SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 10, 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

426

KA 06-02999

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, PERADOTTO, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHAN J. REOME, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

NATHAN J. REOME, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered July 19, 2006. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (three counts) and conspiracy in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice by directing that the sentences shall run concurrently with respect to each other and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial with two codefendants, of three counts of rape in the first degree (Penal Law § 130.35 [1]) and one count of conspiracy in the fourth degree (§ 105.10 [1]). We previously rejected the contention of one of the codefendants on his appeal that County Court abused its discretion in denying his motion to sever his trial from that of defendant and the other codefendant (*People v Buccina*, 62 AD3d 1252), and we likewise conclude here that the court did not abuse its discretion in denying the motion of defendant to sever his trial from that of his codefendants. "The evidence against defendant and his codefendants was essentially identical, and the respective defenses were not in irreconcilable conflict" (*id.* at 1253; *see People v Bolling*, 49 AD3d 1330, 1332; *cf. People v Cardwell*, 78 NY2d 996, 997-998; *see generally People v Mahboubian*, 74 NY2d 174, 184-185). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "The testimony of the People's witnesses was not so unworthy of belief as to be incredible as a matter of law . . . and thus it cannot be said

that the jury failed to give the evidence the weight it should be accorded" (*People v Rufus*, 56 AD3d 1175, 1175, *lv denied* 11 NY3d 930 [internal quotation marks omitted]; *see generally Bleakley*, 69 NY2d at 495).

We reject the further contention of defendant that the testimony of the accomplice was not sufficiently corroborated (*see* CPL 60.22 [1]). "[T]he purpose of the [corroboration] requirement is not to establish defendant's guilt independently but to provide some basis for the jury to conclude the accomplice testimony is credible" (*People v Besser*, 96 NY2d 136, 143). "[M]uch less evidence and of a distinctly inferior quality is sufficient to meet the slim corroborative linkage to otherwise independently probative evidence from [an] accomplice[]" (*People v Breland*, 83 NY2d 286, 294). Here, the People met their burden by offering "some nonaccomplice evidence 'tending to connect' defendant to the crime[s] charged" (*id.* at 143-144). Indeed, we conclude that the victim's testimony concerning, inter alia, the number of attackers and the method of the attack "harmonize[s] with the accomplice's narrative so as to provide the necessary corroboration" (*id.* [internal quotation marks omitted]). "Once the statutory minimum pursuant to CPL 60.22 (1) was met, it was for the jurors to decide whether the corroborating testimony satisfied them that the accomplice[was] telling the truth" (*People v Pierce*, 303 AD2d 966, 966, *lv denied* 100 NY2d 565). We also reject the contention of defendant in his main and pro se supplemental briefs that he was denied his right to a fair trial based on the cumulative effect of the alleged errors at trial (*see People v Hall*, 53 AD3d 1080, 1083, *lv denied* 11 NY3d 855; *People v Dixon*, 50 AD3d 1519, 1520, *lv denied* 10 NY3d 958).

Defendant contends in his pro se supplemental brief that the court punished him for asserting his right to a trial by imposing a harsher sentence than he would have received had he pleaded guilty. Even assuming, arguendo, that defendant preserved his contention for our review, we conclude that "[a] review of the record shows no retaliation or vindictiveness against the defendant for electing to proceed to trial" (*People v Shaw*, 124 AD2d 686, 686, *lv denied* 69 NY2d 750). We agree with defendant, however, that the sentence is unduly harsh and severe under the circumstances of this case, and we therefore modify the sentence as a matter of discretion in the interest of justice by directing that the sentences shall run concurrently with respect to each other (*see* CPL 470.15 [6] [b]). The contention of defendant in his pro se supplemental brief concerning the alleged legal insufficiency of the evidence is unpreserved for our review (*see People v Gray*, 86 NY2d 10, 19). We have considered the remaining contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

PERADOTTO and GORSKI, JJ., concur; SMITH, J., concurs in the following Memorandum: I agree with the majority that the People sufficiently corroborated the accomplice testimony by presenting nonaccomplice evidence "tending to connect the defendant with the commission of" the crimes (CPL 60.22 [1]). I further conclude that

the evidence upon which the majority relies satisfies the corroboration requirement. I write separately, however, to highlight an additional piece of evidence that in my view also tends to connect defendant with the commission of the crimes.

The crimes were allegedly committed in a vehicle by defendant, two codefendants, and an accomplice. The accomplice pleaded guilty and testified against defendant and the two codefendants, and thus his testimony required corroboration. The victim testified that she initially did not remember many of the details of the crimes, but she then testified that "I could tell you right now I remember a few extra things that I probably didn't remember before and that's because I'm sitting in a room with three people that I can tell you they sat in the car." I conclude that, although such testimony was insufficient to constitute an in-court identification of defendant, it constitutes an additional piece of evidence "tending to connect the defendant with the commission of" the crimes (CPL 60.22 [1]).

HURLBUTT, J.P., and MARTOCHE, J., dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent. Pursuant to CPL 60.22 (1), "[a] defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense." As noted in *People v Delgado* (50 AD3d 915, 917, quoting *People v Steinberg*, 79 NY2d 673, 683), " '[t]he corroboration must be independent of, and may not draw its weight and probative value from, the accomplice's testimony.' " Further, "[a]lthough the corroborative evidence need not establish every element of the crimes charged, it must tend to connect the defendant to the offenses" (*id.*).

In our view, the People failed to offer any independent evidence sufficient to corroborate the testimony of the accomplice identifying defendant as one of the perpetrators of the rape of the victim, and thus County Court should have granted defendant's motion for a trial order of dismissal on that ground.

At trial, the victim neither identified nor described the four attackers who raped her. Although there was DNA evidence implicating three of the perpetrators, including the accomplice who entered a guilty plea and testified at trial, there was no such evidence with respect to defendant. Consequently, corroboration of the accomplice's testimony identifying defendant as one of the perpetrators was mandated by CPL 60.22 (1). We cannot agree with the conclusion of the plurality that the necessary corroboration was furnished by the testimony of the victim. The consistency between the testimony of the victim and the accomplice with respect to the details of the crimes "tends to support the accomplice[']s credibility, but it does not reasonably tend to connect the defendant with the crime[s]" (*People v Nieto*, 97 AD2d 774, 776; *see People v Marmulstein*, 109 AD2d 948, 949; *see generally People v Glasper*, 52 NY2d 970, 971; *People v Hudson*, 51 NY2d 233, 238-239).

The People's reliance on defendant's friendship with two of the

codefendants and defendant's telephone conversations with them before and after the occurrence of the crimes as corroboration of the accomplice's testimony is misplaced. "Defendant's association with the [codefendants], in and of itself, does not independently establish any criminal activity on his part" (*Marmulstein*, 109 AD2d at 949). The only other arguably corroborative evidence relied on by the People is testimony that, when approached by the police, defendant was "extremely nervous," and that, when being arrested and having his buccal swab taken for DNA testing, he vomited several times. We agree with defendant that such purported evidence of consciousness of guilt "was so inherently weak that it did not satisfy the corroboration requirement of CPL 60.22" (*People v Moses*, 63 NY2d 299, 309; *see People v Reddy*, 261 NY 479, 487-488).

Finally, we agree with the implicit conclusion of the plurality that there is no corroboration in the trial testimony of the victim relied on by the concurrence. We therefore would reverse the judgment, grant defendant's motion for a trial order of dismissal, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

Entered: July 10, 2009 Patricia A. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

501

CA 08-01071

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND GORSKI, JJ.

J.K. TOBIN CONSTRUCTION CO., INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DAVID J. HARDY CONSTRUCTION CO., INC.,
DEFENDANT-RESPONDENT,
AND PAT J. BOMBARD, DEFENDANT-APPELLANT.

DAVID J. HARDY CONSTRUCTION CO., INC.,
THIRD-PARTY PLAINTIFF,

V

BOMBARD CAR CO., INC., THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

COTE, LIMPERT & VAN DYKE, LLP, SYRACUSE (THEODORE H. LIMPERT OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (RICHARD K. HUGHES OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

RIEHLMAN SHAFER AND SHAFER, TULLY (D. CHRISTIAN FISCHER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 15, 2008 in an action to foreclose on a mechanic's lien. The order denied plaintiff's motion for partial summary judgment on the second and third causes of action against defendant David J. Hardy Construction Co., Inc., granted plaintiff's motion for partial summary judgment on the first cause of action against defendants, denied the cross motion of defendant Pat J. Bombard and third-party defendant to discharge the mechanic's lien, and granted in part the cross motion of defendant David J. Hardy Construction Co., Inc. for leave to amend its answer.

It is hereby ORDERED that said appeal is unanimously dismissed and the order is otherwise modified on the law by granting the motion of plaintiff for partial summary judgment on the second and third causes of action and by denying in its entirety the cross motion of defendant David J. Hardy Construction Co., Inc. and as modified the order is affirmed without costs, and

It is further ORDERED that judgment be entered in favor of plaintiff and against defendant David J. Hardy Construction Co., Inc. in the amount of $121,918.21, together with interest at the rate of 9% per annum commencing September 30, 2006, and costs and disbursements.

Same Memorandum as in *J.K. Tobin Constr. Co., Inc. v David J. Hardy Constr. Co., Inc.* ([appeal No. 2] ___ AD3d ___ [July 10, 2009]).

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

502

CA 08-01072

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND GORSKI, JJ.

J.K. TOBIN CONSTRUCTION CO., INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. HARDY CONSTRUCTION CO., INC.,
DEFENDANT,
AND PAT J. BOMBARD, DEFENDANT-APPELLANT.

