



*SUPREME COURT OF THE STATE OF NEW YORK*  
*APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT*

DECISIONS FILED

OCTOBER 9, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

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. 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*

**990**

**CA 08-02269**

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

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RICHARD HUNT, PLAINTIFF,

V

MEMORANDUM AND ORDER

CIMINELLI-COWPER CO., INC., ET AL., DEFENDANTS.

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CIMINELLI-COWPER CO., INC.,  
THIRD-PARTY PLAINTIFF-APPELLANT,

V

HUBER CONSTRUCTION, INC., THIRD-PARTY DEFENDANT,  
DAVID OGIONY DEVELOPMENT CO., INC.,  
AHLSTROM-SCHAEFFER ELECTRIC CORPORATION AND  
PETTIT & PETTIT, INC., THIRD-PARTY  
DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 1.)

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TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (MARK M. CAMPANELLA  
OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (LISA T. SOFFERIN OF COUNSEL), FOR  
THIRD-PARTY DEFENDANT-RESPONDENT DAVID OGIONY DEVELOPMENT CO., INC.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF  
COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT AHLSTROM-SCHAEFFER  
ELECTRIC CORPORATION.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (WILLIAM BOLTRAK OF  
COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT PETTIT & PETTIT, INC.

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Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered May 1, 2008 in a personal injury action. The order, *inter alia*, granted the motions of third-party defendants for summary judgment dismissing the third-party complaint and all cross claims against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motions of third-party defendants David Ogiony Development Co., Inc. and Pettit & Pettit, Inc. and reinstating the third-party complaint and cross claim against them and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law

negligence action seeking damages for injuries he sustained when he slipped and fell on an icy and unlit path while performing construction work on property owned by Jamestown Community College, Jamestown Community College Region and Jamestown Community College Regional Board of Trustees (collectively, JCC defendants), defendants in appeal Nos. 1 and 2 and the third-party plaintiffs in appeal No. 2. Ciminelli-Cowper Co., Inc. (Ciminelli), a defendant in appeal Nos. 1 and 2 and the third-party plaintiff in appeal No. 1, served as the construction manager on the project. Ciminelli and the JCC defendants each commenced a third-party action against various contractors on the project, asserting causes of action for contractual defense and indemnification and breach of contract based on their failure to procure insurance naming Ciminelli and the JCC defendants as additional insureds on the project. The JCC defendants also asserted a cause of action for common-law indemnification. The contracts between the JCC defendants and third-party defendants Ingalls Site Development, Inc., formerly known as David Ogiony Development Co., Inc. (Ogiony), Pettit & Pettit, Inc. (Pettit), and Ahlstrom-Schaeffer Electric Corporation (Ahlstrom) provided in relevant part that "the Contractor shall indemnify and hold harmless the Owner[, i.e., the JCC defendants, and the] Construction Manager[, i.e., Ciminelli,] . . . from and against claims, damages, losses and expenses . . . arising out of or resulting from performance of the Work . . . but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable . . . ." The contracts also provided that those third-party defendants (hereafter, third-party defendants) shall obtain an endorsement to their general liability policies naming, inter alia, Ciminelli and the JCC defendants as additional insureds on a primary basis.

In appeal No. 1, Ciminelli appeals from an order granting, inter alia, the motions of third-party defendants for summary judgment dismissing Ciminelli's third-party complaint and all cross claims against them. The order in appeal No. 1 also denied the cross motion of Ciminelli for partial summary judgment seeking a determination that third-party defendants are obligated to procure insurance naming Ciminelli as an additional insured and to defend and indemnify Ciminelli in the main action. In appeal No. 2, the JCC defendants appeal from an order granting the motions of third-party defendants for summary judgment dismissing the JCC defendants' amended third-party complaint and all cross claims against them. The order in appeal No. 2 also denied the cross motion of the JCC defendants for partial summary judgment seeking a determination that third-party defendants are obligated to procure insurance naming the JCC defendants as additional insureds and that third-party defendants are obligated contractually and under the common law to defend and indemnify the JCC defendants in the main action.

We agree with Ciminelli in appeal No. 1 that Supreme Court erred in granting the motions of Ogiony and Pettit for summary judgment dismissing the third-party complaint and all cross claims against them. We also agree with the JCC defendants in appeal No. 2 that the court erred in granting the motion of Ogiony for summary judgment

dismissing the amended third-party complaint and all cross claims against it, as well as those parts of the motion of Pettit for summary judgment dismissing the contractual defense and indemnification cause of action and the common-law indemnification cause of action and all cross claims against it. We therefore modify the orders in appeal Nos. 1 and 2 accordingly.

Ogiony, the snow removal contractor, established as a matter of law that it was not obligated to defend or indemnify Ciminelli and the JCC defendants in the main action by submitting evidence that there was no snow on the path where plaintiff fell and that its contract with the JCC defendants did not require the application of sand, salt or other ice melting products (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Ciminelli and the JCC defendants, however, raised a triable issue of fact whether Ogiony was negligent in its failure to remove snow from the area where the accident occurred and, if so, whether such negligence caused or contributed to the icy conditions of the path (*see generally id.*). Ciminelli and the JCC defendants submitted evidence that the contract between Ogiony and the JCC defendants required Ogiony to remove snow from the area where plaintiff's accident occurred, that Ogiony's subcontractor failed to remove snow from that area, and that the ice on the path was attributable, at least in part, to the melting and re-freezing of accumulated snow.

With respect to the breach of contract causes of action asserted against it by Ciminelli and the JCC defendants, Ogiony failed to submit any evidence demonstrating that, at the time of plaintiff's accident, it had procured the insurance for those defendants required by its contract with the JCC defendants. Thus, Ogiony failed to establish its entitlement to judgment as a matter of law dismissing those causes of action (*see generally id.*).

We further conclude that, by its own submissions, Pettit raised a triable issue of fact whether it was obligated to defend and indemnify Ciminelli and the JCC defendants in the main action based on its failure to install or its negligent installation of a walkway that caused or contributed to plaintiff's fall (*see generally Zuckerman*, 49 NY2d at 562). Pursuant to the contract between Pettit and the JCC defendants, Pettit was required to install temporary stone walkways at building entrances on the project site, including the area where plaintiff fell. Although Pettit's owner testified at his deposition that Pettit installed a stone walkway at that location prior to plaintiff's accident and that he believed that the walkways were constructed in accordance with the contract specifications, plaintiff testified at his deposition that there was no such walkway at the time of his accident and that his fall was caused in part by the presence of a hole or divot in the path.

With respect to the breach of contract cause of action asserted against it by Ciminelli, Pettit failed to submit any evidence demonstrating that it procured the required insurance and thus failed to establish its entitlement to judgment as a matter of law dismissing

that cause of action (*see generally id.*). We conclude, however, that Pettit established its entitlement to judgment as a matter of law dismissing the breach of contract cause of action asserted against it by the JCC defendants. Pettit submitted the deposition testimony of its president, who testified that he procured the required insurance, as well as a certificate of general liability insurance naming the JCC defendants and Ciminelli as additional insureds on a primary basis. The JCC defendants failed to raise a triable issue of fact with respect thereto in opposition to the motion (*see generally id.*).

We conclude with respect to Ahlstrom that the court properly granted its motions for summary judgment dismissing the third-party complaint, the amended third-party complaint and all cross claims against it. Pursuant to its contract with the JCC defendants, Ahlstrom was obligated to install six security lights on the project site. Ahlstrom established as a matter of law that it was not required to defend or indemnify Ciminelli and the JCC defendants in the main action by submitting evidence that it installed the lights pursuant to Ciminelli's directions and that it was not negligent in its placement of the lights (*see generally id.*). In opposition to the motions, Ciminelli and the JCC defendants failed to raise a triable issue of fact whether the lights functioned properly or whether inadequate lighting in the area of plaintiff's fall was attributable to any act or omission on the part of Ahlstrom (*see generally id.*). Ahlstrom also established as a matter of law that it procured the requisite insurance for both the JCC defendants and Ciminelli pursuant to its contract with the JCC defendants. In support of its motions, Ahlstrom submitted a certificate of insurance for the time period covering plaintiff's accident that named the JCC defendants and Ciminelli as additional insureds on a primary basis. The JCC defendants and Ciminelli failed to raise a triable issue of fact with respect thereto in opposition to the motions (*see generally id.*).

We reject the contention of Ciminelli in appeal No. 1 and the contention of the JCC defendants in appeal No. 2 that the court erred in denying those parts of their respective cross motions for summary judgment on the third-party complaint and the amended third-party complaint with respect to Ogiony and Pettit. We do not address those parts of the cross motions with respect to Ahlstrom in view of our determination that the court properly granted Ahlstrom's motions, inasmuch as the third-party complaint, amended third-party complaint and cross claims have been dismissed against Ahlstrom. We also do not address that part of the cross motion of the JCC defendants with respect to their breach of contract cause of action against Pettit, for the same reason.

With respect to Ogiony and Pettit, Ciminelli and the JCC defendants failed to establish their entitlement to contractual indemnification as a matter of law because, as we previously concluded herein, there are triable issues of fact with respect to the negligence of Pettit and Ogiony (*see Malecki v Wal-Mart Stores*, 222 AD2d 1010, 1011). With respect to the common-law indemnification cause of action asserted against Ogiony and Pettit by the JCC

defendants, they failed to establish as a matter of law that those third-party defendants were "guilty of some negligence that contributed to the causation of the accident" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65; see *DiPasquale v M.J. Ogiony Bldrs., Inc.*, 60 AD3d 1338, 1339-1340). With respect to the breach of contract causes of action alleging that those third-party defendants failed to procure insurance naming Ciminelli and the JCC defendants as additional insureds, Ciminelli and the JCC defendants failed to submit any evidence that those third-party defendants did not obtain that insurance (see *Zuckerman*, 49 NY2d 557, 562). Finally, to the extent that Ciminelli or the JCC defendants contend that they have been denied a defense pursuant to the insurance contracts obtained by third-party defendants, the proper remedy is to commence a declaratory judgment action against third-party defendants' insurers based upon their rights as additional insureds (see *Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

**991**

**CA 08-02267**

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

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RICHARD HUNT, PLAINTIFF,

V

MEMORANDUM AND ORDER

CIMINELLI-COWPER CO., INC., ET AL., DEFENDANTS.

