairhurst*, 301 AD2d 734, 739).

We further conclude that plaintiff failed to establish that irreparable injury would result absent injunctive relief (*see Genesis II Hair Replacement Studio v Vallar*, 251 AD2d 1082). "[B]ecause the non[]competition agreement is for a finite period, i.e., 18 months, any loss of sales occasioned by the allegedly improper conduct of defendant can be calculated. Thus, plaintiff has an adequate remedy in the form of monetary damages, and injunctive relief is both unnecessary and unwarranted" (*D&W Diesel v McIntosh*, 307 AD2d 750, 751). In addition, we conclude that a balance of the equities in this case do not favor granting the preliminary injunction. Defendant was terminated without cause and, even after he was notified of his involuntary termination, he endeavored to remain an employee of plaintiff by applying for one of the new positions created in the reorganization. As the Court of Appeals reasoned in *Post v Merrill Lynch, Pierce, Fenner & Smith* (48 NY2d 84, *rearg denied* 48 NY2d 975), a case involving a forfeiture-for-competition clause in a private pension plan, "[a]n employer should not be permitted to use offensively [a noncompetition] clause . . . to economically cripple a former employee and simultaneously deny other potential employers his

[or her] services" (*id.* at 89).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1122**

**KA 07-01855**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD SEMRAU, DEFENDANT-APPELLANT.

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CHARLES J. GREENBERG, BUFFALO, FOR DEFENDANT-APPELLANT.

RICHARD SEMRAU, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered September 4, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (four counts), burglary in the first degree, criminal possession of a weapon in the third degree and criminal possession of stolen property in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, four counts of murder in the second degree (Penal Law § 125.25 [1], [3]), arising from the bludgeoning of an elderly couple in their home. Contrary to the contention of defendant, County Court properly refused to suppress statements that he made to the police in September 2006. The court determined that defendant was not in custody when he made those statements and thus, contrary to the contention of defendant, the fact that he had not been Mirandized when he made the statements does not require their suppression. It is well settled that, "where there are conflicting inferences to be drawn from the proof, the choice of inferences is for the trier of the facts[, a]nd that choice is to be honored unless unsupported, as a matter of law" (*People v Leonti*, 18 NY2d 384, 390, *rearg denied* 19 NY2d 922, *mot to amend remittitur granted* 19 NY2d 922, *cert denied* 389 US 1007; *see generally People v Wood*, 175 AD2d 637, *lv denied* 79 NY2d 834). Here, the record of the suppression hearing establishes that defendant voluntarily accompanied the police to the police station and was not handcuffed prior to making the statements (*see People v Towsley*, 53 AD3d 1083, 1084, *lv denied* 11 NY3d 795; *People v Regan*, 21 AD3d 1357, 1358), he was provided food, beverages and use of the bathroom (*see People v Dozier*,

32 AD3d 1346, *lv dismissed* 8 NY3d 880*; People v Hernandez*, 25 AD3d 377, 378, *lv denied* 6 NY3d 834), and the questioning was investigatory rather than accusatory (*see People v Murphy*, 43 AD3d 1276, 1277, *lv denied* 9 NY3d 1008; *People v Flecha*, 43 AD3d 1385, 1385-1386, *lv denied* 9 NY3d 990). Thus, there is ample support for the court's determination that defendant was not in custody when he made the statements in question.

Defendant failed to preserve for our review his further contention that the verdict is inconsistent inasmuch as he failed to raise that contention before the jury was discharged (*see People v Camacho*, 70 AD3d 1393, *lv denied* 14 NY3d 886, 887; *People v Griffin*, 48 AD3d 1233, 1234, *lv denied* 10 NY3d 840), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject the contention of defendant that defense counsel's failure to raise that contention before the jury was discharged constituted ineffective assistance of counsel (*see generally People v Carter*, 7 NY3d 875, 876-877). Defendant failed to meet his burden of demonstrating " 'the absence of strategic or other legitimate explanations' for [defense] counsel's' " failure to do so (*People v Benevento*, 91 NY2d 708, 712).

Contrary to defendant's further contention, there was no *Rosario* violation. "There is no requirement that a prosecutor record in any fashion his [or her] interviews with a witness. If the prosecutor chooses to do so, *Rosario* and its progeny require that the recording be furnished to the defense. But nothing in the *Rosario* line of cases in any way imposes an obligation on the prosecutor to create *Rosario* material in interviewing witnesses. Nor do these cases or any related authority hold that a defendant's right of cross-examination is unfairly frustrated by the failure to record the witness's statement" (*People v Steinberg*, 170 AD2d 50, 76, *affd* 79 NY2d 673; *see People v Littles*, 192 AD2d 314, *lv denied* 81 NY2d 1016).