DAVID J. HARDY CONSTRUCTION CO., INC.,
THIRD-PARTY PLAINTIFF,

V

BOMBARD CAR CO., INC., THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

COTE, LIMPERT & VAN DYKE, LLP, SYRACUSE (THEODORE H. LIMPERT OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (RICHARD K. HUGHES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 15, 2008 in an action to foreclose on a mechanic's lien. The judgment, upon plaintiff's motion for partial summary judgment on the first cause of action to enforce the mechanic's lien and the cross motion of defendant Pat J. Bombard and third-party defendant to discharge that lien, granted judgment in favor of plaintiff against certain real property owned by defendant Pat J. Bombard.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, to foreclose on a mechanic's lien arising out of a construction project on property owned by defendant Pat J. Bombard (Bombard). Plaintiff had entered into a subcontract with defendant-third-party plaintiff, David J. Hardy Construction Co., Inc. (Hardy), the general contractor on the construction project, to perform "earthwork" that included the installation of a storm drainage system. Third-party defendant, Bombard Car Co., Inc. (Bombard Car), leases the property

from Bombard and operates a retail automobile business there. In its first cause of action, plaintiff sought to enforce the mechanic's lien against Bombard and Hardy and, in its remaining two causes of action, plaintiff alleged breach of contract and an account stated against Hardy, on the ground that plaintiff allegedly was not paid in full pursuant to the terms of the subcontract. Plaintiff thereafter made a motion (first motion) for partial summary judgment on the second and third causes of action, against Hardy. Plaintiff also made a separate motion (second motion) for partial summary judgment seeking to enforce the mechanic's lien against Hardy and Bombard, and Bombard and Bombard Car cross-moved to discharge the mechanic's lien. In addition, Hardy cross-moved for leave to amend its answer to assert counterclaims for breach of contract and negligence against plaintiff. By the order in appeal No. 1, Supreme Court denied plaintiff's first motion, granted plaintiff's second motion, denied the cross motion of Bombard and Bombard Car, and granted that part of Hardy's cross motion only with respect to the counterclaim for breach of the subcontract. By the judgment in appeal No. 2, the court granted plaintiff judgment on the mechanic's lien. We note at the outset that those parts of the order in appeal No. 1 granting plaintiff's second motion and denying the cross motion of Bombard and Bombard Car are subsumed in the judgment of foreclosure on the mechanic's lien in appeal No. 2. Thus, the appeal by Bombard and Bombard Car in appeal No. 1 is dismissed (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *see also* CPLR 5501 [a] [1]).

Addressing first plaintiff's second motion, we conclude that the court properly granted that motion inasmuch as plaintiff established its entitlement to judgment as a matter of law, and Bombard and Hardy failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Bombard's contention that plaintiff was negligent in its performance is supported only by an unsworn item of correspondence sent to Bombard by an engineer, which is insufficient to raise a triable issue of fact (*see Lehigh Constr. Group v Almquist*, 262 AD2d 943, 944, *lv dismissed* 94 NY2d 838, 99 NY2d 501).

Bombard also contends that the mechanic's lien cannot be foreclosed against him because he entered into the construction contract with Hardy in his capacity as president of Bombard Car, not in his individual capacity. We reject that contention. "An owner of real property may be subjected to a mechanic's lien for improvements when the work is done 'with the consent' of the owner . . . The consent required by [Lien Law § 3] is not mere acquiescence and benefit, but some affirmative act or course of conduct establishing confirmation . . . Such consent may be inferred from the terms of the lease and the conduct of the owner" (*Harner v Schecter*, 105 AD2d 932, 932).

Here, Bombard is the property owner as well as the president of the company leasing the subject property. Indeed, it is undisputed that Bombard, without distinguishing between his individual and corporate capacities, negotiated the terms of the contract with Hardy,

had frequent conversations and interactions at the work site with Hardy's director of construction during the course of the project, and was directly involved in the field meetings at the work site. Thus, we conclude that Bombard consented to the improvements (*see* Lien Law § 3; *Harner*, 105 AD2d 932).

We further conclude that the court erred in denying plaintiff's first motion, for partial summary judgment on the second and third causes of action in the amended complaint. Plaintiff established its entitlement to judgment as a matter of law on the second cause of action, for breach of contract against Hardy, by establishing that it had a subcontract with Hardy and that Hardy owed plaintiff money on that subcontract (*see e.g. Colucci v AFC Constr.*, 54 AD3d 798; *Castle Oil Corp. v Bokhari*, 52 AD3d 762). Plaintiff also established its entitlement to judgment as a matter of law on the third cause of action, for an account stated against Hardy, by submitting the purchase orders that were submitted to and received by Hardy without objection (*see Castle Oil Corp.*, 52 AD3d 762). The conclusory statement of Hardy in opposition to the first motion, i.e., that summary judgment would be premature because it was not known whether plaintiff had breached the subcontract and, if it did, the extent of the damage caused, is insufficient to raise an issue of fact to defeat the motion. Hardy failed to establish that facts essential to oppose the motion were in plaintiff's possession, and a "mere hope" that discovery will disclose evidence to establish that plaintiff, rather than Hardy, breached the subcontract is insufficient to defeat plaintiff's first motion (*Ramesar v State of New York*, 224 AD2d 757, 759, *lv denied* 88 NY2d 811; *see Wright v Shapiro*, 16 AD3d 1042, 1043). We therefore modify the order in appeal No. 1 accordingly, and we direct that judgment be entered in favor of plaintiff and against Hardy in the amount of $121,918.21, together with interest at the rate of 9% per annum commencing September 30, 2006, and costs and disbursements.

Finally, we note that plaintiff contends that the court erred in granting that part of the cross motion of Hardy for leave to amend its answer to assert a counterclaim against plaintiff for breach of contract. It is of course well settled that leave to amend a pleading should be freely granted and is properly denied only where the proposed amendment plainly lacks merit (*see* CPLR 3025 [b]; *Manufacturers & Traders Trust Co. v Reliance Ins. Co.*, 8 AD3d 1000; *A.R. Mack Constr. Co. v Patricia Elec.*, 5 AD3d 1025, 1026). Here, the counterclaim in question does not plainly lack merit on its face, but the court had before it a motion by plaintiff for partial summary judgment on its cause of action for breach of contract against Hardy. Our conclusion that Hardy was entitled to leave to amend its answer, which requires a standard of review different from that applicable to a motion for partial summary judgment, thus is of no moment. In determining that plaintiff is entitled to partial summary judgment on its cause of action for breach of contract against Hardy, we have concomitantly determined that the counterclaim in question is without merit as a matter of law. We therefore further modify the order in

appeal No. 1 accordingly.

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

506

CA 08-01952

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND GORSKI, JJ.

ERIN R. VANPELT AND STEPHEN J. VANPELT, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF GIANNA ROSE VANPELT, DECEASED, PLAINTIFFS-RESPONDENTS,

V ORDER

MARC A. FEINER, M.D., INDIVIDUALLY AND AS AN AGENT, OFFICER, AND/OR EMPLOYEE OF MEDICAL ARTS OB-GYN, P.C., MAPATUNAGE A. SIRIWARDENA, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHELLE M. WESTERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT MARC A. FEINER, M.D., INDIVIDUALLY AND AS AN AGENT, OFFICER, AND/OR EMPLOYEE OF MEDICAL ARTS OB-GYN, P.C., AND FOR DEFENDANTS.

PHELAN, PHELAN & DANEK, LLP, ALBANY (TIMOTHY S. BRENNAN OF COUNSEL), FOR DEFENDANT-APPELLANT MAPATUNAGE A. SIRIWARDENA, M.D.

BOTTAR & LEONE, PLLC, SYRACUSE (MICHAEL A. BOTTAR OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Oneida County (John W. Grow, J.), entered November 27, 2007 in a medical malpractice action. The order denied the motions of defendants Marc A. Feiner, M.D., individually and as an agent, officer, and/or employee of Medical Arts OB-GYN, P.C., and Mapatunage A. Siriwardena, M.D. for partial summary judgment.

Now, upon reading and filing the stipulation to discontinue appeals signed by the attorneys for the parties on June 24 and 26, 2009,

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

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

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

528

CA 08-01230

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

CHARLES SCAPARO AND DARLENE SCAPARO,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

VILLAGE OF ILION, ET AL., DEFENDANTS,
HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
DEFENDANT-RESPONDENT,
AND OUR LADY QUEEN OF APOSTLES CHURCH OF ST.
MARY OF MOUNT CARMEL/S.S. PETER AND PAUL,
DEFENDANT-RESPONDENT-APPELLANT.
(ACTION NO. 1.)

ANTHONY YERO AND CYNTHIA YERO,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

VILLAGE OF ILION, ET AL., DEFENDANTS,
HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
DEFENDANT-RESPONDENT,
AND OUR LADY QUEEN OF APOSTLES CHURCH OF ST.
MARY OF MOUNT CARMEL/S.S. PETER AND PAUL,
DEFENDANT-RESPONDENT-APPELLANT.
(ACTION NO. 2.)

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (ANTHONY J. BRINDISI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

LAW OFFICE OF JOHN A. PANZONE, P.C., BARNEVELD (JOHN A. PANZONE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

ROCHE, CORRIGAN, MCCOY & BUSH, PLLC, ALBANY (ROBERT P. ROCHE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an amended order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered February 15, 2008 in personal injury actions. The amended order granted the motion of defendant Herkimer County Industrial Development Agency seeking summary judgment, denied the motion of defendant Our Lady Queen of Apostles Church of St. Mary of Mount Carmel/S.S. Peter and Paul seeking summary judgment, and denied the cross motion of plaintiffs seeking partial summary judgment.

It is hereby ORDERED that the amended order so appealed from is modified on the law by granting the motion of defendant Our Lady Queen of Apostles Church of St. Mary of Mount Carmel/S.S. Peter and Paul and dismissing the amended complaints in action Nos. 1 and 2 against that defendant and as modified the amended order is affirmed without costs.