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JAMESTOWN COMMUNITY COLLEGE, JAMESTOWN COMMUNITY COLLEGE REGION AND JAMESTOWN COMMUNITY COLLEGE REGIONAL BOARD OF TRUSTEES, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

INGALLS SITE DEVELOPMENT, INC., FORMERLY KNOWN AS DAVID OGIONY DEVELOPMENT CO., INC., AHLSTROM-SCHAEFFER ELECTRIC CORPORATION AND PETTIT & PETTIT, INC., THIRD-PARTY DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 2.)

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KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (THERESA J. PULEO OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-APPELLANTS.

BROWN & KELLY, LLP, BUFFALO (LISA T. SOFFERIN OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT INGALLS SITE DEVELOPMENT, INC., FORMERLY KNOWN AS DAVID OGIONY DEVELOPMENT CO., INC.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT AHLSTROM-SCHAEFFER ELECTRIC CORPORATION.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (WILLIAM BOLTRAK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT PETTIT & PETTIT, INC.

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Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered July 28, 2008 in a personal injury action. The order, inter alia, granted the motions of third-party defendants for summary judgment dismissing the amended third-party complaint and all cross claims against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of third-party defendant Ingalls Site Development, Inc., formerly known as David Ogiony Development Co., Inc., and reinstating the amended third-party

complaint and cross claim against it, and by denying in part the motion of third-party defendant Pettit & Pettit, Inc. and reinstating the third and fourth causes of action and cross claim against it, and as modified the order is affirmed without costs.

Same Memorandum as in *Hunt v Ciminelli-Cowper Co., Inc.* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Oct. 9, 2009]).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

1001

**KA 08-00429**

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

OLUSEGUN GBENGBE, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered February 1, 2008 pursuant to the 2005 Drug Law Reform Act. The order, inter alia, granted defendant's application for resentencing upon defendant's 2005 conviction of criminal possession of a controlled substance in the second degree and imposed a new sentence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting those parts vacating the sentence imposed November 16, 2005 and imposing a new sentence and as modified the order is affirmed, the sentence imposed January 30, 2008 is vacated, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and imposing a determinate term of imprisonment of 4½ years plus a period of postrelease supervision of five years. We previously reversed the sentence imposed following defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v Gbengbe*, 46 AD3d 1445).

We reject defendant's contention that the new sentence is harsh and excessive. The court upon remittal properly set forth in its decision the reasons for the new sentence, taking into consideration defendant's role in the drug conspiracy, the advantageous terms of the original plea bargain and defendant's failure to cooperate with law enforcement, which resulted in a less favorable plea agreement (see generally *People v Boatman*, 53 AD3d 1053). We thus conclude that the court properly exercised its discretion in determining the length of

the new sentence. We reject defendant's further contention that the new sentence was unauthorized as a matter of law, inasmuch as the new sentence falls within the sentencing range of Penal Law § 70.71 (2) (b) (ii).

For the reasons set forth in our decision in *People v Graves* (\_\_\_ AD3d \_\_\_ [Oct. 9, 2009]), however, we conclude that the court erred in imposing the new sentence without first affording defendant the opportunity to appeal from the order specifying the new sentence and to withdraw his application for resentencing following our determination of that appeal. We therefore modify the order by deleting those parts vacating the original sentence and imposing a new sentence, vacate the new sentence imposed, and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *Boatman*, 53 AD3d at 1054).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1004**

**KA 08-00428**

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHONCIE STITH, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

---

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered February 1, 2008 pursuant to the 2005 Drug Law Reform Act. The order, inter alia, granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and imposed a new sentence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting those parts vacating the sentence imposed February 24, 2004 and imposing a new sentence and as modified the order is affirmed, the sentence imposed January 30, 2008 is vacated, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and imposing a determinate term of imprisonment of nine years plus a period of postrelease supervision of five years. We previously reversed the sentence imposed following defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v Stith*, 46 AD3d 1416).

We reject defendant's contention that the new sentence is harsh and excessive. The court upon remittal properly set forth in its decision the reasons for the new sentence, taking into consideration defendant's criminal history, defendant's role in the conspiracy, the advantageous terms of the original plea bargain, and defendant's refusal to cooperate with law enforcement authorities (*see generally People v Boatman*, 53 AD3d 1053). We thus conclude that the court properly exercised its discretion in determining the length of the new

sentence. We reject defendant's further contention that the new sentence is unauthorized as a matter of law, inasmuch as the new sentence falls within the sentencing range of Penal Law § 70.71 (3) (b) (ii).

For the reasons set forth in our decision in *People v Graves* (\_\_\_ AD3d \_\_\_ [Oct. 9, 2009]), however, we conclude that the court erred in imposing the new sentence without first affording defendant the opportunity to appeal from the order specifying the new sentence that the court would impose and to withdraw his application for resentencing following our determination of that appeal. We therefore modify the order by deleting those parts vacating the original sentence and imposing a new sentence, vacate the new sentence imposed, and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *Boatman*, 53 AD3d at 1054).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1042**

**CA 09-00363**

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

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IN THE MATTER OF TOWN BOARD OF TOWN OF PARMA,  
PETITIONER/PLAINTIFF-RESPONDENT,

V

OPINION AND ORDER

BOARD OF TRUSTEES OF VILLAGE OF HILTON,  
VILLAGE OF HILTON,  
RESPONDENTS/DEFENDANTS-RESPONDENTS,  
JAMES BEEHLER AND SUSAN BEEHLER,  
RESPONDENTS/DEFENDANTS-APPELLANTS.

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KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR  
RESPONDENTS/DEFENDANTS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (EDWARD F. PREMO, III, OF  
COUNSEL), FOR PETITIONER/PLAINTIFF-RESPONDENT.

SCOLARO, SHULMAN, COHEN, FETTER & BURSTEIN, P.C., ROCHESTER (RONALD A.  
MITTLEMAN OF COUNSEL), FOR RESPONDENTS/DEFENDANTS-RESPONDENTS.

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Appeal from a judgment of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered April 28, 2008 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, inter alia, granted in part the relief sought in the petition and complaint.

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

Opinion by GREEN, J.: Article 17 of the General Municipal Law, known as the Municipal Annexation Law, sets forth the procedural steps to be followed when a municipality seeks to acquire territory lying within the boundaries of an adjacent municipality (*see generally Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 513-514). We are primarily concerned on this appeal with one of those procedural steps. At issue is whether, pursuant to General Municipal Law § 711 (2) (b), the failure of petitioner/plaintiff, Town Board of the Town of Parma (Town Board), to make, sign and file an order containing its determination with respect to the proposed annexation of property by respondent/defendant Village of Hilton (Village) constituted an approval of the proposed annexation by default and thereby resulted in the annexation of the property by operation of law. We conclude under the facts of this case that the Town Board's failure to take those procedural steps neither constituted default approval of the proposed annexation nor resulted

in annexation by operation of law.

The property that is the subject of the proposed annexation is an uninhabited and undeveloped 45-acre parcel at 610 Burritt Road in the Town of Parma (Town), which is adjacent to the Village. The owners of the property, respondents/defendants James Beehler and Susan Beehler, submitted a petition to the Town Board and respondent/defendant Board of Trustees of the Village of Hilton (Village Board) requesting approval of the annexation of their property by the Village. The Beehlers intended to construct a 117-unit senior citizen housing development on the property. At the time the petition was filed, the property was located in a rural residential zone, which would have permitted residential development to the extent of 20 to 30 single-family homes on two to three acre lots. James Beehler advised the Town Supervisor and the Mayor of the Village that the proposed annexation would facilitate the intended development because the Village's zoning ordinance provided for higher-density senior citizen residential districts, while the Town's zoning ordinance did not.

Following notice to the public, the Village Board conducted a public hearing on the petition on December 12, 2006. At the conclusion of the hearing, the Village Board unanimously adopted a resolution approving the proposed annexation. At the same time, the Village Board enacted Local Law No. 5 of 2006, providing that the property at 610 Burritt Road "is hereby annexed to the Village of Hilton and shall be zoned PRD-S for senior citizen housing . . . ." The annexation and zoning designation were to be "effective as of the date of filing of this local law with the Secretary of State." It is undisputed that Local Law No. 5 of 2006 has never been filed in the office of the Secretary of State in accordance with Municipal Home Rule Law § 27 (3).

The Town Board conducted its public hearing on the petition on January 9, 2007, following the required public notice, and voted four to one to deny approval of the proposed annexation. The Town Clerk prepared the minutes of the hearing, which were approved by the Town Board at its meeting on January 16, 2007, and thereafter forwarded them to the Village Board. Also on January 16, 2007, James Beehler wrote a letter to the Mayor of the Village requesting that the Village initiate a special proceeding pursuant to General Municipal Law § 712 and offering to pay any legal expenses incurred by the Village in connection with that proceeding. On January 20, 2007, the Village Board held a special meeting to consider that request and voted three to two against pursuing further legal action with respect to the proposed annexation. Nevertheless, the Village Board thereafter filed with the Clerks of the Village, the Town and Monroe County copies of its order approving the annexation, along with the petition, notice and minutes of the meeting adopting the resolution in favor of annexation (see § 711 [2] [b]; [5]). It is undisputed that the Town Board did not "make, sign and file a written order" setting forth its determination with respect to the annexation petition "in the offices of the clerks of all the affected local governments" pursuant to General Municipal Law § 711 (2) (b) or with the Monroe County Clerk pursuant to section 711 (5).

On April 25, 2007, the attorney representing the Beehlers sent a letter to the Town Board and Village Board stating that, by virtue of the Town Board's failure to file a written order in the manner prescribed by General Municipal Law § 711 (2) (b), the annexation was approved and the Beehlers' property is annexed to the Village. Section 711 (2) (b) provides the one step in the procedure for the governing boards of each municipality affected by a proposed annexation that the Town Board neglected to follow. Pursuant to section 711 (1), within 90 days after the hearing both the Village Board and the Town Board were required to make determinations whether "it is in the over-all public interest to approve such proposed annexation." Section 711 (2) (b) provides:

"Each such board shall thereupon make and sign a written order accordingly containing its determination and file copies thereof, together with copies of the agreement, if any, the petition, the notice, the written objections, if any, and testimony and minutes of proceedings taken and kept on the hearing, in the offices of the clerks of all the affected local governments. In the event that the governing board of an affected local government does not make, sign and file a written order as required by this section, such governing board shall be deemed to have approved the proposed annexation as of the expiration of the ninety-day period provided in subdivision one hereof [i.e., within ninety days after the hearing]."