Defendant's contention that the conviction is not supported by legally sufficient evidence because the testimony of the accomplice was not sufficiently corroborated is without merit. "The corroborative evidence need not show the commission of the crime; it need not show that defendant was connected with the commission of the crime . . . It is enough if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth" (*People v Dixon*, 231 NY 111, 116; *see People v Reome*, 15 NY3d 188, 191-192). Here, there was abundant corroboration of the testimony of the accomplice, including the testimony of a witness to whom defendant sold some of the property taken during the crime (*see People v Brown*, 62 AD3d 1089, 1091, *lv denied* 13 NY3d 742), police testimony establishing that an earring that was stolen during the burglary was found in defendant's apartment (*see People v Spencer*, 272 AD2d 682, 684, *lv denied* 95 NY2d 858), the testimony of witnesses stating that they observed the accomplice while he was acting as a lookout, and defendant's recorded tacit admission to the crimes. Furthermore, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is

also otherwise legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We have considered the remaining contentions of defendant, including those raised in his pro se supplemental brief, and conclude that they are without merit.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1123**

**KA 09-00320**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL GRAHAM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

DARRELL GRAHAM, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered January 6, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to the contention of defendant in each appeal, we conclude that he validly waived his right to appeal. Supreme Court made clear that the waiver of the right to appeal was a condition of each plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was "separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *see People v Dillon*, 67 AD3d 1382). Contrary to the contention of defendant in appeal No. 2, "[t]rial courts are not required to engage in any particular litany during an allocution in order to obtain a valid guilty plea in which defendant waives a plethora of rights," including the right to appeal (*People v Moissett*, 76 NY2d 909, 910-911). Thus, his "waiver [of the right to appeal] is not invalid on the ground that the court did not specifically inform [him] that his general waiver of the right to appeal encompassed the court's suppression rulings" (*People v Tantao*, 41 AD3d 1274, 1275, *lv denied* 9 NY3d 882), and his waiver of the right

to appeal thus encompasses his challenge to the court's suppression ruling in appeal No. 2 (*see People v Kemp*, 94 NY2d 831, 833; *People v Garner*, 52 AD3d 1265, 1266, *lv denied* 11 NY3d 736). The contention of defendant in appeal No. 1 that he was prejudiced by alleged prosecutorial misconduct during the grand jury proceeding is likewise forfeited by his valid waiver of the right to appeal (*see People v Di Raffaele*, 55 NY2d 234, 240).

Although the contention of defendant in his pro se supplemental brief that his guilty plea in each appeal was not knowingly and intelligently entered survives his waiver of the right to appeal, defendant failed to preserve his contention for our review by failing to move to withdraw his pleas or to vacate the judgments of conviction (*see People v Brown*, 66 AD3d 1385, *lv denied* 14 NY3d 839; *People v Bland*, 27 AD3d 1052, *lv denied* 6 NY3d 892). To the extent that the further contention of defendant in his pro se supplemental brief concerning alleged ineffective assistance of counsel in each appeal survives the plea and the waiver of the right to appeal (*see People v Wright*, 66 AD3d 1334, *lv denied* 13 NY3d 912), we conclude that his contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404). Indeed, there is no support in the record for the contention of defendant that defense counsel misinformed him about a promised sentence cap and, to the extent that he relies upon alleged misrepresentations by defense counsel that are outside the record on appeal, the proper vehicle for challenging those alleged misrepresentations is a motion pursuant to CPL article 440 (*see People v Gilchrist*, 251 AD2d 1030, 1031, *lv denied* 92 NY2d 925, 929).