Memorandum: The plaintiffs in action Nos. 1 and 2 commenced these Labor Law and common-law negligence actions seeking damages for injuries sustained by Charles Scaparo, a plaintiff in action No. 1, and Anthony Yero, a plaintiff in action No. 2 (collectively, plaintiff workers), when the trench in which they were installing a sewer lateral collapsed. At the time of the accident, plaintiff workers were employees of the Village of Frankfort (Village) and were installing the sewer lateral from the newly constructed cemetery chapel owned by Our Lady Queen of Apostles Church of St. Mary of Mount Carmel/S.S. Peter and Paul (Church), a defendant in both actions, to the sewer main at a street intersection in the Village. The sewer lateral was installed on property that was owned by Herkimer County Industrial Development Agency (HCIDA), another defendant in both actions. The property owned by HCIDA was adjacent to the Church property and was within the 60-foot utility right-of-way that the Village had over the HCIDA property. In these consolidated appeals, the plaintiffs in both actions contend that Supreme Court erred in granting the motion of HCIDA seeking summary judgment dismissing the amended complaints against it, and the Church contends on its cross appeal that the court erred in denying its motion seeking summary judgment dismissing the amended complaints against it. Although we conclude that the court properly granted the motion of HCIDA, we further conclude that the court erred in denying the motion of the Church, and we therefore modify the amended order accordingly.

Addressing first the motion of HCIDA, we note at the outset that plaintiffs' contention that HCIDA failed to follow the best evidence rule to establish that the Village had a right-of-way over its property 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). We reject plaintiffs' further contention that HCIDA is an owner within the meaning of Labor Law § 241 (6). In cases imposing liability on an owner that does not contract for the work, there is "some nexus between the owner and the worker, whether by[, inter alia,] a . . . grant of an easement, or other property interest" (*Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 51). Here, HCIDA established that it did not grant the Village an easement or other property interest and that plaintiff workers were on HCIDA's premises by reason of the arrangement between the Church and the Village to install the sewer lateral (*cf. Kerr v Rochester Gas & Elec. Corp.*, 113 AD2d 412, 416). Plaintiffs failed to raise an issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Addressing next the motion of the Church, we note that the Church established that it was required to pay for the cost of the materials and that the Village supplied the labor and retained ownership of the

sewer lateral. The court determined that the Church was an owner for purposes of Labor Law § 241 (6) because it contracted for and benefitted from the installation of the sewer lateral and that there was a triable issue of fact whether the Church was in a position to control the work and to insist that proper safety practices were followed for the purposes of Labor Law § 200. That was error.

It is well established that, for purposes of the Labor Law, the term "owner" is not limited to the titleholder (*see generally Walp v ACTS Testing Labs, Inc./Div. of Bur. Veritas*, 28 AD3d 1104; *Reisch v Amadori Constr. Co.*, 273 AD2d 855, 856). "The term [owner] has been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have the work performed for his benefit" (*Copertino v Ward*, 100 AD2d 565, 566). Here, the work was performed for the benefit of the Church, but the Church did not have an interest in the HCIDA property. As we explained in *Sweeting v Board of Coop. Educ. Servs.* (83 AD2d 103, 114, *lv denied* 56 NY2d 503), "[t]he 'owners' contemplated by the Legislature are those parties with a property interest who hire the general contractor to undertake the construction work on their behalf." The dissent relies on *Copertino*, in which the homeowner contracted to replace the sewer line that ran from his home to the main pipe in the street, and the plaintiff worker was injured in a portion of the trench located in the street. The Second Department concluded in *Copertino* that the homeowner was liable pursuant to the Labor Law not only because he had contracted for the sewer line to be installed on his property but also because as "the abutting property owner [he] has an easement running through and under the street for his sewer connection" (*id.* at 567). "An easement is an *interest in land* created by grant or agreement, express or implied, which confers a right upon the holder thereof to some . . . lawful use out of or over the estate of another" (*id.*). Here, however, the Church had no property interest in the HCIDA property over which the sewer line was placed, and thus it cannot be considered an owner for purposes of Labor Law § 240 (1) or § 241 (6) (*see generally Fisher v Coghlan*, 8 AD3d 974, 975-976, *lv dismissed* 3 NY3d 702).

All concur except GREEN and GORSKI, JJ., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part, and would affirm. We agree with the majority that Supreme Court properly granted the motion of Herkimer County Industrial Development Agency, a defendant in both actions, seeking summary judgment dismissing the amended complaints against it. Contrary to the majority, however, we conclude that the court also properly denied the motion of Our Lady Queen of Apostles Church of St. Mary of Mount Carmel/S.S. Peter and Paul, another defendant in both actions (Church), seeking summary judgment dismissing the amended complaints against it. Although it is undisputed that the Church did not hold title to the property where the accident occurred, "the meaning of 'owners' under section 241 (6) of the Labor Law . . . has not been limited to the titleholder[, and t]he term has been held to encompass a [party] who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for [its] benefit"

(*Copertino v Ward*, 100 AD2d 565, 566; *see Reisch v Amadori Constr. Co.*, 273 AD2d 855, 856). The Church's own submissions raise triable issues of fact whether the Church may be considered an owner for purposes of Labor Law § 241 (6) liability. The Church contracted for and benefitted from the installation of the sewer lateral in question. In addition, the Church's architect designed the sewer lateral and directed the Village of Frankfort (Village) to install it within a specific time frame. Further, although the sewer lateral was installed within the utility right-of-way of the Village, the Church could have had the work performed by any licensed contractor; it was not necessary that the Village perform the work. Under those circumstances, we conclude at a minimum that there is a triable issue of fact whether the Church had an interest in the property where the accident occurred and fulfilled the role of owner (*see Copertino*, 100 AD2d at 566-567). We further conclude that the Church failed to meet its initial burden of establishing, for purposes of Labor Law § 200 liability, that it neither exercised supervisory control over the work nor had actual or constructive notice of the unsafe shoring that allegedly caused the accident (*see Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225). Finally, although in view of its decision the majority was not required to reach the issue whether the court properly denied plaintiffs' cross motion seeking partial summary judgment on liability under Labor Law §§ 200 and 241 (6), we conclude that the court properly denied plaintiffs' cross motion.

Entered: July 10, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

567

KA 07-01268

PRESENT: HURLBUTT, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON D. LIGGINS, DEFENDANT-APPELLANT.

RICHARD P. FERRIS, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered April 27, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts) and criminally using drug paraphernalia in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is reversed on the law, that part of the motion seeking to suppress tangible property is granted, the indictment is dismissed, and the matter is remitted to Oneida County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of two counts each of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). We agree with defendant that County Court erred in refusing to suppress evidence seized by the police as the result of a warrantless entry into his apartment.

"[O]ur Constitutions accord special protection to a person's expectation of privacy in his [or her] own home" (*People v Knapp*, 52 NY2d 689, 694; US Const 4th, 14th Amends; NY Const, art I, § 12). The warrantless intrusion into defendant's apartment was presumptively unreasonable and unconstitutional unless it was justified by one of the " 'carefully delineated' exceptions to the Fourth Amendment's Warrant Clause" (*People v Molnar*, 98 NY2d 328, 331-332; *see generally People v Mitchell*, 39 NY2d 173, 177, *cert denied* 426 US 953), and no exception applies here. We note in particular that, when the police officers entered defendant's apartment, they were not in "hot pursuit" of a suspect fleeing the scene of a crime (*cf. People v Maryon*, 20 AD3d 911, *lv denied* 5 NY3d 854), nor were there "exigent circumstances where 'delay in the course of an investigation . . . would gravely

endanger [the lives of police officers or of others]' " (*People v Henderson*, 107 AD2d 469, 471, quoting *Warden v Hayden*, 387 US 294, 298-299). Further, the court properly rejected the People's attempt to justify the warrantless entry based upon the codefendant's alleged consent to enter the apartment.

We conclude that the court erred in determining that the warrantless entry into defendant's apartment was justified by the emergency exception to the warrant requirement. That "exception must be narrowly construed because it is susceptible of abuse" (*People v Guins*, 165 AD2d 549, 552, *lv denied* 78 NY2d 1076), and the People bear the burden of demonstrating its applicability (*see People v Hodge*, 44 NY2d 553, 557). The People did not meet their burden of satisfying the first and third elements of the emergency exception (*see generally People v Dallas*, 8 NY3d 890, 891). With respect to the first element, the evidence at the suppression hearing does not establish that the police had "reasonable grounds to believe that there [was] an emergency at hand and an immediate need for their assistance for the protection of life or property" (*Mitchell*, 39 NY2d at 177). The People presented evidence that police officers responded to a report of "shots fired" at the address of defendant's apartment building, but they failed to present any evidence concerning the source of the report, the timing of the report in relation to the incident, the identity or description of the perpetrator, or the existence of a possible victim (*see People v Garrett*, 256 AD2d 588, 589, *lv denied* 93 NY2d 922, 924; *see also People v Lawrence*, 145 AD2d 375, 376-378).

Further, and more significantly, the People failed to satisfy the third element of the emergency exception, i.e., that "[t]here [was] some reasonable basis, *approximating probable cause*, to associate the emergency with the area or place to be searched" (*Mitchell*, 39 NY2d at 177-178 [emphasis added]). When the officers arrived at the address in the report, they observed shell casings approximately 15 feet from the apartment building. A woman who identified herself as a resident of the building advised the officers that there had been an argument in the apartment occupied by defendant and his codefendant, moments prior to the shooting. She did not provide any details concerning the number of voices, the identity of the persons involved or the subject of the argument. Based solely upon that information, the officers proceeded to defendant's apartment, knocked on the door for three to five minutes, and entered the apartment after the codefendant opened the door and truthfully informed them that she was there alone. Apart from the resident's vague, undetailed report of an argument, there was no basis for the officer who testified at the suppression hearing to believe that "the trouble started in" defendant's apartment. The reported argument does not establish a "direct relationship" between defendant's apartment and the purported emergency (*id*. at 179). To the contrary, it is undisputed that the shell casings were found outside the building, that defendant's apartment is on the third floor, and that no individual was observed entering the apartment after the shots were fired (*cf. People v Love*, 84 NY2d 917, 918-919; *People v Stevens*, 57 AD3d 1515; *People v Parker*, 299 AD2d 859; *Matter of Pablo C.*, 220 AD2d 235; *People v DePaula*, 179 AD2d 424, 426).