The Beehlers took the position that, by failing to comply with the filing requirement of that section, the Town Board approved the annexation by default and the annexation occurred by operation of law.

Following receipt of the letter sent by the Beehlers' attorney's, the Town Board commenced this hybrid CPLR article 78 proceeding and declaratory judgment action. The Town Board sought judgment declaring, inter alia, that its failure to file an order containing its determination on the annexation petition pursuant to section 711 (2) (b) did not result in a default approval of the petition by the Town, that no such annexation has occurred, and that 610 Burrirt Road remains within the Town. The Town Board also sought judgment, inter alia, annulling the determinations by the Village Board purporting to annex and rezone 610 Burrirt Road.

The Village Board and the Village submitted an answer but did not oppose the relief sought by the Town Board. In an affidavit submitted in response to the Town Board's petition and complaint, the Mayor of the Village, who also serves on the Village Board, asserted that the Village Board had changed its position with respect to whether annexation is in the best interest of the Village. The Mayor asserted that a majority of the Village Board had by then taken the position that annexation is not in the Village's best interest.

In their answer, the Beehlers opposed the relief sought by the Town Board and asserted a counterclaim seeking judgment declaring that the annexation of their property occurred by operation of law on April 9, 2007, 90 days after the public hearing conducted by the Town. In addition, the Beehlers asserted a cross claim against the Village and Village Board seeking a writ of mandamus compelling the Village to initiate the process of finalizing the annexation pursuant to General Municipal Law § 717 and to file Local Law No. 5 of 2006 in the office of the Secretary of State (see Municipal Home Rule Law § 27 [3]).

Supreme Court denied the relief sought by the Beehlers and granted in part the relief sought by the Town Board. We agree with the conclusion of the court in its decision that the Town Board's failure to adhere to the filing requirements of General Municipal Law § 711 (2) (b) "did not result in default approval of the annexation and, in any event, such default approval, under the facts presented, would violate the New York State Constitution."

"The power to effect an annexation is largely a matter controlled by statute and constitutional provisions" (*Matter of City Council of City of Mechanicville v Town Bd. of Town of Halfmoon*, 27 NY2d 369, 372). That power is entrusted by statute and constitutional provisions to the governing boards of the affected local governments, which must exercise it based upon consideration of the over-all public interest. Article IX, § 1 of the NY Constitution, entitled "Bill of rights for local governments," provides in relevant part in section 1 (d):

"No local government or any part of the territory thereof shall be annexed to another . . . until the governing board of each local government, the area of which is affected, shall have consented thereto upon the basis of a determination that the annexation is in the over-all public interest."

That section further directs the Legislature to "provide, where such consent of a governing board is not granted, for adjudication and determination . . . of the issue of whether the annexation is in the over-all public interest." The NY Constitution thus contemplates that annexation shall occur only with the consent of each affected municipality or by the judgment of a court (see 1970 Atty Gen [Inf Ops] 72). In either case, moreover, the determination rests on the issue whether "annexation is in the over-all public interest."

The Legislature stated its intent in enacting the Municipal Annexation Law in language echoing the language of the constitutional provision:

"It is the intention of the legislature by the enactment of this article to provide a municipal annexation law pursuant to the provisions of the bill of rights for local governments in subdivision (d) of section one

of article nine of the constitution, which provisions specify basic prerequisites to the annexation of territory from one local government to another including (1) the consent of the people, if any, of a territory proposed to be annexed and (2) the consent of the governing board of each local government, the area of which is affected, upon the basis of its determination that the annexation is in the over-all public interest, and which provisions require the legislature to provide, where such consent of a governing board is not granted, for adjudication and determination, on the law and the facts, in a proceeding initiated in the supreme court, of the issue of whether the annexation is in the over-all public interest" (General Municipal Law § 702).

In this case, at the conclusion of the public hearing, the Town Board clearly and explicitly withheld its consent to the proposed annexation, based upon its determination that annexation would not be in the over-all public interest. The Town Board, however, also concededly failed to comply with the filing provision of section 711 (2) (b) within the 90-day period following that hearing. We are thus called upon to determine the consequences of that failure in view of the statutory provision that, in the event of such noncompliance with the filing requirements by the Town Board, it "shall be deemed to have approved the proposed annexation" (§ 711 [2] [b]).

Notwithstanding the "deemed . . . approved" language of the statute, we conclude under the circumstances of this case that the Town Board has not approved the proposed annexation by default, its inaction is not tantamount to consent, and the annexation of the Beehlers' property by the Village has not occurred by operation of law. Contrary to the position of the Beehlers, we further conclude that construing the statute as permitting default approval of a proposed annexation in circumstances where there has been clearly expressed disapproval would effectively negate the " 'Home Rule' powers of a municipality constitutionally guaranteed" under NY Constitution, article IX, § 1 (d) (*City of New York v State of New York*, 86 NY2d 286, 292, citing *Town of Black Brook v State of New York*, 41 NY2d 486). Default approval in the face of such clear disapproval by the Town Board cannot be reconciled with the constitutional right of each municipality to maintain its territorial integrity absent its express consent to annexation or a judicial determination that annexation is in the over-all public interest (see *Matter of Town of Johnstown v City of Gloversville*, 64 Misc 2d 951, 953-954, *revd on other grounds* 36 AD2d 143, *lv dismissed* 29 NY2d 639; 1970 Atty Gen [Inf Ops] 72).

Nor does the failure to comply with the statute's filing requirements in a timely manner constitute a waiver by the Town Board of its rights under NY Constitution, article IX, § 1 (d). Nothing in

the record supports a finding that the inaction by the Town Board evinced an intention to forego its rights under the NY Constitution or the Municipal Annexation Law (*see generally Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466, 469). Rather, the Town Board exercised its right to withhold its consent to the annexation, and its inaction with respect to the filing requirement was apparently the result of an inadvertent clerical error.

In our view, that inadvertent clerical error should not produce a result so directly at odds with the annexation scheme contemplated by the Municipal Annexation Law and the NY Constitution. In this case, neither of the affected local governments wishes to proceed with the proposed annexation. The Town Board passed a resolution opposing it based upon its determination that it was not in the over-all public interest, and the Village Board ultimately elected not to challenge the Town Board based upon its own determination with respect to the over-all public interest. Indeed, although the Village Board adopted a local law approving the annexation, it has not taken the steps necessary for that local law to become effective (*see Municipal Home Rule Law § 27 [3]*).

In addition, as the court concluded, none of the parties was misled with regard to the position of the Town Board by its failure to comply with the filing requirements of section 711 (2) (b). The Village Board and the Beehlers had actual notice that the Town Board had not consented to the annexation no later than one week following the Town Board's public hearing. At that point, the Village Board could have challenged the determination of the Town Board pursuant to General Municipal Law § 712 notwithstanding the Town Board's failure to comply with the filing requirements of section 711 (2) (b) (*see Matter of Common Council of City of Gloversville v Town Bd. of Town of Johnstown*, 32 NY2d 1, 3 n 1; *Matter of Town of Johnstown v City of Gloversville*, 36 AD2d 143, 145, *lv dismissed* 29 NY2d 639). Thus, neither the Village Board nor the Beehlers were prejudiced by the inaction of the Town Board.

We therefore conclude that, under the circumstances presented here, General Municipal Law § 711 (2) (b) cannot be construed, consistent with NY Constitution, article IX, § 1 (d), as permitting default approval of the proposed annexation by the Town Board or as resulting in annexation by operation of law of the property at 610 Burritt Road. In light of our conclusion, we do not address the remainder of the issues addressed in the judgment or the alternative grounds for affirmance urged by the Town Board. Accordingly, we conclude that the judgment should be affirmed.

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1075**

**KA 08-00228**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MAURICE GRAVES, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered January 18, 2008 pursuant to the 2005 Drug Law Reform Act. The order, inter alia, granted defendant's application for resentencing upon defendant's 2005 conviction of criminal possession of a controlled substance in the second degree and imposed a new sentence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting those parts vacating the sentence imposed July 19, 2005 and imposing a new sentence and as modified the order is affirmed, the sentence imposed January 14, 2008 is vacated, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and imposing a determinate term of imprisonment of nine years plus a five-year period of postrelease supervision. We previously reversed the sentence imposed following defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v Graves*, 45 AD3d 1393).

We reject defendant's contention that the new sentence is harsh and excessive. The court upon remittal properly set forth in its decision the reasons for the sentence, taking into consideration the magnitude of the crime and defendant's role in the criminal enterprise, as well as the advantageous terms of defendant's plea bargain. We therefore conclude that the court properly exercised its discretion in determining the length of the new sentence (see generally *People v Newton*, 48 AD3d 115, 119-120; *People v Anonymous*,

33 AD3d 336). We reject defendant's further contention that the new sentence was unauthorized as a matter of law, inasmuch as the new sentence falls within the sentencing parameters of Penal Law § 70.71 (2) (b) (ii).

The court erred, however, in imposing the new sentence without first affording defendant the opportunity to appeal from the order specifying the new sentence that the court would impose and to withdraw his application for resentencing following our determination of that appeal (see *People v Love*, 46 AD3d 919, 921, lv denied 10 NY3d 842; see generally *People v Loyd*, 53 AD3d 679, 680). Pursuant to DLRA-2, upon granting an application for resentencing, the court "shall . . . specify and inform [the defendant] of the term of a determinate sentence of imprisonment it would impose upon such conviction, as authorized for a class A-II felony by and in accordance with [Penal Law § 70.71], in the event of a resentence and shall enter an order to that effect." The court must then advise the defendant that, unless he or she either withdraws the application for resentencing or appeals from the court's specifying order, the court will enter an order vacating the original sentence and impose the specified determinate sentence. An appeal may be taken as of right from the court's specifying order, following which the defendant "shall be given an opportunity to withdraw an application for resentencing before any resentence is imposed" (L 2005, ch 643, § 1). We therefore modify the order by deleting those parts vacating the original sentence and imposing a new sentence, vacate the new sentence imposed, and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *People v Boatman*, 53 AD3d 1053, 1054).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

1083

CA 08-02197

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

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ERIK CRANDALL, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

WRIGHT WISNER DISTRIBUTING CORP.,  
DEFENDANT-APPELLANT,  
CLAUDE G. WRIGHT, CLAUDE H. WRIGHT, DOING  
BUSINESS AS WRIGHT REAL ESTATE PARTNERSHIP,  
WRIGHT REAL ESTATE, L.L.C.,  
DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANTS.