Finally, although the challenge by defendant to the severity of the sentence in each appeal is not encompassed by the waiver of the right to appeal inasmuch as "defendant waived his right to appeal before [the court] advised him of the potential periods of imprisonment that could be imposed" (*People v Mingo*, 38 AD3d 1270, 1271), we nevertheless conclude that the sentences are not unduly harsh or severe.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1124**

**KA 09-00577**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL GRAHAM, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

DARRELL GRAHAM, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered January 6, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same Memorandum as in *People v Graham* ([appeal No. 1] ___ AD3d ___ [Oct. 1, 2010]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1125**

**KA 09-02345**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN DIAZ, DEFENDANT-APPELLANT.

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NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered August 13, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, promoting prison contraband in the third degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him of, inter alia, assault in the first degree (Penal Law § 120.10 [1]), defendant contends that the evidence presented by the People at trial with respect to the crime of assault varied from the allegations set forth in the indictment, as amplified by the bill of particulars, rendering the evidence legally insufficient to support the assault conviction. We reject that contention. The bill of particulars alleged that defendant "attacked the victim from behind and stabbed him several times in the abdomen and chest area." At trial, the victim testified that he did not recall the details of the attack and did not see his assailant. He further testified, however, that he informed a police officer following the attack that the assailant "reached around from my behind and stabbed me in the front." In addition, although several correction officers testified that they observed defendant and the victim facing each other during the altercation, those witnesses also testified that they did not observe the commencement of the altercation. Thus, neither the testimony of the victim nor of the correction officers can be said to conflict with the allegation in the bill of particulars that defendant initially attacked the victim from behind, and we conclude under the circumstances of this case that "defendant received the requisite fair notice of the accusations against him" (*People v McCallar*, 53 AD3d 1063, 1065, *lv denied* 11 NY3d 833 [internal quotation marks omitted]; *see People v Grega*, 72 NY2d

489, 495-496).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1126**

**KA 08-02228**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL JOHNSON, DEFENDANT-APPELLANT.

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MICHAEL B. JONES, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered December 7, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of rape in the third degree (Penal Law § 130.25 [2]) and sexual abuse in the third degree (§ 130.55) and sentencing him to a term of incarceration based on his admission that he violated a condition of his probation. Defendant's contention with respect to the plea proceeding underlying the original judgment is "not properly before us inasmuch as there is no notice of appeal from the original judgment in the record before us, nor is there otherwise any indication in the record that an appeal from that judgment was perfected" (*People v Brown*, 307 AD2d 759; *see People v Lawlor*, 49 AD3d 1270, *lv denied* 10 NY3d 936; *People v Parente*, 4 AD3d 793). Although defendant is correct that his waiver of the right to appeal encompassed the sentence of probation but did not encompass the sentence of incarceration imposed following his violation of probation (*see People v Cheatham*, 278 AD2d 889, *lv denied* 96 NY2d 798; *People v Rodriguez*, 259 AD2d 1040), we nevertheless reject his contention that the sentence of incarceration is unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was sentenced to a determinate term of incarceration of 60 days for his conviction of sexual abuse in the third degree, and it must therefore be amended to reflect that he was sentenced to a determinate term of incarceration of three months (*see People v Martinez*, 37 AD3d 1099, 1100, *lv denied* 8 NY3d 947).

We have reviewed defendant's remaining contentions and conclude

that they are without merit.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1127**

**KA 09-01437**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID PLUNKETT, DEFENDANT-APPELLANT.

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AUDREY BARON DUNNING, ILION, FOR DEFENDANT-APPELLANT.

JOHN H. CRANDALL, SR., DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., NEW YORK CITY (BEBE J. ANDERSON OF COUNSEL), FOR AMERICAN ACADEMY OF HIV MEDICINE ASSOCIATION OF NURSES IN AIDS CARE, HIV MEDICINE ASSOCIATION, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., AMICI CURIAE.

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Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered May 23, 2007. The judgment convicted defendant, upon his plea of guilty, of aggravated assault on a police officer or a peace officer and assault in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of one count of aggravated assault upon a police officer or a peace officer (Penal Law § 120.11) and two counts of assault in the second degree (§ 120.05 [3]). By pleading guilty, defendant forfeited his contention that County Court erred in refusing to dismiss the indictment based upon the prosecutor's alleged failure to introduce exculpatory evidence before the grand jury (*see People v Crumpler*, 70 AD3d 1396, 1397, *lv denied* 14 NY3d 839), as well as his contention concerning the alleged insufficiency of the evidence presented to the grand jury (*see People v Dickerson*, 66 AD3d 1371, 1372-1373, *lv denied* 13 NY3d 859). In addition, defendant forfeited his contention that the court improperly curtailed defense counsel's questioning of prospective jurors concerning their views on mental illness because, "[b]y pleading guilty instead of going to trial, the defendant . . . necessarily surrendered his right to challenge on appeal any alleged trial errors" (*People v Green*, 75 NY2d 902, 904-

905, *cert denied* 498 US 860).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1128**