Because the warrantless intrusion into defendant's apartment was not justified under the emergency exception to the warrant requirement (*see generally Mitchell*, 39 NY2d at 177), the evidence seized as the result of that intrusion, including the evidence seized pursuant to the search warrant that was subsequently issued, should have been suppressed (*see Guins*, 165 AD2d at 553). We therefore reverse the judgment, grant that part of the omnibus motion of defendant seeking to suppress tangible property seized from his apartment, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

All concur except PERADOTTO and CARNI, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent because we cannot agree with the majority's conclusion that County Court erred in determining that the warrantless entry into defendant's apartment was justified by the emergency exception to the warrant requirement. Considering the benefit of hindsight and our detachment from the tension and drama of responding to a "shots fired" call for police assistance, we conclude that the People established that the police officers had reasonable grounds to believe that an emergency situation existed (*see generally People v Love*, 204 AD2d 97, 98, *affd* 84 NY2d 917; *People v Mitchell*, 39 NY2d 173, 177-178, *cert denied* 426 US 953). Viewing in totality "[t]he nature and specificity of the call, the speed with which the officers responded (thereby increasing the chances that the danger still existed)," the shell casings that were located 15 feet in front of the building and the report by an identified civilian at the scene, who resided in the apartment next to that of defendant and stated that she overheard an argument in defendant's apartment "moments prior" to the shots, we conclude that the court properly determined that the warrantless entry into defendant's apartment was justified under the emergency exception to the warrant requirement (*People v DePaula*, 179 AD2d 424, 426). "In recognizing the danger of delayed response, the law does not require adherence to a standard which 'made stricter by hindsight' would preclude the police from 'all courses of conduct but the least intrusive' " (*id.*, quoting *People v Calhoun*, 49 NY2d 398, 403). We further note that neither the US nor the NY Constitution requires the "obvious signs which connect the place to be searched with the emergency," signs that the majority concludes are lacking in this case (*People v Mitchell*, 39 NY2d at 179). Although the majority concludes that the People failed to present any evidence concerning the identity of the perpetrator or the existence of a possible victim, such information is not required to justify the applicability of the emergency exception to the warrant requirement (*see generally People v Carby*, 198 AD2d 366, *lv denied* 82 NY2d 922, 925). Similarly, unlike the majority, we cannot fault the police for entering the apartment in the absence of a "hot pursuit" as the exigent circumstance doctrine relied upon by the People does not require a "hot pursuit" (*see People v Henderson*, 107 AD2d 469, 471). In our view, "it is difficult to conceive of what other action, consistent with their belief that someone inside [defendant's apartment] might be injured or threatened, could have been taken [by the officers] to provide immediate

assistance" (*DePaula*, 179 AD2d at 426). We therefore would affirm the judgment.

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

615.1

CA 08-02582

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

CAYUGA INDIAN NATION OF NEW YORK,
PLAINTIFF-APPELLANT,

V OPINION AND ORDER

CAYUGA COUNTY SHERIFF DAVID S. GOULD AND
SENECA COUNTY SHERIFF JACK S. STENBERG,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

JENNER & BLOCK LLP, WASHINGTON, D.C. (IAN HEATH GERSHENGORN, OF THE WASHINGTON, D.C. AND MASSACHUSETTS BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND FRENCH-ALCOTT, PLLC, SYRACUSE, FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE AND KARL L. SLEIGHT, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

ROBERT ODAWI PORTER, SALAMANCA, AND KANJI & KATZEN, PLLC, ANN ARBOR, MICHIGAN, FOR SENECA NATION OF INDIANS, AMICUS CURIAE.

MICHAEL A. CARDOZO, CORPORATION COUNSEL, NEW YORK CITY (LEONARD KOERNER OF COUNSEL), FOR CITY OF NEW YORK, AMICUS CURIAE.

JOHN C. CRUDEN, ACTING ASSISTANT ATTORNEY GENERAL, WASHINGTON, D.C. (KATHRYN E. KOVACS, OF THE WASHINGTON, D.C. AND MARYLAND BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR THE UNITED STATES OF AMERICA, AMICUS CURIAE.

DANIEL M. DONOVAN, DISTRICT ATTORNEY, WHITE PLAINS (JOHN J. CARMODY OF COUNSEL), FOR DISTRICT ATTORNEYS ASSOCIATION OF NEW YORK STATE, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 10, 2008 in an action for, inter alia, a declaratory judgment. The judgment, inter alia, denied the motion of plaintiff for summary judgment and granted the cross motion of defendants Cayuga County Sheriff and Seneca County Sheriff for summary judgment.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the motion is granted in part and judgment is granted in favor of plaintiff as follows:

It is ADJUDGED and DECLARED that Tax Law § 471-e

exclusively governs the imposition of sales and excise taxes on cigarettes sold on a qualified reservation as that term is defined in Tax Law § 470 (16) (a), and

It is further ADJUDGED and DECLARED that plaintiff's two stores in question are located within a qualified reservation as that term is defined in Tax Law § 470 (16) (a),

and the cross motion is denied and the declarations are vacated.

Opinion by HURLBUTT, J.P.:

This appeal presents two primary substantive issues for our consideration. First, we must determine whether Tax Law § 471-e (as amended by L 2005, ch 61, part K, §§ 2, 7; ch 63, part A, § 4) provides the exclusive means by which to tax cigarette sales on an Indian reservation to non-Indians or to Indians who are not members of that nation or tribe where the reservation is located (hereafter, non-member Indians), or whether Tax Law § 471 provides an independent basis for imposing a tax on such sales. Second, we must determine whether plaintiff's two convenience stores are located within a " '[q]ualified reservation' " as that term is defined in Tax Law § 470 (16) (a) (as amended by L 2005, ch 61, part K, § 1). We agree with plaintiff with respect to both issues, i.e., that section 471-e is the exclusive means for taxing such cigarette sales and that plaintiff's two stores are located within a qualified reservation. We therefore conclude that the judgment of Supreme Court (*Cayuga Indian Nation of N.Y. v Gould,* 21 Misc 3d 1142[A], 2008 NY Slip Op 52478[U]) should be reversed.

Factual Background

In 2003 plaintiff purchased property on the open market in Union Springs, Cayuga County and in Seneca Falls, Seneca County and has been operating a convenience store on the property in each county. It is undisputed that plaintiff sells from both stores unstamped cigarettes, upon which New York State sales taxes have not been paid, to both its Indian and non-Indian customers (*see* Tax Law § 471 [1]; § 471-e [1] [a]).

In May 2008 this Court determined in *Day Wholesale, Inc. v State of New York* (51 AD3d 383) that the amended version of Tax Law § 471-e was not "in effect" based on the failure of the Department of Taxation and Finance (Department) to take action to implement that statute by issuing necessary coupons. We wrote in *Day Wholesale* that section 471-e, entitled "Taxes imposed on qualified reservations," "embodie[d] the Legislature's most recent effort to collect taxes on cigarettes sold on Indian reservations" (*id.* at 384). Thereafter, law enforcement officials in Cayuga and Seneca Counties determined that plaintiff was selling unstamped cigarettes from non-reservation lands in violation of Tax Law § 471 and former § 1814. On November 25, 2008, a detective from the Cayuga County Sheriff's Office and an

investigator from the Seneca County District Attorney's Office obtained search warrants in Supreme Court in each county and, pursuant thereto, law enforcement officials seized various items of property, including large quantities of unstamped cigarettes, from both stores.

Procedural History

On November 26, 2008, plaintiff commenced this action seeking, inter alia, the return of the property seized during the execution of the two search warrants and a declaration that plaintiff was not violating Tax Law §§ 471, 471-e, 473 or former § 1814 by selling unstamped cigarettes. The first cause of action seeks a declaration that, "because [section] 471-e is not in effect, [p]laintiff is under no obligation to pay or collect taxes on the cigarettes [it] sell[s]." The second cause of action alleges that, because Tax Law § 471-e is not in effect, the search warrants and subsequent seizure of property were illegal. The third cause of action seeks the return of a computer on the ground that it was outside the scope of the applicable search warrant. The fourth cause of action seeks, inter alia, a preliminary injunction enjoining defendants "from alleging that [p]laintiff and/or its employees have violated . . . Tax Law §§ 471, 471-e, 473, or [former §] 1814 . . . ."

On the same day that plaintiff commenced this action, plaintiff also moved by order to show cause for relief similar to that requested in the complaint. The Cayuga County Sheriff and the Seneca County Sheriff (defendants) cross-moved to dismiss the complaint against them on several grounds. In the alternative, defendants sought to convert their cross motion to one for summary judgment dismissing the complaint against them. Upon notice to the parties, Supreme Court, Monroe County, converted plaintiff's motion to one seeking summary judgment, and also converted defendants' cross motion to one for summary judgment. Although the court rejected defendants' contention that declaratory relief was not a remedy available to plaintiff, the court denied plaintiff's motion. The court granted judgment declaring, inter alia, that Tax Law § 471-e did not "exclusively govern the imposition of sales and excise taxes on cigarettes" sold from the two stores and determined that the two stores in question are not located on qualified reservations. The court also "declared" that this Court's decision in *Day Wholesale* did not invalidate prosecutions under section 471 and former section 1814 (*Cayuga Indian Nation of N.Y.*, 2008 NY Slip Op 52478[U], at *17). Although we agree with the court that plaintiff properly sought declaratory relief, we disagree with the court's remaining conclusions. Instead, we conclude that section 471-e is the exclusive statute governing the imposition of sales and excise taxes on cigarettes sold on reservations. We further conclude that both stores are located within a qualified reservation, as that term is defined in section 470 (16) (a).