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OSBORN, REED & BURKE, LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

DAVID A. JOHNS, PULTNEYVILLE, FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (David M. Barry, J.), entered July 7, 2008 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant Wright Wisner Distributing Corp. for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he was struck by an overhead garage door while working on the floor of a truck wash bay. The bay was located on premises owned by Wright Real Estate Partnership (Wright Partnership) and leased to Wright Wisner Distributing Corp. (defendant). We conclude that Supreme Court properly denied those parts of the motion of defendant for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against it. Although Wright Partnership hired the general contractor for the project that included construction of the truck wash bay, the project was for defendant's benefit and defendant failed to establish as a matter of law that it lacked the authority to control the allegedly defective condition of the work site (see *Capasso v Kleen All of Am., Inc.*, 43 AD3d 1346, 1347-1348; *Riordan v BOCES of Rochester*, 4 AD3d 869, 870-871). Contrary to the contention of defendant, the deposition testimony of its own witnesses submitted in support of the motion suggests that defendant retained control over the work site throughout the course of the project.

Defendant by its own submissions also raised a triable issue of fact whether it created the allegedly dangerous condition of the overhead garage door by controlling the electricity supplied to the door and setting the automatic timer on the door (*see Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1156). Further, defendant submitted evidence that it selected the safety devices for the door and determined not to install a safety edge to reverse the direction of the door when it encountered an obstacle. To the extent that the absence of a safety edge on the door rendered the door unsafe, there is thus an issue of fact whether defendant was responsible for the creation of that condition.

Defendant also failed to establish that it lacked actual notice of the dangerous condition (*see id.*). There is evidence in the record that, at the time of plaintiff's accident, one or more of defendant's employees knew that the door was connected to the power supply and was set to close automatically after a certain period of time. In addition, defendant by its own submissions raised a triable issue of fact whether it had constructive notice of the allegedly dangerous condition of the overhead garage door (*see id.*). Indeed, there was a delay of several weeks or months between the activation of the garage door's automatic timer and the installation of safety devices on the door and, based on that delay, there is a triable issue of fact whether defendant's employees had sufficient time to discover the dangerous condition of the door and to remedy it by, *inter alia*, turning off power to the door while plaintiff was working in the truck wash bay, warning plaintiff of the presence of the timer, or switching the door to manual operation (*see Zaher v Shopwell, Inc.*, 18 AD3d 339, 341; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838). Finally, the contention of defendant that the court should have granted that part of the motion for summary judgment dismissing the common-law negligence cause of action based on a theory of *res ipsa loquitur* is not properly before us inasmuch as it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985; *see also Hazell v Dranitzke*, 46 AD3d 619).

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

1087

CA 09-00659

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

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EDWIN DZIENGIELEWSKI, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TOPS MARKETS, LLC (FORMERLY SUED HEREIN AS  
TOPS MARKETS, ALSO KNOWN AS TOPS, ALSO KNOWN  
AS TOPS FRIENDLY MARKETS), DEFENDANT-RESPONDENT.

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THE BALLOW LAW FIRM, P.C., BUFFALO (JASON A. RICHMAN OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (NICHOLAS J. DICESARE OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered December 11, 2008 in a personal injury action. The order granted the motion of defendant for summary judgment dismissing the amended complaint.

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 is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while using a handleless cart to move two large barrels of animal refuse in defendant's receiving area. We agree with plaintiff that Supreme Court erred in granting defendant's motion for summary judgment dismissing the amended complaint. Defendant failed to establish its entitlement to summary judgment as a matter of law, inasmuch as its submissions in support of its motion raised an issue of fact whether defendant had undertaken the duty of providing the means by which plaintiff was to move the barrels from the receiving area (*see Anderson v Bush Indus.*, 280 AD2d 949, 950; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1091.1**

**KA 09-01065**

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

GREGG GRATES, DEFENDANT-RESPONDENT.  
(APPEAL NO. 1.)

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

LESLIE R. LEWIS, NEW HARTFORD, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Oneida County Court (Charles C. Merrell, A.J.), entered September 29, 2008. The order dismissed the indictment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the third count of the indictment and reducing that count to falsifying business records in the second degree (Penal Law § 175.05) and as modified the order is affirmed, and the matter is remitted to Oneida County Court for further proceedings in accordance with the following Memorandum: The People appeal from an order dismissing the indictment against defendant in its entirety. With respect to the first count of the indictment, charging defendant with grand larceny in the third degree (Penal Law § 155.35), based on Lien Law § 79-a (1) (b), we reject the People's contention that the evidence before the grand jury was legally sufficient to support that count. Pursuant to Lien Law article 3-A, "a general contractor who receives funds on a project holds the funds as a trustee and if the contractor applies or consents to the use of those funds for any purpose other than valid trust purposes, he or she is deemed to have diverted trust funds and may be guilty of larceny for failure to pay trust claims within 31 days of the time the claim is due" (*People v Miller*, 23 AD3d 699, 700, *lv denied* 6 NY3d 815; see §§ 70, 71, 79-a [1]). We conclude that the People failed to present evidence to the grand jury establishing that the specific funds received by defendant from the owner for whom he was building a house were used for any purpose other than for the trust purposes (see § 79-a [1]; see generally *Miller*, 23 AD3d at 700). With respect to the second count of the indictment, charging defendant with offering a false instrument for filing in the first degree (Penal Law § 175.35), we note that, according to the order on appeal, that count was withdrawn.

With respect to the third count of the indictment, charging defendant with falsifying business records in the first degree (Penal Law § 175.10), we conclude that the evidence before the grand jury was legally insufficient to support that count. Nevertheless, we conclude that the evidence before the grand jury was legally sufficient to support the lesser included offense of falsifying business records in the second degree pursuant to either subdivision (1) or (2) of section 175.05. The evidence established that defendant crossed out the proper name of his company on a draft version of a confession of judgment and wrote in the name of his prior business, which no longer existed. He thereafter signed the final version of the confession of judgment in the name of the prior, nonexistent business. "A person is guilty of falsifying business records in the second degree when, with intent to defraud, he [or she] . . . [m]akes or causes a false entry in the business records of an enterprise; or . . . [a]lters . . . a true entry in the business records of an enterprise" (§ 175.05 [1], [2]). We conclude that the confession of judgment, which evidenced a debt of defendant's company owed to another company for construction materials, constituted a business record, i.e., a writing "kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity" (§ 175.00 [2]; see generally *People v Bloomfield*, 6 NY3d 165, 170). Viewed in the light most favorable to the People, the confession of judgment signed by defendant in the name of his prior business, " 'if unexplained and uncontradicted, would warrant conviction [of falsifying business records in the second degree] by a petit jury' " pursuant to either subdivision (1) or (2) of section 175.05 (*People v Bello*, 92 NY2d 523, 525, quoting *People v Jennings*, 69 NY2d 103, 114). We therefore modify the order by reinstating the third count of the indictment and reducing that count to falsifying business records in the second degree, and we remit the matter to County Court for the People to specify the subdivision of section 170.05 to which the third count of the indictment relates and, as so specified, for further proceedings with respect to that count.

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1091.2**

**KA 09-01235**

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

ORDER

GREGG GRATES, DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

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

LESLIE R. LEWIS, NEW HARTFORD, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Oneida County Court (Charles C.  
Merrell, A.J.), entered October 27, 2008. The order denied the motion  
of the People for leave to reargue.

It is hereby ORDERED that said appeal is unanimously dismissed  
(see *People v Auslander*, 169 AD2d 853, 854).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

1093

**KA 08-00401**

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RASHUN MIKE, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered February 1, 2008 pursuant to the 2005 Drug Law Reform Act. The order, inter alia, granted defendant's application for resentencing upon defendant's 2003 conviction of criminal possession of a controlled substance in the second degree and specified the sentence that would be imposed.

It is hereby ORDERED that the order so appealed from is unanimously affirmed and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and specifying that County Court would impose a determinate sentence of 10½ years plus a period of postrelease supervision of five years. We previously reversed an order granting defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v Mike*, 46 AD3d 1406).

We reject defendant's contention that the proposed new sentence is harsh and excessive. The court upon remittal properly set forth in its decision the reasons for the proposed new sentence, taking into consideration defendant's criminal history, defendant's involvement in the drug conspiracy, the advantageous terms of the plea bargain, and the fact that the original indeterminate sentence was previously reduced in light of defendant's cooperation with the police (see generally *People v Boatman*, 53 AD3d 1053). We thus conclude that the court properly exercised its discretion in determining the length of the proposed new sentence. We further reject defendant's contention that the proposed new sentence was unauthorized as a matter of law.

Even assuming, arguendo, that defendant's contention is properly raised on an appeal from a specifying order (see L 2005, ch 643, § 1), we conclude that the proposed new sentence falls within the sentencing range of Penal Law § 70.71 (3) (b) (ii). We therefore affirm the order and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *Boatman*, 53 AD3d at 1054).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1097**

**KA 08-00400**

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JERRY HARDMON, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered January 18, 2008 pursuant to the 2005 Drug Law Reform Act. The order, inter alia, granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and imposed a new sentence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting those parts vacating the sentence imposed March 23, 2004 and imposing a new sentence and as modified the order is affirmed, the sentence imposed January 14, 2008 is vacated, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and imposing a determinate term of imprisonment of 10 years plus a five-year period of postrelease supervision. We previously reversed the sentence imposed following defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v Hardmon*, 45 AD3d 1394).

We reject defendant's contention that the new sentence imposed is harsh and excessive. The court upon remittal properly set forth its reasons for the new sentence, taking into consideration the magnitude of the crime and the charges against defendant, the failure of defendant to avail himself of a more favorable sentence by cooperating with law enforcement authorities, and the advantageous terms of defendant's plea bargain. We therefore conclude that the court properly exercised its discretion in determining the length of the new

sentence (see generally *People v Newton*, 48 AD3d 115, 119-120; *People v Anonymous*, 33 AD3d 336). We reject defendant's further contention that the new sentence was unauthorized as a matter of law, inasmuch as the new sentence falls within the sentencing parameters of Penal Law § 70.71 (3) (b) (ii).