**KA 08-02273**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WINNIE NIXON, DEFENDANT-APPELLANT.

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THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 2, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, improper automobile equipment and improper license plates.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that Supreme Court abused its discretion in denying his motion to sever his trial from that of his codefendant. We agree. Defendant and the codefendant were jointly charged with criminal possession of a weapon in the second degree arising from the police having found a handgun in a vehicle that they stopped. Defendant was also charged with violations of the Vehicle and Traffic Law arising from his operation of the vehicle. In support of his pretrial motion for severance, defendant contended that he and the codefendant had irreconcilable defenses because, according to defendant, the codefendant was in sole possession of the weapon, while the defense of the codefendant was that defendant possessed the weapon but placed it under the codefendant's passenger seat when the police stopped the vehicle. Defendant further contended that he would be prejudiced in the event that the codefendant's attorney was permitted to present evidence against him, thereby acting as a second prosecutor. Indeed, defendant was correct in that respect because the codefendant's "attorney took an aggressive adversarial stance against [defendant at trial], in effect becoming a second prosecutor" (*People v Cardwell*, 78 NY2d 996,

998). In support of his motion for a mistrial following the testimony of the codefendant at trial, defendant contended that the codefendant had testified that defendant stated that he could not be caught with a handgun because he was on parole, and we note in any event that both defendants in fact implicated each other at trial (*cf. People v Watkins*, 10 AD3d 665, 665-666, *lv denied* 3 NY3d 761). Consequently, we agree with defendant that " '[t]he essence or core of the defenses [were] in conflict, such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other' " (*People v Mahboubian*, 74 NY2d 174, 184). In view thereof, along with the fact that "there [was] a significant danger, as both defenses [were] portrayed to the trial court [in the pretrial motion and the motion for a mistrial], that the conflict alone would lead the jury to infer defendant's guilt," severance was required (*id.*; *see People v Kyser*, 26 AD3d 839, 840). Although it appears from the record that the court did not address defendant's irreconcilable conflict contention in refusing to sever the trial or to grant a mistrial, that failure is of no moment because we deem the court to have implicitly denied the severance and mistrial motions on that ground (*see generally People v Mason*, 305 AD2d 979, *lv denied* 100 NY2d 563). Consequently, we reverse the judgment and grant a new trial. Inasmuch as the codefendant was acquitted at trial, defendant's severance motion is moot.

Contrary to the further contention of defendant, the conviction of criminal possession of a weapon in the second and third degrees is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict convicting him of those crimes is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). In light of our determination, we do not address defendant's remaining contention.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1129**

**KA 09-01837**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID O'BRIEN, DEFENDANT-APPELLANT.

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EDWARD C. COSGROVE, BUFFALO, FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, SPECIAL PROSECUTOR, MAYVILLE (LYNN S. SCHAFFER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cattaraugus County Court (Richard C. Kloch, Sr., A.J.), rendered September 9, 2009. The judgment convicted defendant, upon a jury verdict, of vehicular manslaughter in the second degree, criminally negligent homicide, and misdemeanor driving while intoxicated (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Cattaraugus County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of vehicular manslaughter in the second degree (Penal Law § 125.12 [1]), criminally negligent homicide (§ 125.10), and two counts of driving while intoxicated (Vehicle and Traffic Law § 1192 [2], [3]). Viewing the evidence in light of the elements of the two counts of driving while intoxicated and the count of vehicular manslaughter in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to those counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant contends for the first time on appeal that County Court erred in precluding him from calling two sitting judges as character witnesses to testify concerning his reputation for "truthfulness" or "honesty," and thus that contention is not properly before us (*see* CPL 470.05 [2]). In any event, defendant's contention is without merit (*see People v Sullivan*, 177 AD2d 673, *lv denied* 79 NY2d 864). Although defendant preserved for our review his further contention that the court erred in precluding him from calling those judges as character witnesses to testify concerning his reputation for "sobriety," we conclude that defendant's contention lacks merit inasmuch as the probative value of such testimony was "substantially outweighed by the danger that it [would] unfairly prejudice the [prosecution] or mislead the jury" (*People v Scarola*, 71 NY2d 769,

777).