Availability of Declaratory Relief

As a preliminary matter, we note that defendants and amicus District Attorneys Association of New York State contend that a

declaratory judgment action cannot be maintained by a party against whom a criminal proceeding is pending, relying primarily on *Kelly's Rental v City of New York* (44 NY2d 700) and *Matter of Morgenthau v Erlbaum* (59 NY2d 143, *cert denied* 464 US 993). We reject that contention. Although courts of equity "will *not* ordinarily intervene to enjoin the enforcement of the law by prosecuting officials" (*Reed v Littleton*, 275 NY 150, 153), a declaratory judgment action is available "in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" (*Dun & Bradstreet, Inc. v City of New York*, 276 NY 198, 206; *see Cooper v Town of Islip*, 56 AD3d 511, 512; *Ulster Home Care v Vacco*, 255 AD2d 73, 76-77).

In this case, plaintiff commenced the action the day after the search warrants were executed but before a "criminal action" was commenced against it by the filing of an accusatory instrument (CPL 1.20 [17]). Plaintiff sought a declaration concerning its criminal liability pursuant to Tax Law §§ 471, 471-e, 473 and former § 1814, and no factual issues are in dispute. The reliance by defendants and amicus on *Kelly's Rental* for the proposition that a party cannot bring a declaratory judgment if a "[c]riminal proceeding" (CPL 1.20 [18]) is pending against that party is misplaced. Although in *Kelly's Rental* the Court of Appeals uses the term "criminal proceeding" instead of "criminal action," a criminal action had been commenced in that case when the declaratory judgment action was brought (*id.* at 702; *see Matter of Beneke v Town of Santa Clara*, 9 AD3d 820, 820-821). Thus, under the facts of *Kelly's Rental*, plaintiff was not precluded from bringing this action inasmuch as a criminal action against it had not yet been commenced.

The reliance by defendants and amicus on *Morgenthau* for the proposition that only the People may commence a declaratory judgment action in this context is also misplaced (*see id.* at 152). In that case, the Court of Appeals stated that only the People could challenge an interlocutory ruling of a criminal court in the defendant's favor, noting that a defendant "always has available a right to appeal" (*id.*). The declaratory judgment action in *Morgenthau*, however, was commenced during the pendency of a criminal action, rather than prior to its commencement (*see id.* at 146). Thus, we conclude that the court properly determined that it could entertain this action insofar as it involved the "application of certain statutes to plaintiff's undisputed conduct" and not "collateral review of the validity of the search warrants or the manner of [their] execution" (*Cayuga Indian Nation of N.Y.*, 2008 NY Slip Op 52478[U], at *4; *see generally New York Foreign Trade Zone Operators, Inc. v State Liq. Auth.*, 285 NY 272, 276-278; *Dun & Bradstreet*, 276 NY at 206; *Bunis v Conway*, 17 AD2d 207, 208-209, *lv dismissed* 12 NY2d 645, 882).

Legislative and Executive History

Section 471 (1) of the Tax Law provides in relevant part that "[t]here is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax

shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax . . . .” It is well settled that a state is without power to tax cigarettes to be consumed on reservations by tribal members but has the power to tax on-reservation sales to non-Indians and non-member Indians (*see generally Oklahoma Tax Commn. v Citizen Band Potawatomi Indian Tribe of Okla.*, 498 US 505, 512-513; *Washington v Confederated Tribes of Colville Reservation*, 447 US 134, 151, 160-161, *reh denied* 448 US 911; *Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463, 481-483).

Prior to 2003, this State’s attempts to collect the tax on cigarette sales to non-Indians were based solely on regulations promulgated by the Department (*see e.g.* 20 NYCRR former 336.6, 336.7). 20 NYCRR former 336.6 (b) (3) defined qualified reservation as “the following reservations of the exempt Indian nations or tribes: Allegany Indian reservation, Cattaraugus Indian reservation, Oil Spring Indian reservation, Oneida Indian territory, Onondaga Indian reservation, Poospatuck Indian reservation, St. Regis Mohawk (Akwesasne) Indian reservation, Shinnecock Indian reservation, Tonawanda Indian reservation and Tuscarora Indian reservation.” Under that definition, plaintiff’s stores are not located on property that constituted a qualified reservation. Effective April 29, 1998, however, those regulations were repealed, based in part on enforcement difficulties faced by the Department (*see* NY Reg, Apr. 29, 1998, at 22-24), and the Department adopted a policy of forbearance, pursuant to which it suspended all attempts to collect the tax on reservation sales of cigarettes (*see generally Matter of New York Assn. of Convenience Stores v Urbach*, 92 NY2d 204, 213-215).

Soon after the repeal of the aforementioned regulations, litigation initiated by non-Indian convenience store owners resulted in the determination that the Department had a rational basis for refusing to enforce the regulations and could not be compelled to do so (*see Matter of New York Assn. of Convenience Stores v Urbach*, 275 AD2d 520, 522-523, *appeal dismissed* 95 NY2d 931, *lv denied* 96 NY2d 717, *cert denied* 534 US 1056). Thereafter, in June 2001, the United States District Court for the Northern District of New York held in *Oneida Indian Nation of N.Y. v City of Sherrill, N.Y.* (145 F Supp 2d 226) that various properties that had been acquired by the Oneida Nation of New York (OIN) on the open market were not taxable by the City of Sherrill and the counties in which they were located based on the doctrine of sovereign immunity (*see id.* at 253-254). Although the District Court’s judgment was affirmed by the Second Circuit Court of Appeals and ultimately reversed by the United States Supreme Court (*id.*, *affd* 337 F3d 139, *revd* 544 US 197, *reh denied* 544 US 1057), we note that the District Court found “no evidence of any congressional act that disestablished the [OIN] Reservation” between the 1794 Treaty of Canandaigua, which confirmed and guaranteed the Reservation, and the present day (*id.* at 254). On May 15, 2003, while the appeal from the District Court’s judgment was pending before the Second Circuit, the Legislature overrode the Governor’s veto to pass chapter 62 of the Laws of 2003. Chapter 62, part T3, section 4 (as amended by L 2003,

ch 63, part Z, § 4) created Tax Law former § 471-e, entitled "Taxes imposed on native American nation or tribe lands," provided that the Department was directed to "promulgate rules and regulations necessary to implement the collection of sales and use taxes on . . . cigarettes" where a non-Native American purchases such cigarettes "on or originating from native American nation or tribe land" (former § 471-e).

As noted, the Second Circuit thereafter affirmed the District Court's judgment in OIN's favor, holding that the OIN's aboriginal reservation was not disestablished by the 1838 Treaty of Buffalo Creek and that, because the OIN's properties in the City of Sherrill that were purchased on the open market "are located within that reservation . . . Sherrill can neither tax the land nor evict the [OIN]" (*Oneida Indian Nation of N.Y.*, 337 F3d at 167). Two months later, in September 2003, the Department proposed regulations in response to Tax Law former § 471-e (*see* NY Reg, Sep. 24, 2003, at 18-21). To the extent relevant here, those proposed regulations defined qualified reservation as it is currently defined in section 470 (16) (*see Proposal of Indian tax enforcement provisions,* http://www.tax.state.ny.us/pdf/rulemaking/sep1003/indianenf/text.pdf [NY St Dept of Tax & Fin, Sept. 10, 2003, at 5-6]).

On April 23, 2004, the District Court determined that plaintiff's original reservation of approximately 64,000 acres had not been disestablished and that plaintiff was not subject to local zoning regulation (*see Cayuga Indian Nation of N.Y. v Village of Union Springs*, 317 F Supp 2d 128, 143, 151).

In June 2004, the Legislature passed a bill that essentially tracked the language of the Department's proposed regulations, including the definition of qualified reservation and the current language of Tax Law § 471-e (*see* 2004 NY Senate Bill S6822-B). The bill's Senate sponsor noted that, despite the passage of former section 471-e in 2003, the Department had refused to implement a system to collect "non-Indian taxes" (Sponsor's Letter, Veto Jacket, 2004 Senate Bill S6822-B). The legislation was vetoed by the Governor (*see* Governor's Veto No. 265, Veto Jacket, 2004 Senate Bill S6822-B).

On March 27, 2005, the same proposed legislation, with minor amendments, came to the floor of the Senate and Assembly. On March 29, 2005, the United States Supreme Court issued its decision in *Oneida Indian Nation of N.Y.*, reversing the Second Circuit by holding that the OIN could not reassert sovereignty over lands that had been allocated to it in the 1794 Treaty of Canandaigua but that had been free of Indian ownership or control for 200 years (*see* 544 US at 202-203). Two days later, on March 31, 2005, the Legislature passed chapter 61 of the Laws of 2005, amending, inter alia, Tax Law §§ 470 and 471-e. The Governor signed the bill into law on April 12, 2005 (*see* L 2005, ch 61).

On March 16, 2006, 15 days after coupons necessary to allow member Indians to purchase tax-free cigarettes were to be issued by

the Department (*see generally* L 2005, ch 63, part A, § 4), the Department issued an advisory opinion stating that it was adhering to its policy of forbearance (*see* NY St Dept of Tax & Fin Advisory Op No. TSB-A-06[2]M, available at http://www.tax.state.ny.us/pdf/advisory_opinions/misc/a06_2m.pdf). On May 2, 2008, this Court issued its decision in *Day Wholesale* holding that Tax Law § 471-e was not in effect because the Department had not issued the necessary coupons (*see* 51 AD3d at 388-389).