For the reasons set forth in our decision in *People v Graves* (\_\_\_ AD3d \_\_\_ [Oct. 9, 2009]), however, we conclude that the court erred in imposing the new sentence without first affording defendant the opportunity to appeal from the order specifying the new sentence that the court would impose and to withdraw his application for resentencing following our determination of that appeal. We therefore modify the order by deleting those parts vacating the original sentence and imposing a new sentence, vacate the new sentence imposed, and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *People v Boatman*, 53 AD3d 1053, 1054).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

1107

CA 08-02575

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

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EVAN COLLINS AND FELICIA COLLINS,  
CLAIMANTS-APPELLANTS,

V

OPINION AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.

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LOUIS ROSADO, BUFFALO, FOR CLAIMANTS-APPELLANTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MICHAEL S. BUSKUS OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

---

Appeal from an order of the Court of Claims (Francis T. Collins, J.), entered July 10, 2008. The order granted claimants' motion for leave to renew and, upon renewal, adhered to the prior decision denying claimants' application for permission to file a late notice of claim.

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

Opinion by CENTRA, J.:

I

Claimants made an application for permission to file a late notice of claim against defendant for, inter alia, unlawful imprisonment, alleging that the New York State Division of Parole (Division) improperly imposed a five-year period of postrelease supervision (PRS) upon Evan Collins (claimant) that ultimately resulted in his confinement. We conclude that the order granting claimants' motion for leave to renew and, upon renewal, adhering to the prior decision denying claimants' application should be affirmed.

II

The facts of this case are not in dispute. By judgment rendered May 26, 1999, claimant was convicted upon his plea of guilty of, inter alia, attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [former (4)]) and was sentenced as a second felony offender. Although a five-year period of PRS was mandatory pursuant to section 70.45, Supreme Court (Mario J. Rossetti, A.J.) did not impose any period of PRS. Upon claimant's release from prison after serving the sentence, the Division administratively

imposed a five-year period of PRS. Claimant was arrested approximately two years later and incarcerated on a parole detainer warrant. Claimant then filed a petition for a writ of habeas corpus, alleging that he was being illegally detained because he was never advised by the court, the prosecutor, or defense counsel that his sentence would include a period of PRS. Supreme Court (M. William Boller, A.J.) granted the petition to the extent of quashing the parole detainer warrant and vacating the five-year period of PRS imposed by the Division. Claimant was subsequently released from custody.

Approximately seven months later, claimants made an application in the Court of Claims for permission to file a late notice of claim against defendant based on "excusable neglect and/or for good cause." The proposed claim included causes of action for unlawful imprisonment, invasion of privacy, abuse of process, extreme emotional distress, and loss of consortium, all allegedly caused by the Division's imposition of a period of PRS. Defendant contended in opposition that, inter alia, the claim was without merit because a period of PRS was mandated. The court denied the application after considering the relevant factors and, although the court thereafter granted the motion of claimants for leave to renew their application, it adhered to its prior decision.

### III

We note at the outset that the order granting the motion of claimants for leave to renew their prior application and adhering to the court's prior decision superseded the order denying the application from which claimants now appeal (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985). We nevertheless exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the superseding order (*see CPLR 5520 [c]; Miller v Richardson*, 48 AD3d 1298, 1300, *lv denied* 11 NY3d 710).

### IV

"The Court of Claims has broad discretion in determining whether to grant or deny an application for permission to file a late notice of claim and its decision will not be disturbed absent a clear abuse of that discretion" (*Matter of Martinez v State of New York*, 62 AD3d 1225, 1226; *see Scarver v State of New York*, 233 AD2d 858). In determining whether to grant such an application, the court must consider, inter alia, the following factors:

"whether the delay in filing the claim was excusable; whether the state had notice of the essential facts constituting the claim; whether the state had an opportunity to investigate the circumstances underlying the claim; whether the claim appears to be meritorious; whether the failure to file or serve upon the attorney general a timely claim or to serve upon the attorney general a notice of intention resulted in

substantial prejudice to the state; and whether the claimant has any other available remedy" (Court of Claims Act § 10 [6]; see *Matter of Smith v State of New York*, 63 AD3d 1524).

In view of the relevant factors, particularly "whether the claim appears to be meritorious" (Court of Claims Act § 10 [6]; see *Smith*, 63 AD3d 1524), we conclude that the court did not abuse its discretion in adhering to its prior decision denying the application. We agree with the court that the proposed claim did not have merit, and we conclude that " 'it would be futile to permit a defective claim to be filed even if the other factors in Court of Claims Act § 10 (6) supported the granting of the claimant[s' application]' " (*Martinez*, 62 AD3d at 1226).

V

The gravamen of the proposed claim is unlawful imprisonment based upon the Division's imposition of a period of PRS. Penal Law § 70.45 was enacted in 1998 and required a period of PRS to be imposed on determinate sentences for offenses committed on or after September 1, 1998. As originally enacted, the statute provided that "[e]ach determinate sentence also includes, as a part thereof, an additional period of [PRS]" (§ 70.45 [former (1)]). Despite the mandate of the statute, many courts failed to impose a period of PRS when sentencing a defendant to a determinate sentence, as occurred here. In those instances, often non-judicial court personnel, the Division or, most frequently, the Department of Correctional Services (DOCS), would impose a period of PRS. In fact, it has been estimated that the Division or DOCS imposed a period of PRS upon " 'tens of thousands' " of defendants (*State of New York v Myers*, 22 Misc 3d 809, 811).

On appeal from the judgments of conviction in such cases, the defendants contended that, because the sentencing court did not pronounce a period of PRS, they were not subject to any such period. This Court and others had consistently held for several years that the sentencing court was not required to specify a period of PRS during sentencing pursuant to Penal Law § 70.45 (see e.g. *People v Hollenbach*, 307 AD2d 776, lv denied 100 NY2d 642; *People v Crump*, 302 AD2d 901, lv denied 100 NY2d 537; *People v Bloom*, 269 AD2d 838, lv denied 94 NY2d 945). Indeed, in *People v DePugh* (16 AD3d 1083, 1083), we wrote that a period of PRS " 'is mandatory for determinate sentences and is automatically included in the sentence' " (see *Hollenbach*, 307 AD2d at 776). In 2006, however, the United States Court of Appeals, Second Circuit, invalidated the administrative imposition of a period of PRS by DOCS when the sentencing court failed to sentence the defendant to such a period (*Earley v Murray*, 451 F3d 71, 76-77, cert denied 551 US 1159). The Second Circuit wrote that "[t]he only cognizable sentence is the one imposed by the judge. Any alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect" (*id.* at 75).

In early 2008, the Court of Appeals in *Matter of Garner v New*

*York State Dept. of Correctional Servs.* (10 NY3d 358) and *People v Sparber* (10 NY3d 457) determined that only a court may impose a period of PRS. The Court explained in *Garner* that "DOCS was acting in a judicial capacity" when it administratively imposed a period of PRS and that "the sentencing judge-and only the sentencing judge-is authorized to pronounce the PRS component of a defendant's sentence" (10 NY3d at 362). The Court determined in *Sparber* that, to remedy the improper imposition of a period of PRS, the matter must be remitted to the sentencing court for resentencing (10 NY3d at 471-472), and it reasoned that "the failure to pronounce the required sentence amounts only to a procedural error, akin to a misstatement or clerical error, which the sentencing court could easily remedy" (*id.* at 472).

As a result of the decisions in *Garner* and *Sparber*, the Legislature enacted Correction Law § 601-d, which outlined the procedure for resentencing defendants who were sentenced between September 1, 1998 and June 30, 2008 to a determinate term without "imposition of any term of [PRS]" (§ 601-d [1]). Correction Law § 601-d (2) requires DOCS or the Division to inform the sentencing court upon discovering that a defendant's commitment order does not include any period of PRS. The sentencing court must commence a proceeding to resentence the defendant within 30 days of receiving such notice (§ 601-d [4] [c]). At the resentencing hearing, the court may impose a period of PRS or, upon the consent of the People, the court may reimpose the originally imposed determinate sentence without any period of PRS (see Penal Law § 70.85).

## VI

After the *Garner* and *Sparber* decisions, several defendants who had been incarcerated as a result of the imposition of a period of PRS by non-judicial court personnel, the Division, or DOCS brought claims or applied for permission to file late notices of claim against defendant for unlawful imprisonment. In fact, counsel for defendant indicated at oral argument of this appeal that approximately 250 similar cases were currently pending. The cases have had varying outcomes before the Court of Claims, and there has yet to be an Appellate Division decision on whether the claims or proposed claims have merit.

A claimant or plaintiff asserting a cause of action for unlawful imprisonment "must establish that the defendant intended to confine the [claimant or] plaintiff, that the [claimant or] plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged" (*Martinez v City of Schenectady*, 97 NY2d 78, 85; see *Broughton v State of New York*, 37 NY2d 451, 456-457, cert denied sub nom. *Schanbarger v Kellogg*, 423 US 929). It is the last element that claimants herein will be unable to establish. "A detention, otherwise unlawful, is privileged where the confinement was by arrest under a valid process issued by a court having jurisdiction" (*Davis v City of Syracuse*, 66 NY2d 840, 842 [internal quotation marks omitted]; see *Holmberg v County of Albany*, 291 AD2d 610, 612, lv denied 98 NY2d 604). In other

words, "where the illegal imprisonment is pursuant to legal process which is valid on its face, the State cannot be held liable in damages for wrongful detention . . . [unless] the court issuing the process lacked jurisdiction of the person or the subject matter" (*Harty v State of New York*, 29 AD2d 243, 244, *affd* 27 NY2d 698).