There is no merit to the further contention of defendant that he was deprived of a fair trial by the court's participation in the direct examination of a prosecution witness. The record establishes that the questions posed by the court were limited and merely clarifying in nature (*see People v Yut Wai Tom*, 53 NY2d 44, 56-57) and, contrary to defendant's contention, the court did not " 'overstep[] [its] bounds and assume[] the role of a prosecutor' " (*People v Jacobsen*, 140 AD2d 938, 940). Defendant failed to preserve for our review his contention that the court erred in asking a witness questions that were raised by a juror (*see People v Clark*, 52 AD3d 860, 863, *lv denied* 11 NY3d 831, 896), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed to preserve for our review his contention that his verbal and written consent to a chemical blood alcohol test was not knowing or voluntary because the police failed to inform him of the existence of the "two-hour rule" set forth in Vehicle and Traffic Law § 1194 (2) (a) (1) and, in any event, that contention is without merit. "The two-hour time limit does not apply where, as here, [the] defendant [has] expressly consented to the blood test" (*People v Hoffman*, 283 AD2d 928, 929, *lv denied* 96 NY2d 919; *see People v Atkins*, 85 NY2d 1007, 1008-1009).

Finally, defendant contends that the court erred in admitting in evidence the results of his blood test inasmuch as those results were unreliable. We reject that contention. Even assuming, arguendo, that the court was required to conduct a hearing pursuant to *People v Victory* (166 Misc 2d 549) to determine the admissibility of the blood test results taken more than two hours after defendant's arrest, we conclude that the testimony of the People's expert, a forensic scientist, at that hearing established the reliability of the blood test results and the methods that she used to determine defendant's blood alcohol content (BAC) at the time of the accident. Defendant's contention that the expert made erroneous factual assumptions in estimating defendant's BAC at the time of the accident goes to the weight that the expert's testimony should be accorded, not to the admissibility of the blood test results (*see generally People v Parker*, 304 AD2d 146, 159, *lv denied* 100 NY2d 585; *People v Pettigrew*, 255 AD2d 969, 970-971, *lv denied* 92 NY2d 1037).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1132**

**CA 09-02429**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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STEPHEN TURNER, PLAINTIFF-APPELLANT,

V ORDER

CSX TRANSPORTATION, INC., ET AL.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (PATRICK DONOGHUE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ANSPACH MEEKS ELLENBERGER, LLP, BUFFALO (STEVEN E. CARR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 6, 2009 in a personal injury action. The order determined the interest rate to be applied to the money judgment for plaintiff.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 1, 2010, and filed in the Erie County Clerk's Office on July 1, 2010,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1133**

**CA 09-02575**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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STEPHEN TURNER, PLAINTIFF-APPELLANT,

V ORDER

CSX TRANSPORTATION, INC., ET AL.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (PATRICK DONOGHUE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ANSPACH MEEKS ELLENBERGER, LLP, BUFFALO (STEVEN E. CARR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an amended judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 4, 2009 in a personal injury action. The amended judgment awarded plaintiff money damages upon a jury verdict.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 1, 2010, and filed in the Erie County Clerk's Office on July 1, 2010,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1135**

**CA 10-00249**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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LOVELESS FAMILY TRUST, NEIL LOVELESS,
PAULA MANNING, PLAINTIFFS-RESPONDENTS-APPELLANTS,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

PAUL KOENIG, DEFENDANT-APPELLANT-RESPONDENT.

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FOULKE LAW FIRM, AUBURN (WALTER C. FOULKE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

FRANK A. ALOI, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

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Appeal and cross appeal from an order of the Supreme Court, Wayne County (Maurice E. Strobridge, J.H.O.), entered July 20, 2009. The order, among other things, granted plaintiffs' motion to dismiss certain affirmative defenses.

It is hereby ORDERED that said appeal is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, an order compelling an accounting and partitioning of a 243.75-acre farm located on State Route 414 in the Town of Rose. The property, which includes a dwelling and various outbuildings, was owned by defendant and his sister, Pauline E. Loveless, as tenants in common with no right of survivorship. Through a series of conveyances, the one-half interest of defendant's sister in the property was transferred to plaintiff Loveless Family Trust (Trust), of which plaintiffs Neil Loveless and Paula Manning are the sole trustees. Plaintiffs alleged, inter alia, that defendant excluded them from the property; failed to collect fair market rent from defendant's daughter, who resided on the property; and refused to allow them to inspect the farm's books and records. In his answer, defendant asserted five affirmative defenses and a counterclaim, seeking reimbursement for carrying charges, taxes, repairs, maintenance and renovation expenses related to the property. Plaintiffs moved to dismiss the affirmative defenses and counterclaim "and/or" for summary judgment dismissing them and they sought "an order of partition" pursuant to RPAPL 901 and 1201. By way of an affirmation treated by Supreme Court as a "motion," defendant cross-moved for a summary finding of title by adverse possession and for dismissal of the complaint. The court granted those parts of plaintiffs' motion seeking dismissal of the first, second, third and