Discussion
I Section 471-e

Our first task is to discern the intent of the Legislature in its enactment of chapter 61 of the Laws of 2005. As amended by that chapter, Tax Law § 471-e (1) (a) provides that,

> "[n]otwithstanding any provision of this article to the contrary [. . .,] Indians may purchase cigarettes for [their] own use or consumption exempt from cigarette tax on their nations' or tribes' qualified reservations. However, . . . Indians purchasing cigarettes off their reservations or on another nation's or tribe's reservation, and non-Indians making cigarette purchases on an Indian reservation shall not be exempt from paying the cigarette tax when purchasing cigarettes within this state. Accordingly, all cigarettes sold on an Indian reservation to non-members of the nation or tribe or to non-Indians shall be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp."

In resolving the parties' dispute concerning the meaning of Tax Law § 471-e, we are mindful that our function "is to ascertain and give effect to the intention of the Legislature" (McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a]), and that "statutory text is the clearest indicator of legislative intent" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660). Nevertheless, " 'inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history' " (*Mowczan v Bacon*, 92 NY2d 281, 285, quoting *Matter of Sutka v Conners*, 73 NY2d 395, 403; *see Consedine v Portville Cent. School Dist.*, 12 NY3d 286, 290-291).

The Legislature's express imposition of the cigarette tax in Tax Law § 471-e and adoption of the language of the proposed regulations of the Department demonstrate the intention of the Legislature to overhaul the statutory scheme and, in our view, to provide a single statutory basis for taxing cigarette sales on qualified reservations. Historically, the State of New York has not attempted to impose taxes on reservation cigarette sales unless a specific regulatory or statutory scheme was in place to differentiate between sales to

Indians and sales to non-Indians or non-member Indians. Without such a scheme in place, it logically follows that no taxes may be collected or owed to the State by plaintiff. Moreover, the Legislature acted after the courts had determined that the Department had a rational basis for refusing to enforce the regulations (*see New York Assn. of Convenience Stores*, 275 AD2d at 522-523), and thus in 2005 the Legislature was aware that, although the Department was directed to promulgate regulations by former section 471-e, the Department was not required to enforce those regulations. The Legislature therefore recognized the need to have a separate statutory scheme in place, aside from the general taxing provision of Tax Law § 471, in order to impose a cigarette tax on reservation sales to non-Indians and non-member Indians, while at the same time acknowledging that it was "without power" to tax reservation sales to qualified Indians (§ 471 [1]).

As this Court noted in *Day Wholesale*,

> "there is no question that the Legislature intended to create a procedure that would permit the State to collect cigarette taxes on reservation sales to non-Indians and non-members of the nation or tribe while simultaneously exempting from such tax reservation sales to qualified Indian purchasers. Because both aspects of the procedure *must function simultaneously*, the Legislature provided for a system utilizing Indian tax exemption coupons to distinguish taxable sales from tax-exempt sales. Without the coupon system in place, cigarette wholesale dealers and reservation cigarette sellers have no means by which to verify sales to tax-exempt purchasers"

(51 AD3d at 387 [emphasis added]). Given the recognition of the Legislature that the sovereignty considerations attendant upon imposing and collecting a state cigarette tax on reservation sales renders Tax Law § 471 alone insufficient to impose the tax and its express imposition of the tax in section 471-e, as well as our decision in *Day Wholesale* that section 471-e is not in effect, we are compelled to conclude that there is no statutory basis for the imposition of a cigarette tax on a qualified reservation as that term is defined in section 470 (16) (a). Thus, possession or sales of untaxed cigarettes on qualified reservations cannot subject the seller or possessor to criminal prosecution.

II Qualified Reservation

Of course, if the convenience stores in question were not situated on a qualified reservation, as defendants contend, then Tax Law § 471-e would be inapplicable, and the stores would be fully subject to taxation under section 471 and, more to the point, to criminal prosecution under former section 1814. We conclude, however, that the Legislature intended to include the subject properties within

the definition of a qualified reservation. Tax Law § 470 (16) provides a four-part definition of the term qualified reservation. We note that of relevance in this case is the fact that subdivision (a) defines a qualified reservation as "[l]ands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state . . . ." In 2003, when the Department drafted the proposed regulations that were then adopted by the Legislature, federal common law provided that Indian nations or tribes could purchase land on the open market and regain sovereignty over that land provided that the land was within that nation's or tribe's original reservation (*see generally Oneida Indian Nation of N.Y.*, 337 F3d at 155-157). It is in this context that the definition of qualified reservation was proposed by the Department and subsequently adopted by the Legislature. We conclude that the Legislature intended that the definition of qualified reservation reflect the existing federal common law at the time that the legislation was passed. Thus, under the plain language of the statute and consistent with legislative intent, the two properties in question in this case qualify as "[l]ands held by an Indian nation or tribe" as contemplated by the statute (§ 470 [16] [a]).

We acknowledge that the language of Tax Law § 470 (16) (a) does not take into consideration the Supreme Court's determination in *Oneida Indian Nation of N.Y.* that Indian nations cannot regain sovereignty over such lands (*see* 544 US at 202-203). Nevertheless, that case was decided well after the definition of qualified reservation was crafted by the Department, and only two days prior to the enactment of section 470 (16) adopting that definition. Moreover, it is apparent that the Legislature intended to include within the definition of qualified reservation properties such as those in question in this case. Subdivision (b) of section 470 (16) expressly includes a concept of sovereignty in the definition of qualified reservation as "[l]ands . . . over which an Indian nation or tribe exercises governmental power . . . ." In contrast, subdivision (a) contains no mention of sovereignty. We thus agree with plaintiff that the clear legislative intent was to omit any consideration of sovereignty under subdivision (a).

As the legislative and executive history preceding the enactment of chapter 61 of the Laws of 2005 noted above makes clear, the Legislature intended the definition of qualified reservation to comport with the holdings of the District Court and Second Circuit Court of Appeals in *Oneida Indian Nation of N.Y.* that there has been no disestablishment of the reservation lands ceded to the OIN (and to plaintiff) by the Treaty of Canandaigua (*see* 337 F3d at 161-165; 145 F Supp 2d at 254). The Supreme Court found it unnecessary to address that issue when it reversed the Second Circuit in *Oneida Indian Nation of N.Y.* (*see* 544 US at 215 n 9). We are thus persuaded that, based on the current state of the federal common law, plaintiff's reservation has not been disestablished and thus constitutes a qualified reservation pursuant to the plain language of Tax Law § 470 (16) (a). We therefore conclude that the two stores at issue in this case, which are located on plaintiff's original reservation, are located on a qualified reservation.

Conclusion

In sum, the legislative purpose, context, and history of Tax Law § 471-e lead to the conclusion that it exclusively governs the imposition of sales and excise taxes on cigarettes sold on a qualified reservation as that term is defined in section 470 (16) (a). Further, both of plaintiff's stores are located within a qualified reservation as that term is defined in section 470 (16) (a).

Accordingly, we conclude that the judgment should be reversed, plaintiff's motion granted in part, judgment granted in favor of plaintiff declaring that section 471-e exclusively governs the imposition of sales and excise taxes on cigarettes sold on a qualified reservation as that term is defined in section 470 (16) (a) and that plaintiff's two stores in question are located within a qualified reservation as that term is defined in section 470 (16) (a), defendants' cross motion denied and the declarations vacated.

CENTRA, GREEN, and GORSKI, JJ., concur with HURLBUTT, J.P.; PERADOTTO, J., dissents and votes to affirm in the following Opinion: I respectfully dissent, and would affirm. I agree with the majority that plaintiff's two convenience stores are located on a "[q]ualified reservation" as that term is defined in Tax Law § 470 (16) (a) and that declaratory relief is available to plaintiff on the facts of this case. I cannot agree with the majority's conclusion, however, that Tax Law § 471-e is the exclusive statute governing the imposition of sales and excise taxes on cigarettes sold on Indian reservations. In my view, the majority's conclusion is belied by the plain language of the statute and its legislative history. The statutory tax obligation on all cigarettes possessed for sale in New York State—including cigarettes sold by reservation retailers to non-Indians and Indians who are not members of that nation or tribe where the reservation is located (non-member Indians)—is imposed by Tax Law § 471. In my view, section 471-e does not circumscribe the long-standing tax obligation imposed by section 471. To the contrary, section 471-e establishes a statutory mechanism for the *collection* of that tax from reservation sales to non-Indians and non-member Indians which have historically evaded the cigarette tax.

Statutory Text

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208), and that "the most direct way to effectuate the will of the Legislature is to give meaning and force to the words of its statutes" (*Desiderio v Ochs*, 100 NY2d 159, 169). To that end, "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning" (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91).

Tax Law § 471 (1) clearly and unambiguously provides:

> *"There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale*, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax . . . It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof" (emphasis added).

Section 471 (2) requires that stamping agents "purchase stamps and affix such stamps in the manner prescribed to packages of cigarettes to be sold within the state . . . ." There is no language in section 471 exempting reservation sales from the cigarette tax or otherwise limiting the applicability of the tax based upon where in the state such sales take place or to whom such sales are made. Rather, the plain language of section 471 imposes a tax on all cigarettes possessed for sale in the state except where the state lacks the power to impose such a tax (*see* § 471 [1]). It is by now well settled that a state is without power to tax reservation cigarette sales to tribal members for their own consumption (*see Department of Taxation and Fin. of N.Y. v Milhelm Attea & Bros., Inc.*, 512 US 61, 64; *Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463, 475-481). It is equally well settled, however, that the tax obligation imposed by section 471 validly applies to reservation sales to non-Indians and non-member Indians (*see Milhelm Attea & Bros.*, 512 US at 64; *Snyder v Wetzler*, 84 NY2d 941, 942). As the United States Supreme Court recognized in *Milhelm Attea & Bros.*, Tax Law § 471 (1)

> "imposes a tax on all cigarettes possessed in the State except those that New York is 'without power' to tax . . . Because New York lacks authority to tax cigarettes sold to tribal members for their own consumption . . ., cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped. *On-reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to state taxation*" (512 US at 64 [emphasis added]).