There is no question that the legal process by which claimant was confined was valid on its face. The issue, however, is whether the Division lacked jurisdiction to impose a period of PRS. "There is a distinction between acts performed in excess of jurisdiction and acts performed in the clear absence of any jurisdiction over the subject matter. The former is privileged, the latter is not" (*Sassower v Finnerty*, 96 AD2d 585, 586, *appeal dismissed* 61 NY2d 756, *lv denied* 61 NY2d 608, 985; *see Harley v State of New York*, 186 AD2d 324, *appeal dismissed* 81 NY2d 781). That distinction is not always straightforward (*see e.g. Nuernberger v State of New York*, 41 NY2d 111, 113), but we fortunately are guided by the recent *Garner* decision. In *Garner*, the Court of Appeals analyzed whether the petitioner was entitled to CPLR article 78 relief in the nature of prohibition, which requires a showing that a "body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction" (CPLR 7803 [2]; *see Garner*, 10 NY3d at 361). In determining that the petitioner was entitled to a writ of prohibition barring DOCS from administratively imposing a five-year period of PRS, the Court held that, in imposing that term, "DOCS was acting in a judicial capacity . . . [and that such] act was in excess of DOCS's jurisdiction" (*Garner*, 10 NY3d at 362). We note that, although the Court held that the imposition of a period of PRS by DOCS was "solely within the province of the sentencing judge" (*id.*), the Court used the phrase "in excess of DOCS's jurisdiction" rather than stating that DOCS was "without" jurisdiction. Indeed, the Court further characterized the act of DOCS as "beyond [its] limited jurisdiction over inmates and correctional institutions," thus indicating that DOCS was not wholly without jurisdiction in the first instance (*id.*).

We likewise conclude that, here, the imposition of a period of PRS by the Division was in excess of its jurisdiction, not in the complete absence of jurisdiction, and that the act was therefore privileged. At the time the Division imposed the period of PRS, it was acting pursuant to case law holding that a period of PRS was automatically included in a sentence, even in the event that the sentencing court did not pronounce a period of PRS (*see e.g. DePugh*, 16 AD3d 1083). While the Court of Appeals in *Garner* and *Sparber* determined that a period of PRS may not be administratively imposed, DOCS and the Division are not always precluded from clarifying the sentence of a defendant. For example, in *People ex rel. Gill v Greene* (12 NY3d 1, 5-6), the Court determined that, where the sentencing court failed to pronounce that the sentence imposed was either consecutive to or concurrent with a previous, undischarged sentence, it was proper for DOCS to calculate the sentences to run consecutively, as required by the statute. Thus, in certain instances, DOCS has the power to calculate sentences in accordance with the relevant statutes, without direction from the sentencing

court. The Division here was also not wholly without jurisdiction or without "some competence over the cause" (*Nuernberger*, 41 NY2d at 113). It simply acted in excess of the jurisdiction it did have, and we thus conclude that its actions were privileged and that claimants are unable to establish a claim for unlawful imprisonment.

VII

We also agree with defendant that the cause of action for unlawful imprisonment does not appear to be meritorious because claimants cannot establish that the Division's alleged unlawful action caused them any injury. As noted above, case law and recent legislative action have resulted in the resentencing of defendants who were sentenced to a determinate term without any period of PRS (see Correction Law § 601-d; Penal Law § 70.85; *Sparber*, 10 NY3d at 465, 471-472). At the time claimant was sentenced as a second felony offender based on his conviction of a class E violent felony, a five-year period of PRS was mandated (see Penal Law § 70.45 [former (2)]). Thus, if the sentencing court had been alerted to the fact that it failed to impose a period of PRS, the court would have imposed the same five-year period of PRS at the resentencing hearing that the Division itself imposed. While the procedure by which the period of PRS was imposed was improper, the actual imposition thereof was not. We therefore conclude that claimants cannot establish that they were injured by the Division's imposition of a period of PRS (see *Mickens v State of New York*, 25 Misc 3d 191).

VIII

Accordingly, we conclude that the order should be affirmed.

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

**1114**

**CA 09-00562**

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

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STEVEN CHRISTOPHER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

COACH LEASING, INC., ET AL., DEFENDANTS,  
AND PROGRESSIVE TRANSPORTATION, INC.,  
DEFENDANT-APPELLANT.

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LAW OFFICES OF MICHAEL PILARZ, BUFFALO (MICHAEL PILARZ OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

BRESSLER & KUNZE, ROCHESTER (MELVIN BRESSLER OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

SLIWA & LANE, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANTS  
ESTATE OF MICHAEL PINELLI, SR. AND MICHAEL P. PINELLI.

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Appeal from a judgment of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered September 10, 2008 in a personal injury action. The interlocutory judgment, upon a jury verdict, determined the issue of liability in favor of plaintiff and against defendant Progressive Transportation, Inc.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the bus in which he was a passenger collided with a truck operated by Michael P. Pinelli. The bus was operated by an employee of the New York State Department of Correctional Services (DOCS) and was owned by Progressive Transportation, Inc. (defendant). The accident occurred when the bus driver attempted to pass the vehicle driven by Pinelli as Pinelli was making a left turn.

We reject defendant's contention that Supreme Court erred in refusing to charge the jury that the applicable standard for determining defendant's liability is the reckless disregard standard set forth in Vehicle and Traffic Law § 1104 (e). Because the bus was a "[c]orrection vehicle" (§ 109-a) rather than a "police vehicle" (§ 132-a), the bus was exempt from traffic regulations governing directions of movement and was subject to the reckless disregard standard of liability only if it satisfied the siren and light requirements set forth in section 1104 (c) (*see generally* *Abood v*

*Hospital Ambulance Serv.*, 30 NY2d 295, 297-299). Here, the evidence presented at trial established that the bus did not satisfy those requirements.

Defendant further contends that the court erred in failing to instruct the jury that Pinelli was an interested witness. We note that the record establishes that, although the court agreed to give that charge, it ultimately neglected to do so. In any event, we conclude that the error is harmless under the circumstances of this case (see *Reichert v City of New York*, 17 AD3d 654). We agree with defendant that the court erred in admitting both the testimony of the police officer who responded to the accident concerning Pinelli's statements purportedly explaining how and where the accident occurred, and the officer's report containing Pinelli's statements and the officer's conclusion that the bus crossed a double solid yellow line (see generally *Cover v Cohen*, 61 NY2d 261, 274; *Hatton v Gassler*, 219 AD2d 697; Prince, Richardson on Evidence § 8-203 [Farrell 11th ed]). We conclude, however, that the error is harmless. Our decision in *Huff v Rodriguez* (45 AD3d 1430) does not require a different result. That decision did not create a per se rule of law requiring reversal whenever hearsay testimony and evidence concerning the ultimate issue in a case are admitted but, rather, we decided *Huff* based on the facts presented therein.

Finally, defendant contends that the court erred in allowing plaintiff to cross-examine the bus driver concerning the DOCS disciplinary proceedings against him because the standard of proof for those disciplinary proceedings was greater than the standard of proof required for this action (see *Montes v New York City Tr. Auth.*, 46 AD3d 121, 122-124; *Ramirez v Manhattan & Bronx Surface Tr. Operating Auth.*, 258 AD2d 326, lv denied 93 NY2d 817). That contention is raised for the first time on appeal and is therefore not properly before us (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

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

1151

CA 08-02263

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

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JOHN T. NOTHNAGLE, INC.,  
PLAINTIFF-RESPONDENT-APPELLANT,

V

ORDER

PETER G. CHIARIELLO, ELMER'S BRIGHTON  
GARAGE, INC.,  
DEFENDANTS-APPELLANTS-RESPONDENTS,  
JOHN F. NICASTRO, 1832-1840 MONROE AVE., LLC,  
AND 1848 MONROE AVE., LLC,  
DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 1.)

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CARL L. FEINSTOCK, ROCHESTER, FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

EVANS & FOX LLP, ROCHESTER (RICHARD J. EVANS OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT-APPELLANT.

ROBERT F. LEONE, ROCHESTER, FOR DEFENDANTS-RESPONDENTS.

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Appeal and cross appeal from an order of the Supreme Court,  
Monroe County (Kenneth R. Fisher, J.), entered October 9, 2008 in a  
breach of contract action. The order, inter alia, granted in part  
plaintiff's motion for summary judgment.

It is hereby ORDERED that said appeal and cross appeal are  
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 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1152**

**CA 08-02264**

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

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JOHN T. NOTHNAGLE, INC., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PETER G. CHIARIELLO, ELMER'S BRIGHTON  
GARAGE, INC., DEFENDANTS-APPELLANTS,  
ET AL., DEFENDANTS.  
(APPEAL NO. 2.)

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CARL L. FEINSTOCK, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

EVANS & FOX LLP, ROCHESTER (RICHARD J. EVANS OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered October 24, 2008 in a breach of contract action. The judgment awarded plaintiff damages and attorneys' fees against defendants Peter G. Chiariello and Elmer's Brighton Garage, Inc.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed with costs, plaintiff is awarded attorneys' fees on appeal and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Peter G. Chiariello and Elmer's Brighton Garage, Inc. (defendants) appeal from a judgment awarding plaintiff, a licensed real estate broker, damages and attorneys' fees for defendants' breach of a listing contract with plaintiff. Contrary to the contention of defendants, Supreme Court properly granted that part of plaintiff's motion for summary judgment on the breach of contract action against them. Absent an express agreement in the listing contract to the contrary, "the broker's right to a commission is not contingent upon performance of the underlying real estate contract" (*Coldwell Banker Vil. Green Realty v Pillsworth*, 32 AD3d 568, 569; see also *Norma Reynolds Realty v Wilczewski*, 160 AD2d 787, 788, lv dismissed 76 NY2d 889, rearg denied 76 NY2d 983; *Felleman v Von Luckner*, 234 App Div 787). Here, the listing contract contains no such express agreement (*cf. Liggett Realtors, Inc. v Gresham*, 38 AD3d 214). Indeed, the listing contract, when "read as a whole, and every part . . . interpreted with reference to the whole," indicates that the conditions under which plaintiff was entitled to receive a commission are separate and distinct from the transfer of title at closing (*Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [internal quotation marks omitted]). Further, plaintiff is entitled

to attorneys' fees and costs associated with defending this appeal pursuant to the terms of the listing contract, and we remit the matter to Supreme Court to determine the amount of reasonable attorneys' fees incurred (see *Duell v Condon*, 200 AD2d 549, *affd* 84 NY2d 773; *Miller v Marra Bros. Motor Co.*, 185 AD2d 663, *lv dismissed* 80 NY2d 972).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

1155

**CA 09-00259**

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

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LAUREEN S. THOMAS, AS ADMINISTRATRIX OF THE  
ESTATE OF CHRISTOPHER TUPPER, DECEASED,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BROOKE L. BURRUS, DEFENDANT,  
AND GEICO INSURANCE COMPANY,  
DEFENDANT-RESPONDENT.

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RALPH W. FUSCO, UTICA, FOR PLAINTIFF-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (SUSAN E. OTTO OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered November 13, 2008 in a wrongful death action. The order, inter alia, granted the motion of defendant Geico Insurance Company for a change of venue.