fifth affirmative defenses, and denied defendant's cross motion. Although the court did not address those parts of plaintiffs' motion seeking dismissal of the counterclaim and an order of partition, the failure to rule is deemed a denial (*see Brown v U.S. Vanadium Corp.*, 198 AD2d 863). Defendant appeals and plaintiff cross-appeals from the order. The notice of cross appeal recites that plaintiffs are cross-appealing "only" from that part of the order that did not dismiss the counterclaim. We dismiss the cross appeal, however, inasmuch as plaintiffs in their brief have not addressed the failure to dismiss the counterclaim (*see generally Sawyer v Town of Lewis*, 11 AD3d 938, 940).

With respect to defendant's appeal, we conclude that the court properly denied defendant's cross motion. "In a tenancy-in-common, each cotenant has an equal right to possess and enjoy all or any portion of the property as if the sole owner. Consequently, nonpossessory cotenants do not relinquish any of their rights as tenants-in-common when another cotenant assumes exclusive possession of the property" (*Myers v Bartholomew*, 91 NY2d 630, 632-633). As the Court further wrote in *Myers*, "a tenant-in-common seeking to assert a successful claim of adverse possession is required to show more than mere possession; the cotenant must also commit acts constituting ouster" (*id.* at 633; *see Trevisano v Giordano*, 202 AD2d 1071, *appeal dismissed* 84 NY2d 848; *Perkins v Volpe*, 146 AD2d 617, *lv dismissed* 74 NY2d 791). In the absence of ouster, "a cotenant may begin to hold adversely only *after* 10 years of exclusive possession" (*Myers*, 91 NY2d at 634-635; *see* RPAPL former 541).

The contention of defendant that he exclusively possessed the property and paid all of the expenses related to the property for a period in excess of 20 years is of no moment, inasmuch as exclusive possession and the payment of maintenance expenses by a cotenant are insufficient to establish a claim of right for purposes of adverse possession as against a cotenant (*see Perez v Perez*, 228 AD2d 161, 162, *lv dismissed* 89 NY2d 917; *see also Russo Realty Corp. v Orlando*, 30 AD3d 499, 500-501). Moreover, defendant acknowledged that he discussed every repair to the property with his sister's husband before undertaking such repairs. There is likewise no merit to the contention of defendant that he ousted plaintiffs after the creation of the Trust in 1994. Defendant's daughter acknowledged that rent was paid both to defendant and the Trust, and the record reflects that the Trust received rental income tax forms concerning the property in 1999 and from 2001 through 2004. Moreover, defendant testified at his deposition that he refused to discuss matters related to the property with the trustees, his niece and nephew, because he was "too busy," not because he was attempting to oust them.

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1136**

**CA 09-02453**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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NICOLE M. CAPODIFERRO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT A. CAPODIFERRO, DEFENDANT-RESPONDENT.

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MICHELE LEE NEUSCH, BEACON, FOR PLAINTIFF-APPELLANT.

DONALD WHITE, NEW HARTFORD, FOR DEFENDANT-RESPONDENT.

JULIE GIRUZZI-MOSCA, ATTORNEY FOR THE CHILD, UTICA, FOR BRANDON C.

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Appeal from a judgment of the Supreme Court, Oneida County (Bernadette T. Romano, J.), entered January 16, 2009 in a divorce action. The judgment, insofar as appealed from, awarded the parties joint legal custody of their child and directed defendant to pay child support.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: In this matrimonial action, the parties settled all issues prior to trial with the exception of those involving the custody of their five-year-old son. Plaintiff mother sought sole legal and physical custody, while defendant father sought to continue the joint legal and physical custody arrangement that had been in place for the preceding 11 months, at the recommendation of the Attorney for the Child. Following a trial on the issue of custody, Supreme Court ruled in favor of the father. We conclude that the court's determination that the existing custody arrangement is in the child's best interests "is supported by a sound and substantial basis in the record and thus [should] not be disturbed" (*Wideman v Wideman*, 38 AD3d 1318, 1319 [internal quotation marks omitted]). Contrary to the mother's contention, "the record establishes that the court carefully weighed the appropriate factors, and the determination of the court, 'which [was] in the best position to evaluate the character and credibility of the witnesses, must be accorded great weight' " (*id.*). We note in addition that the record supports the court's determination that the joint custody arrangement is feasible despite conflicts between the parties, i.e., "the parties are not 'so embattled and embittered as to effectively preclude joint decision making' " (*Matter of Schlafer v Schlafer*, 6 AD3d 1202, 1202-1203).