Thus, the clear, mandatory language of section 471 requires that stamping agents affix tax stamps to all cigarettes that the state has the power to tax, including cigarettes sold by reservation retailers to non-Indians and non-member Indians (*see City of New York v Milhelm Attea & Bros., Inc.*, 550 F Supp 2d 332, 346, *reconsideration denied* 591 F Supp 2d 234).

The enactment of the current version of Tax Law § 471-e in 2005 did not, as the majority concludes, alter the tax obligation imposed by section 471. Rather, section 471-e sets forth a comprehensive

procedure to collect cigarette taxes in connection with reservation sales to the general public while permitting tribal members to purchase tax-free cigarettes for their own consumption (*see Day Wholesale, Inc. v State of New York*, 51 AD3d 383, 387). Also, contrary to the conclusion of the majority, section 471-e does not "impose" a tax on reservation sales to non-Indian consumers. The tax obligation enforced by section 471-e predated the enactment of that statute (*see* § 471 [1]; *see also Milhelm Attea & Bros.*, 512 US at 64). In concluding that section 471-e creates a tax obligation independent of section 471, the majority relies on subdivision (1) (a) of section 471-e, which provides:

> "Notwithstanding any provision of this article to the contrary qualified Indians may purchase cigarettes for such qualified Indians' own use or consumption exempt from cigarette tax on their nations' or tribes' qualified reservations. However, such qualified Indians purchasing cigarettes off their reservations or on another nation's or tribe's reservation, and non-Indians making cigarette purchases on an Indian reservation shall not be exempt from paying the cigarette tax when purchasing cigarettes within this state. Accordingly, all cigarettes sold on an Indian reservation to non-members of the nation or tribe or to non-Indians shall be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp."

Subdivision (1) (a), the introduction to section 471-e, merely recites the undisputed proposition that cigarettes purchased by enrolled tribal members on tribal lands are tax exempt, while cigarette sales to all other persons are subject to the cigarette tax. The remainder of the statute establishes a system for the collection of the cigarette tax as applied to reservation sales to non-Indians and non-member Indians. Reading section 471 together with section 471-e thus compels the conclusion that the former section imposes the tax on cigarettes, which includes cigarettes sold on reservations to non-Indians and non-member Indians, while the latter section establishes a mechanism for enforcing and collecting the tax on qualified reservations and preserves the tax exemption enjoyed by qualified Indians (*see Day Wholesale*, 51 AD3d at 384-385). As Supreme Court explained in this case, "[s]ection 471-e was merely designed to facilitate the state's collection of cigarette taxes arising from Indian sales to non-Indian consumers" (*Cayuga Indian Nation of N.Y. v Gould*, 21 Misc 3d 1142[A], 2008 NY Slip Op 52478[U], *5).

The statutory text therefore does not support the majority's conclusion that Tax Law § 471-e limits the scope of section 471. In my view, if the Legislature intended to supersede or restrict the longstanding tax obligation imposed by section 471 with respect to reservation cigarette sales to non-Indians and non-member Indians, it would have so stated. Under the plain language of section 471, cigarettes sold by Indian retailers to the public are subject to the

state’s cigarette tax. In the absence of limiting language in section 471 or an explicit legislative directive in section 471-e, the enactment of the latter statute does not extinguish the tax liability imposed by the former statute.

Legislative History

The legislative history of Tax Law § 471-e also supports my view that the Legislature's intent in enacting that provision was to provide a statutory collection mechanism for the tax imposed by section 471. For more than two decades, the State has attempted—without success—to devise an effective means of enforcing and collecting the cigarette tax established by section 471 from reservation sales to non-Indians and non-member Indians. As this Court explained in *Day Wholesale*, section 471-e simply "embodies the Legislature's most recent effort to collect taxes on cigarettes sold on Indian reservations" (51 AD3d at 384).

In 1988, the Department of Taxation and Finance (Department) promulgated a series of regulations to facilitate the collection of sales and excise taxes on reservation sales, including cigarette sales, to non-Indians (*see* 20 NYCRR former 335.4, 335.5; *Matter of New York Assn. of Convenience Stores v Urbach*, 92 NY2d 204, 209). The regulations, which were based on a system of "probable demand," provided that stamping agents would supply registered dealers with unstamped or specially stamped cigarettes for tax-exempt sales and with stamped cigarettes for taxable sales to non-Indians (NY Reg, Sept. 14, 1988, at 45). As the majority points out, the regulations were repealed 10 years later, based in part on enforcement difficulties faced by the Department (*see* NY Reg, Apr. 29, 1998, at 22-24). Nonetheless, the Department specifically recognized that "[t]he repeal of the regulations does not eliminate the *statutory liability* for the taxes as they relate to sales on Indian reservations to non-exempt individuals" (*id.* at 23 [emphasis added]).

After the repeal of the regulations, the Department publicly articulated a "forbearance" policy, pursuant to which it suspended its enforcement efforts to collect the tax imposed by Tax Law § 471 on reservation sales of cigarettes (*see Milhelm Attea & Bros.*, 550 F Supp 2d at 346; *see also New York Assn. of Convenience Stores*, 92 NY2d at 213-215). As a result of the forbearance or, in the words of Supreme Court in this case, the "paralysis" of the Department in enforcing the cigarette tax as applied to reservation sales to non-Indians (*Cayuga Indian Nation of N.Y.*, 2008 NY Slip Op 52478[U], at *7), the Legislature interceded and, in 2003, enacted the first version of section 471-e (*see* L 2003, ch 62, part T3, § 4, as amended by L 2003, ch 63, part Z, § 4). The statute provided that,

> "[w]here a non-native American person purchases, for such person's own consumption, any cigarettes . . . on or originating from native American nation or tribe land . . ., the commissioner shall promulgate rules and regulations necessary to implement the collection of sales, excise and use taxes on such cigarettes or other tobacco products."

It is clear from the face of the statute that the purpose of section 471-e was not to *impose* a tax on cigarettes sold to non-Indians and non-member Indians on reservations, but to require the Department to establish the rules and regulations required to *collect* the tax imposed by section 471. The Governor's veto message explained that the statute "would mandate that the Department . . . begin *collecting taxes* on retail purchases by non-Native Americans on Native American reservation land" (Governor's Veto No. 2, Veto Jacket, 2003 Assembly Bill 2106-B [emphasis added]). The Commissioner of the Department criticized the bill, noting that "the Tribes are not inclined to assist the State in the *collection* of state taxes," and he stated that the bill "proposes no new approach or solutions to this tax *collection* dilemma" (Commissioner's Letter, Veto Jacket, 2003 NY Assembly Bill A2106-B [Bill Jacket, L 2003, ch 62, at 37] [emphasis added]).

Pursuant to Tax Law former § 471-e, the Department developed regulations to collect taxes on reservation cigarette sales to non-Indians (*see* NY Reg, Sept. 24, 2003, at 18-21). The stated purpose of the regulations was "[t]o implement the collection of excise taxes and sales and compensating use taxes on retail sales made to non-Indians on New York State Indian reservations" (*id.* at 18; *see also id.* at 20 ["Chapters (62) (Part T3) and 63 (Part [Z]) of the Laws of 2003 mandate that the Commissioner adopt rules and regulations to effectuate the collection of taxes on retail sales made to non-Indians on Indian reservations in this State"]). Significantly, the Department noted that "[t]his tax liability of non-Indian consumers is a feature of current law and has been for some time" (*id.* at 20). Thus, the Department recognized that section 471-e did not impose a new tax. Instead, the statute directed the Department to establish a "mechanism[]" for the collection of taxes long imposed by New York law (*id.*).

The proposed regulations, however, were never adopted. Thus, in June 2004, the Legislature passed a bill mirroring the language of the proposed regulations and including the current language of Tax Law § 471-e (*see* 2004 NY Senate Bill S6822-B). As the Senate sponsor stated, "[t]his bill codifies existing Department . . . regulations to implement its provisions to collect taxes from non-Native Americans who purchase cigarettes . . . on Native American reservations. The bill allows New York State to collect [those] taxes at the distributor level before they are transported onto the reservation" (Sponsor's Letter, Veto Jacket, 2004 NY Senate Bill S6822-B). Although that bill was vetoed by the Governor, it was reintroduced with minor amendments the following year, and it was signed into law on April 12, 2005 (*see* L 2005, ch 61, part K, § 2).

As the legislative history of the statute makes plain, Tax Law § 471-e did not create a new tax or limit the scope of the tax liability imposed by section 471. Rather, when the Department refused to implement a regulatory framework for the collection of the tax imposed by section 471, the Legislature enacted a comprehensive statutory collection scheme by means of the amended section 471-e. Far from impairing the tax obligation established in section 471, the clear

intent of section 471-e was to collect the taxes lawfully imposed pursuant to section 471 by requiring all cigarettes intended for sale—whether on or off a reservation and whether to Indians or non-Indians—to be tax stamped. Thus, the legislative history does not support the majority's conclusion that "[t]he Legislature . . . recognized the need to have a separate statutory scheme in place, aside from the general taxing provision of Tax Law § 471, in order to impose a cigarette tax on reservation sales . . . ." Rather, in enacting section 471-e, the Legislature recognized that the executive branch was not going to enforce the cigarette tax imposed by section 471 in the absence of explicit legislative directives. As a result, the Legislature crafted a statutory collection scheme to address the particular obstacles posed by reservation cigarette sales. The tax liability established by section 471 was unaffected.