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

Memorandum: Plaintiff, as administratrix of the estate of Christopher Tupper (decedent), commenced this wrongful death action alleging that decedent was killed when he was struck by a vehicle negligently driven by defendant Brooke L. Burrus. Plaintiff initially commenced the action solely against Burrus, but thereafter filed an amended summons and amended complaint adding defendant Geico General Insurance Company, incorrectly sued as Geico Insurance Company (Geico), as a defendant. As against Geico, plaintiff sought a declaration that Geico was obligated to defend and indemnify Burrus in the action based on an automobile liability policy issued to her by Geico.

After learning of the amended summons and amended complaint but prior to personal service thereof, Geico served an answer and moved for a change of venue from Oneida County to Jefferson County. In addition, Geico, inter alia, sought a stay of the action pending a determination of plaintiff's cause of action seeking a declaration that Geico is obligated to defend and indemnify Burrus in the action or, alternatively, a stay to permit Geico to commence its own declaratory judgment action with respect to Geico's obligation to Burrus in this action. We conclude that Supreme Court properly

granted Geico's motion for a change of venue as well as that part of the motion of Geico for a stay of the action to enable it to commence its own declaratory judgment action.

We note at the outset that we reject plaintiff's contention that Geico is "not in this case." Plaintiff filed an amended summons and amended complaint adding Geico as a defendant, and plaintiff was served with Geico's answer. Thus, we conclude that Geico properly appeared in this action (see CPLR 320 [b]).

We reject plaintiff's further contention that the court erred in granting Geico's motion for a change of venue. The record establishes that plaintiff selected an improper venue, which was based upon the location of the office of plaintiff's attorney, and we conclude that plaintiff thereby forfeited her right to designate the place of trial (see *Searle v Suburban Propane Div. of Quantum Chem. Corp.*, 229 AD2d 988, 989). In any event, in view of the fact that plaintiff's amended summons identified Jefferson County as the residence of Burrus, plaintiff cannot be heard to complain that Jefferson County is an improper venue (see CPLR 503 [a]).

Finally, contrary to plaintiff's contention, it is well settled that an insurer may commence an action seeking a declaration concerning the validity of its disclaimer of the duty to defend or indemnify its insured (see *Lang v Hanover Ins., Co.*, 3 NY3d 350, 356).

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

1175

CA 09-00016

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

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DOUG BURNETT AND KELLY BURNETT,  
PLAINTIFFS-RESPONDENTS,

OPINION AND ORDER

V

COLUMBUS MCKINNON CORPORATION,  
DEFENDANT-APPELLANT.

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AMIGONE, SANCHEZ, MATTREY & MARSHALL, LLP, BUFFALO (RICHARD A. CLACK  
OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRADY & SCHAEFER, LLP, AMHERST, HOVDE DASSOW & DEETS LLC,  
INDIANAPOLIS, INDIANA (NICHOLAS C. DEETS, OF THE INDIANA BAR, ADMITTED  
PRO HAC VICE, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 18, 2008 in a personal injury action. The order denied defendant's motion seeking application of the substantive law of Indiana and granted plaintiffs' motion seeking application of the substantive law of New York.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, defendant's motion is granted and plaintiffs' motion is denied.

Opinion by FAHEY, J.: The primary issue before us on this appeal is whether Supreme Court erred in granting plaintiffs' motion for an order applying the substantive law of New York in this personal injury action. We conclude that the court should have determined that the substantive law of Indiana applies to this action, and we thus conclude that the order should be reversed and that defendant's motion seeking that relief should be granted.

I

In May 2001, Doug Burnett (plaintiff) was injured when he was struck by a steel coil that fell from a hook manufactured by defendant and owned by his employer, New Millennium Building Systems, LLC. Defendant is a New York corporation, plaintiff was an Ohio resident, and the accident occurred in Indiana. After discovery was nearly completed, defendant moved for an order applying the substantive law of Indiana to this action. Plaintiffs responded by moving for an order applying the substantive law of New York, and sought alternative relief in the form of an order precluding defendant from asserting any

nonparty defenses with respect to plaintiff's employer (see Ind Code § 34-51-2-14). The court granted plaintiffs' motion seeking application of the substantive law of New York.

II

We begin this choice of law analysis by addressing two ancillary issues. First, as defendant correctly contends, the situs of the tort in this matter is the place of the injury, rather than the location where the allegedly defective product was manufactured (see e.g. *Schultz v Boy Scouts of Am.*, 65 NY2d 189, 195-197; *Devore v Pfizer Inc.*, 58 AD3d 138, 141, lv denied 12 NY3d 703; cf. *Kniery v Cottrell, Inc.*, 59 AD3d 1060, 1061). Indeed, plaintiffs have conceded this issue by contending that the third of the three choice of law rules set forth in *Neumeier v Kuehner* (31 NY2d 121, 128) governs our analysis in this matter.

Second, because New York is the forum state, i.e., the action was commenced here, "New York's choice-of-law principles govern the outcome of this matter" (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521). Plaintiffs' contention that Indiana courts would have applied New York law if this action had been filed in that state is thus of no moment.

III

Turning to the merits, we note that "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz--New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223; see *Bodea v TransNat Express*, 286 AD2d 5, 8). Notably, there are two actual conflicts in this case.

First, New York has adopted a "pure" comparative negligence approach pursuant to which a plaintiff's fault may proportionally diminish the plaintiff's recovery but will not preclude such recovery unless the plaintiff was solely at fault (see CPLR 1411). By contrast, under the laws of Indiana and Ohio, a plaintiff may not recover if the percentage of fault attributable to him or her is greater than 50% of the total fault involved in the accident (see Ind Code §§ 34-51-2-6, 34-51-2-7; Ohio Rev Code § 2315.33).

Second, under New York law, comparative fault may not be apportioned against the employer of an injured worker covered by workers' compensation insurance unless that worker suffered a grave injury within the meaning of Workers' Compensation Law § 11. Conversely, under Indiana law, the employer of an injured worker may be named as a "nonparty" for purposes of apportionment of fault even though the employer is immune from being sued and no damages may be recovered from the employer (see Ind Code §§ 34-51-2-7, 34-51-2-14; *Witte v Mundy*, 820 NE2d 128, 133; *Bulldog Battery Corp. v Pica Invs., Inc.*, 736 NE2d 333, 338). No issues with respect to the comparative fault laws in Ohio have been advanced by the parties.

Having recognized an actual conflict, we must identify "the significant contacts and in which jurisdiction they are located" (*Padula*, 84 NY2d at 521). The "interest analysis" test used in resolving choice of law conflicts gives "controlling effect . . . to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation" (*Schultz*, 65 NY2d at 196 [internal quotation marks omitted]; see *Bodea*, 286 AD2d at 9). "In most cases, [the] significant facts or contacts consist exclusively of the parties' domiciles and the place of the tort" (*Bodea*, 286 AD2d at 9; see *Schultz*, 65 NY2d at 197). Here, the significant contacts are the domiciles of plaintiffs (Ohio) and defendant (New York), as well as the place of the tort (Indiana). As previously noted, however, plaintiffs do not seek to apply the substantive law of their own domicile but, rather, they seek to apply the substantive law of defendant's domicile, i.e., New York, while defendant seeks to apply the substantive law of Indiana.

The next step in our analysis is to determine whether the conflicting laws are intended to regulate conduct or to allocate loss (see *Bodea*, 286 AD2d at 9). In the event that they are intended to regulate conduct, "such as standards of care," the conflict of laws issue is typically resolved by applying the law of the place of the tort (*Cooney v Osgood Mach.*, 81 NY2d 66, 72; see *Bodea*, 286 AD2d at 9). That is not the case here, however. Rather, in this case the conflicting laws at issue "allocate losses after the tort occurs" (*Cooney*, 81 NY2d at 66; see *Padula*, 84 NY2d at 522; *Bodea*, 286 AD2d at 9). We thus must determine which of the three rules set forth in *Neumeier* (31 NY2d at 128) applies.

In *Neumeier*, the issue before the Court of Appeals was whether the "guest statute" contained in the no-fault legislation of the Province of Ontario, providing that the owner or driver of a vehicle is not liable for damages resulting from injury or death to a guest-passenger unless he or she was guilty of gross negligence, would apply against a New York defendant. The Court thus set forth three rules to employ in determining that issue, and those rules have subsequently been applied to tort actions involving conflicting loss allocation laws (see *Bodea*, 286 AD2d at 10; see also *Cooney*, 81 NY2d at 73; *Monroe v NuMed, Inc.*, 250 AD2d 20, lv dismissed 93 NY2d 999). The rules are as follows:

1. Where the parties share a common domicile, the law of the common domicile controls (see *Neumeier*, 31 NY2d at 128; *Bodea*, 286 AD2d at 10).
2. Where the parties are domiciled in different states, the situs of the tort is in a state in which a party is domiciled and the law in that state favors the domiciliary, the law of the place of injury will apply (see *Neumeier*, 31 NY2d at 128; *Bodea*, 286 AD2d at 10).
3. Where the parties are domiciled in different states

with conflicting local laws, the law of the situs of the tort typically applies unless " 'it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants' " (*Neumeier*, 31 NY2d at 128, quoting *Tooker v Lopez*, 24 NY2d 569, 585 [Fuld, J., concurring]; see *Bodea*, 286 AD2d at 10). "Where the interest of each jurisdiction in enforcing its laws is 'roughly equal[,] . . . the situs of the tort is appropriate as a "tie-breaker" because that is the only [jurisdiction] with which [the] parties have purposefully associated themselves in a significant way' " (*Bodea*, 286 AD2d at 10, quoting *Cooney*, 81 NY2d at 74).

IV

Although the parties agree that the third *Neumeier* rule is applicable, they dispute whether the exception contained in that rule applies to the facts of this case. Plaintiffs urge us to invoke the exception to the third *Neumeier* rule on the strength of the decision of the United States District Court in *Datskow v Teledyne Cont. Motors Aircraft Prods.* (807 F Supp 941 [WD NY 1992]). *Datskow* is, of course, not controlling authority, however, and the basis for the conclusion reached therein appears to conflict with the principle elucidated in *Schultz* that "the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred" (*id.* at 195; *cf. Datskow*, 807 F Supp at 944). *Datskow* does not, in any event, establish that the exception to the third *Neumeier* rule should be regularly applied in products liability actions.