The record does not support the mother's further contention that

the court failed to consider its own findings of fact and conclusions of law that accompanied the judgment of divorce in determining the issue of custody. The findings of fact and conclusions of law to which the mother refers were submitted to the court by her own attorney *after* the conclusion of the custody trial and the issuance of the court's custody decision. Also contrary to the contention of the mother, the record does not support her contention that the court was biased against her (*cf. Matter of Yadiel Roque C.*, 17 AD3d 1168, 1169). Although the mother is correct that the court "elicited substantial testimony . . . [from witnesses during the trial,] . . . the [court's] questions sought only clarification or further explanation of testimony" presented by both parties (*Matter of Owens v Garner*, 63 AD3d 1585, 1586).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1139**

**CA 10-00407**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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CAROL A. TONZI, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

RICHARD H. NICHOLS, INDIVIDUALLY AND DOING BUSINESS AS NICHOLS FINANCIAL SERVICES, DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 1.)

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UNDERBERG & KESSLER LLP, ROCHESTER (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

FOLEY AND FOLEY, PALMYRA (JAMES F. FOLEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

WILLIAM A. JACOBSON, ITHACA, AMICUS CURIAE IN SUPPORT OF PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court, Wayne County (Francis A. Affronti, J.), entered September 4, 2009. The order, among other things, granted in part defendant's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1140**

**CA 10-00408**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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CAROL A. TONZI, PLAINTIFF-RESPONDENT,

V ORDER

RICHARD H. NICHOLS, INDIVIDUALLY AND DOING BUSINESS AS NICHOLS FINANCIAL SERVICES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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UNDERBERG & KESSLER LLP, ROCHESTER (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FOLEY AND FOLEY, PALMYRA (JAMES F. FOLEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

WILLIAM A. JACOBSON, ITHACA, AMICUS CURIAE IN SUPPORT OF PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Wayne County (Francis A. Affronti, J.), entered October 20, 2009. The order, among other things, granted plaintiff's motion to compel.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1141**

**CA 09-01471**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V ORDER

HAROLD WILKES, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (KEVIN S. DOYLE OF COUNSEL), FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 2, 2009 in a proceeding pursuant to Mental Hygiene Law article 10. The order denied the motion of respondent to dismiss the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* CPLR 5501 [a] [1]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1142**

**CA 09-01472**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HAROLD WILKES, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (KEVIN S. DOYLE OF COUNSEL), FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 20, 2009 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: This appeal arises from a proceeding pursuant to article 10 of the Mental Hygiene Law, in which petitioner sought the civil confinement of respondent after his criminal sentence expired. He appeals from an order committing him to a secure treatment facility, following a jury verdict determining that he suffers from a mental abnormality that predisposes him to commit sex offenses and makes it unlikely that he will be able to control his behavior.

We reject the contention of respondent that Supreme Court violated his right to confront and cross-examine the witnesses against him. First, respondent's reliance upon *Crawford v Washington* (541 US 36) is unavailing. *Crawford*, which "preserv[es] [a] defendant's right to confront witnesses in the context of a criminal prosecution" (*People v Dort*, 18 AD3d 23, 25, *lv denied* 4 NY3d 885), does not apply to respondent in this civil proceeding (*see People v Bolton*, 50 AD3d 990, *lv denied* 11 NY3d 701; *People v Brown*, 32 AD3d 1222, *lv denied* 7 NY3d 924).

Second, respondent failed to preserve for our review the majority of his contentions concerning the reliance by petitioner's psychological experts upon hearsay information in forming their opinions. Respondent moved in limine to preclude petitioner's