Instead, our analysis in this case proceeds under the general principle set forth in *Neumeier* that, under facts similar to those in this case, the law of the situs of the tort will typically apply. The application of the substantive law of New York in this case would produce uncertainty for litigants, who are entitled to rely upon a consistent application of the *Neumeier* rules (*see id.* at 128). Indeed, we have applied the third *Neumeier* rule, rather than the exception to the rule, in similar circumstances involving automobile and boating accidents (*see Cunningham v Williams*, 28 AD3d 1211, 1212; *Bodea*, 286 AD2d at 8-12), as well as in a case in which the plaintiff sought recovery under a theory of products liability (*see Kniery*, 59 AD3d at 1061).

More importantly, there is no indication on this record that the exception to the third *Neumeier* rule applies to warrant a departure from the locus jurisdiction rule, and the substantive law of Indiana (the situs of the tort) should thus control this case. Plaintiff purposely associated himself with Indiana, and the Legislature of that state has made a policy judgment to bar a plaintiff who was injured in an accident from recovering damages in cases in which he or she bears more than 50% of the fault (*see Ind Code* §§ 34-51-2-6, 34-51-2-7).

Although "considerations of the State's admonitory interest and party reliance are less important" where the conflicting laws relate to the allocation of losses (*Schultz*, 65 NY2d at 198; see *Cunningham*, 28 AD3d at 1212), it cannot be gainsaid that Indiana has at least some interest in applying its substantive law to a workplace accident occurring within that state. That interest outweighs any interest of New York in applying its own substantive law in this case, particularly in light of the fact that "New York has no interest in applying its laws for the benefit of nonresidents and to the detriment of its residents" (*Brewster v Baltimore & Ohio R.R. Co.*, 185 AD2d 653, 654; see also *Blatz v Westinghouse Elec. Corp.*, 274 AD2d 491).

Finally, there is no merit to the additional contention of plaintiffs that defendant's motion was untimely. The choice of law issue "was not 'likely to take [plaintiffs] by surprise' and did not 'raise issues of fact not appearing on the face of [the complaint]' " (*Florio v Fisher Dev.*, 309 AD2d 694, 696, quoting CPLR 3018 [b]).

For all of the above-stated reasons, we conclude that the court should have granted defendant's motion seeking a determination that the substantive law of Indiana applies to this action.

V

The last point of contention on this appeal concerns whether defendant may assert the "nonparty" defense available under Indiana law (see Ind Code § 34-51-2-14). Pursuant to that defense, the employer of an injured worker may be named as a "nonparty" for purposes of apportionment of fault despite the fact that the employer is immune from being sued (see *id.*).

It is, of course, beyond our province to "perform useless or futile acts," and we are thus to refrain from "resolv[ing] disputed legal questions unless [to do so] would have an immediate practical effect on the conduct of the parties" (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 530). Here, although defendant has indicated in its brief that it intends to amend its answer "promptly" in the event that this Court determines that Indiana law applies, there is no motion by defendant for leave to amend its answer to assert the nonparty defense in the event that Indiana substantive law applies, nor can it be said with any degree of certainty that defendant will in fact so move. Consequently, the issue is not ripe for our review, and it would be "merely advisory" to grant the alternative request for relief in plaintiffs' motion, i.e., that defendant be precluded from asserting any nonparty defenses with respect to plaintiff's employer (see *id.* at 531).

VI

Accordingly, we conclude that the order should be reversed,

defendant's motion seeking application of the substantive law of Indiana granted and plaintiffs' motion denied.

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1194**

**CAF 08-02311**

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF ANJENET M. JOHNSON,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

PATRICIA A. STREICH-MCCONNELL,  
RESPONDENT-APPELLANT,  
AND CRAIG A. CONANT, RESPONDENT-RESPONDENT.  
(APPEAL NO. 1.)

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MARRIS & BARTHOLOMAE, P.C., SYRACUSE (RICHARD F. MARRIS OF COUNSEL),  
FOR RESPONDENT-APPELLANT.

PETER SIMON GREINIS, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (ELIZABETH  
deV. MOELLER OF COUNSEL), FOR PETITIONER-RESPONDENT.

THEODORE W. STENUF, LAW GUARDIAN, MINOA, FOR EMILIA C.

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Appeal from an order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered February 22, 2008 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted custody of the subject child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second decretal paragraph and the second ordering paragraph and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, for a hearing in accordance with the following Memorandum: The mother of the child who is the subject of these appeals, a respondent in appeal No. 1 and the petitioner in appeal No. 2, appeals from an order in appeal No. 1 that, inter alia, granted custody of her daughter to the petitioner in that appeal, a paternal aunt. In appeal No. 2, the mother appeals from an order that dismissed as moot her petition seeking to modify a prior amended order awarding custody of the child to the father, a respondent in appeal No. 1 and the sole respondent in appeal No. 2. Contrary to the mother's contention in each appeal, the orders therein do not lack "the essential jurisdictional predicate of [the mother's] consent" to have the matters heard and decided by the Referee (*Litman, Asche, Lupkin & Gioiella v Arashi*, 192 AD2d 403; see generally *Matter of Heather J.*, 244 AD2d 762, 763). The record establishes that the mother signed a stipulation permitting the Referee to hear and decide all issues involved in these proceedings, as well as all future related proceedings, with the assistance of counsel (*cf. Matter of*

*Osmundson v Held-Cummings*, 306 AD2d 950). We reject the contention of the mother that the Referee erred in refusing to allow her to withdraw her valid consent (see generally *Winans v Winans*, 124 NY 140, 143; *Campbell v Bussing*, 274 App Div 893).

Contrary to the further contention of the mother in appeal No. 1, the Referee properly determined that the aunt met her burden of establishing that extraordinary circumstances existed to warrant an award of custody in favor of a nonparent (see generally *Matter of Bennett v Jeffreys*, 40 NY2d 543, 548-549; *Matter of Ruggieri v Bryan*, 23 AD3d 991, 992). The mother's medical records establish that the mother has a history of mental health issues, which she has failed to address adequately (see *Matter of Miller v Orbaker*, 17 AD3d 1145, 1146, lv denied 5 NY3d 714). We agree with the mother, however, that the Referee erred in granting custody of the child to the aunt without conducting a hearing on the issue of the child's best interests (see generally *Ruggieri*, 23 AD3d at 992). "[A] determination that extraordinary circumstances exist is only the beginning, not the end, of judicial inquiry" (*Bennett*, 40 NY2d at 548). Contrary to the contention of the aunt, the record is not sufficient for us to make our own determination with respect to the best interests of the child (cf. *Matter of Brian C.*, 32 AD3d 1224, 1225, lv denied 7 NY3d 717). The Referee limited the proof at the hearing to events that occurred prior to December 2005 and that related solely to the issue of extraordinary circumstances. Thus, the mother was precluded from presenting evidence of any of her rehabilitation efforts made with respect to her mental health issues subsequent to that month. We therefore modify the order in appeal No. 1 accordingly, and we remit the matter to Family Court for a hearing to determine the best interests of the child.

In view of our determination in appeal No. 1, we conclude with respect to the order in appeal No. 2 that the Referee erred in dismissing as moot the mother's petition to modify the prior amended order awarding custody of the child to the father. In the event that it is determined upon remittal that the aunt's petition should be denied, the issues raised in the mother's petition in appeal No. 2 must be addressed. We therefore reverse the order in appeal No. 2 and reinstate the petition.

We have reviewed the mother's remaining contentions with respect to each appeal and conclude that they are without merit.

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

**1195**

**CAF 08-02312**

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF PATRICIA A. STREICH-MCCONNELL,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CRAIG A. CONANT, RESPONDENT-RESPONDENT.  
(APPEAL NO. 2.)

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MARRIS & BARTHOLOMAE, P.C., SYRACUSE (RICHARD F. MARRIS OF COUNSEL),  
FOR PETITIONER-APPELLANT.

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Appeal from an order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered February 25, 2008 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 reversed on the law without costs and the petition is reinstated.

Same Memorandum as in *Matter of Johnson v Streich-McConnell* (\_\_\_ AD3d \_\_\_ [Oct. 9, 2009]).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1204**

**CA 08-01749**

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

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LYNN JUDA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

GREGORY SOLAZZO, DEFENDANT,  
AND ANDREW DONOVAN, DEFENDANT-APPELLANT.  
(ACTION NO. 1.)

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DAILY POST, LLC, PLAINTIFF,

V

LYNN JUDA, ET AL., DEFENDANTS.  
(ACTION NO. 2.)  
(APPEAL NO. 1.)

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DAMON MOREY LLP, BUFFALO (JAMES W. GORMLEY OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

MOSEY PERSICO, LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered July 17, 2008 in actions for, inter alia, breach of fiduciary duty. The order, inter alia, denied that part of the cross motion of defendant Andrew Donovan to dismiss the complaint against him.

It is hereby ORDERED that said appeal from the order insofar as it concerned action No. 2 is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: The defendant-appellant (defendant) in appeal Nos. 1 and 2 contends in appeal No. 1 that Supreme Court erred in granting the motion of the plaintiff in appeal Nos. 1 and 2 insofar as she sought relief in action No. 2. Defendant is not a party to that action and is not aggrieved by that part of the order (see CPLR 5511; *Michael Reilly Design, Inc. v Houraney*, 40 AD3d 592, 593). His appeal from that part of the order is therefore dismissed (see *Michael Reilly Design, Inc.*, 40 AD3d at 593; *Broadway Equities v Metropolitan Elec. Mfg. Co.*, 306 AD2d 426, 427).

With respect to appeal No. 2 and the remainder of appeal No. 1, we affirm for reasons stated in the decisions at Supreme Court.

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1205**

**CA 08-01750**

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

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LYNN JUDA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

GREGORY SOLAZZO, DEFENDANT,  
AND ANDREW DONOVAN, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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DAMON MOREY LLP, BUFFALO (JAMES W. GORMLEY OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

MOSEY PERSICO, LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered April 4, 2008 in an action for breach of fiduciary duty. The order, inter alia, denied the motion of defendant Andrew Donovan to compel disclosure.

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

Same Memorandum as in *Juda v Solazzo* ([appeal No. 1] \_\_\_\_ AD3d \_\_\_\_ [Oct. 9, 2009]).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court