psychologists from relying upon hearsay information, inter alia, on the ground that such hearsay information was not sufficiently reliable to form the basis for an expert opinion. The court declined to rule on respondent's motion in advance of trial. At trial, respondent raised that objection only once, in response to the reliance by one psychologist upon "parole documents that referenced . . . arrest reports regarding [a rape conviction, and conversations with respondent's] father[] regarding that offense." Respondent did not contend that any other specific record or document relied upon by any of the psychologists was unreliable hearsay. Consequently, respondent preserved for our review his contention that only one of the psychologists improperly relied upon hearsay documents or records other than the parole documents and the conversations with his father in forming the psychologist's expert opinion, and his contention is thus properly before us only with respect to such documents and conversations in connection with that one psychologist (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Insofar as respondent's contention is preserved for our review with respect to the parole documents relied upon by that one psychologist, we note that the record contains the testimony of a psychologist that such documents are accepted in the psychological profession as the basis upon which to form an opinion, and we conclude that they are sufficiently reliable to form the basis of an expert psychological opinion under the circumstances presented here. The type of documents at issue are virtually the same as those at issue in *People v Mingo* (12 NY3d 563), a case in which the Court of Appeals concluded that the documents were sufficiently reliable hearsay for use in proceedings pursuant to the Sex Offender Registration Act (*see id.* at 572-574; *People v Marrocco*, 41 AD3d 1297, *lv denied* 9 NY3d 807). Based on the factors set forth by the Court of Appeals in *Mingo* in determining that such documents are reliable, we agree with petitioner that the court properly concluded that the documents in this case were sufficiently reliable to form the basis for the psychologist's expert opinion. Here, respondent pleaded guilty to the charge that was covered by the documents, he had an opportunity during the parole process to challenge the information set forth therein, and he later provided virtually the same information when the psychologist in question interviewed him, thus establishing the reliability of the information. With respect to the conversations with respondent's father, we note that he was called as a witness at trial and was questioned regarding the information at issue. Thus, the information that he provided was in evidence and was properly relied upon by the psychologist in question.

Insofar as respondent preserved for our review his further contention that the court erred in permitting two psychologists to testify to limited amounts of hearsay information at trial in order to explain their opinions, we conclude that respondent's contention lacks merit. Although it is a "questionable assumption" that a psychologist may "not only . . . express [his or] her opinion but [may also] repeat to the jury all the hearsay information on which it was based" (*People v Goldstein*, 6 NY3d 119, 126, *cert denied* 547 US 1159), it is well settled that "hearsay testimony given by experts is admissible for the

limited purpose of informing the jury of the basis of the expert[s'] opinion[s] and not for the truth of the matters related" (*People v Campbell*, 197 AD2d 930, 932, *lv denied* 83 NY2d 850; *see People v Wlasiuk*, 32 AD3d 674, 680, *lv dismissed* 7 NY3d 871; *Shahram v Horwitz, M.D.*, 5 AD3d 1034, 1035). We thus conclude that the testimony was properly admitted after the court determined that its purpose was to explain the basis for the experts' opinions, not to establish the truth of the hearsay material, and that any prejudice to respondent from the testimony was outweighed by its probative value in assisting the jury in understanding the basis for each expert's opinion.

Finally, any error in denying the motion of respondent to exclude certain information obtained from his sex offender treatment program in violation of his rights pursuant to the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d *et seq.*) is harmless. The same information was obtained from proper sources, including conversations between the expert psychologists and respondent, and was properly considered by the psychologists (*see generally Matter of Matthews v Matthews*, 72 AD3d 1631, 1632; *Matter of Wise v Burks*, 61 AD3d 1058; *Matter of Tercjak v Tercjak*, 49 AD3d 772, *lv denied* 10 NY3d 716).

Entered: October 1, 2010 Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1143**

**CA 09-01474**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V ORDER

HAROLD WILKES, RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (KEVIN S. DOYLE OF COUNSEL), FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 11, 2009 in a proceeding pursuant to Mental Hygiene Law article 10. The order, upon a jury verdict, determined that respondent suffers from a mental abnormality that predisposes him to commit sex offenses and makes it unlikely that he will be able to control his behavior.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* CPLR 5501 [a] [1]).

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1144**

**KA 10-01007**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

KATHERINE A. GRAHAM, DEFENDANT-RESPONDENT.

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DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (GREGORY S. OAKES OF COUNSEL), FOR APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Oswego County Court (Walter Hafner, Jr., J.), entered April 9, 2010. The order, insofar as appealed from, granted the motion of defendant to dismiss counts one, two, five and six of the indictment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1145**

**KA 10-01008**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

RICHARD L. GRAHAM, DEFENDANT-RESPONDENT.

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DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (GREGORY S. OAKES OF COUNSEL), FOR APPELLANT.

RODAK & KIRWAN, PC, OSWEGO (TIMOTHY J. KIRWAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Oswego County Court (Walter Hafner, Jr., J.), entered April 9, 2010. The order, insofar as appealed from, granted the motion of defendant to dismiss counts one, two, five and six of the indictment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court