The Impact of *Day Wholesale*

In my view, this Court's decision in *Day Wholesale* does not compel a different result. In that case, we merely determined that the specific collection method outlined in Tax Law § 471-e is not in effect because the State failed to implement the tax exemption coupon system, which we determined was necessary "to the functioning of the procedure set forth in the amended version of Tax Law § 471-e" (51 AD3d at 387). Our decision in that case did not disturb the underlying obligation to pay the taxes imposed by section 471. To the contrary, we recognized that the tax obligation on cigarettes stems from section 471, not section 471-e, and stated:

> "Pursuant to Tax Law § 471 (2), the ultimate liability for the cigarette tax falls on the consumer, but the cigarette tax is advanced and paid by agents . . . through the use of tax stamps . . . The tax applies to 'all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax' . . . Those circumstances pertain only to some of the cigarettes sold on Indian reservations" (*id.* at 384).

The fact that, as a result of *Day Wholesale,* the particular collection scheme established in section 471-e is no longer "in effect" (*id.*) does not relieve reservation retailers of their legal obligation to sell only tax-stamped cigarettes to non-Indian and non-member Indian purchasers. The tax liability imposed by section 471 remains regardless of whether the State has a statutory mechanism in place for the effective collection of the required taxes from Native American retailers.

In a recent federal case, the District Court of the Eastern District of New York rejected the defendants' claims that our decision in *Day Wholesale* altered the scope of Tax Law § 471 (*see Milhelm Attea*

& Bros., 591 F Supp 2d at 237). In that case, the City of New York commenced an action against cigarette wholesalers for violation of the federal Contraband Cigarette Trafficking Act (18 USC § 2341 *et seq.*), alleging that the defendants shipped unstamped cigarettes to Indian retailers who re-sold the cigarettes to the general public in violation of section 471 (*see Milhelm Attea & Bros.*, 591 F Supp 2d at 235). After this Court's decision in *Day Wholesale*, the defendants moved for reconsideration of the District Court's order denying their motions to dismiss, arguing "that stamping agents are not required to affix tax stamps on cigarettes sold to reservation retailers until the Department issues and distributes tax exemption coupons pursuant to [section] 471-e" and that, therefore, the defendants' sale of unstamped cigarettes did not violate New York law (*id.* at 236). In denying defendants' motion for reconsideration, the District Court stated:

> "This Court does not disagree with the contention that [section] 471-e was intended by the New York legislature to provide a mechanism to collect taxes on re-sales of cigarettes by Native American retailers to non-tribe members. The current enforceability of that statute, however, does not alter the scope of [section] 471 or its legal force. Those sales do not become non-taxable events with the Appellate Division's decision in *Day Wholesale*; rather, the court in that case found that statutorily prescribed pre-conditions for one proposed mechanism of collection have not been met" (*id.* at 237-238).

The Department's Forbearance Policy

The majority states that, "[h]istorically, the State of New York has not attempted to impose taxes on reservation cigarette sales unless a specific regulatory or statutory scheme was in place to differentiate between sales to Indians and sales to non-Indians or non-member Indians. Without such a scheme in place, it logically follows that no taxes may be collected or owed to the State by plaintiff." I cannot agree with the majority's reasoning. As discussed above, the State has imposed taxes on cigarette sales to non-Indians—whether on or off a qualified reservation—for decades. While it is true that the Department has adopted a longstanding policy of "forbearance"[1] pursuant to which it has not sought to collect those taxes on reservation sales, an administrative agency's non-enforcement policy does not and cannot nullify a tax obligation created by statute (*see Milhelm Attea & Bros.*, 550 F Supp 2d at 347 ["The (District) Court recognizes that the Department has publicly articulated a forbearance policy on the collection of taxes from the sale of

[1] In my view, the fact that the Department has a "forbearance policy" with respect to the collection of cigarette taxes from Indian sellers suggests that the tax obligation is independent of any regulatory or statutory framework for the collection of such taxes.

cigarettes by stamping agents to reservation retailers . . . However, an enforcement decision by the Department does not serve to obviate state legislation."]). "Simply stated, states 'require' certain conduct via duly enacted laws; the failure of the executive branch to enforce the law is not the same as saying that the legislative branch has repealed it" (*United States v Morrison*, 521 F Supp 2d 246, 254). While the majority may be correct in concluding that, in the absence of the collection scheme established by section 471-e, it may be difficult or impossible for the State to *collect* cigarette taxes from reservation retailers, it does not "logically follow[]" that no taxes are *owed* by plaintiff.

Conclusion

The tax liability imposed by Tax Law § 471 is independent of any particular regulatory or statutory framework established to collect the tax. Accordingly, I would affirm the judgment denying plaintiff's motion for summary judgment and granting defendants' cross motion for summary judgment and declaring that section 471-e does not exclusively govern the imposition of sales and excise taxes on cigarettes sold in plaintiff's two stores and that our decision in *Day Wholesale* does not foreclose prosecutions under the Tax Law. Regardless of whether the State can effectively collect cigarette taxes on reservation sales to non-Indians and non-member Indians, section 471 (1) mandates that all such sales are "subject to tax" and, thus, reservation retailers who flout that obligation risk prosecution under former section 1814.

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

685

KA 06-03711

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE A. ROSARIO, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered January 4, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). By pleading guilty before obtaining a final order ruling on his contention that the canine sniff of the exterior of his codefendant's vehicle was unlawful, defendant forfeited his right to challenge the validity of that canine sniff (*see People v Fernandez*, 67 NY2d 686, 688; *People v Whitehurst*, 291 AD2d 83, 87, *lv denied* 98 NY2d 642). Although CPL 710.70 (2) provides that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty," that statute does not apply inasmuch as no final order was issued.

In any event, we conclude that defendant, who was a mere passenger in his codefendant's vehicle, lacks standing to contest the canine sniff of the vehicle inasmuch as he failed to show that he had a reasonable expectation of privacy in either the codefendant's vehicle or the drugs seized therefrom (*see generally People v Tejada*, 81 NY2d 861, 862; *People v Cheatham*, 54 AD3d 297, 299, *lv denied* 11 NY3d 854; *People v Hooper*, 245 AD2d 1020). The record does not support defendant's contention that the crime charged was founded

solely on the statutory presumption set forth in Penal Law § 220.25 (1).

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

718

CA 08-02042

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

JAMES W. SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANA WINTER, DEFENDANT-APPELLANT.

WILLIAM R. HITES, BUFFALO, FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a supplemental judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered March 18, 2008 in a divorce action. The supplemental judgment, inter alia, distributed the parties' marital assets.

It is hereby ORDERED that the supplemental judgment so appealed from is unanimously modified on the law by providing that plaintiff's personal checking accounts at Evans National Bank and HSBC Bank are marital property and directing plaintiff to pay defendant $11,330.15 for her marital interest in those accounts and by granting defendant interest on the net distributive award at the rate of 9% per annum commencing January 24, 2008 and as modified the supplemental judgment is affirmed without costs.

Memorandum: Defendant appeals from a supplemental judgment issued in a divorce action that, inter alia, distributed marital assets and ordered plaintiff to pay maintenance to defendant. The parties were married in 1996 and had no children. Prior to the marriage, plaintiff was the sole shareholder, chief executive officer, and president of American Wire Tie, Inc. (American Wire), which acquired 100% of the stock in Permanban North America (PNA). The evidence adduced at trial established that, during the marriage, plaintiff was substantially responsible for the day-to-day management and operation of American Wire. He had no involvement in the day-to-day operations of PNA. With respect to American Wire, Supreme Court found that the value of the company did not change during the course of the marriage. The court further found, however, that plaintiff's American Wire 401K had appreciated in value during the marriage, and thus the court awarded defendant half of the value of that appreciation by way of a Qualified Domestic Relations Order. With respect to PNA, the court found that the value of PNA appreciated by $20 million during the course of the marriage but that the increase in value attributable to plaintiff was minimal when compared to the

increase attributable to those hired by plaintiff to run the company. The court thus determined that only 10% of the appreciation in value of PNA was marital property subject to equitable distribution and that defendant was entitled to 40% of the appreciated value based on her contributions as a homemaker. The court made additional awards with respect to, inter alia, life insurance policies, an art collection, and bank accounts, resulting in a total distributive award to defendant of $556,611.82. Finally, the court awarded defendant $1,700 per week as maintenance for a period of approximately 17 months.

We conclude that the court properly determined that only 10% of the appreciation of the value of PNA, a wholly owned subsidiary of American Wire, was marital property subject to distribution. It is undisputed that plaintiff was the sole shareholder of American Wire prior to the marriage, and thus American Wire remained plaintiff's separate property. It is further undisputed that PNA appreciated in value by over $20 million during the course of the marriage but that plaintiff's contributions to that appreciation were minimal. It is well settled that "an increase in the value of separate property of one spouse, occurring during the marriage and prior to the commencement of matrimonial proceedings, which is due in part to the indirect contributions or efforts of the other spouse as homemaker . . . should be considered marital property" (*Price v Price*, 69 NY2d 8, 11). "When a nontitled spouse's claim to appreciation and the other spouse's separate property is predicated solely on the nontitled spouse's indirect contributions, [however,] *some* nexus between the titled spouse's active efforts and the appreciation in the separate property is required" (*Hartog v Hartog*, 85 NY2d 36, 46). Here, the court properly considered the "active efforts of others and any additional passive or active factors" in determining the percentage of total appreciation that constitutes marital property subject to distribution (*see id.* at 48-49).

Contrary to defendant's contention, the court properly determined that there was no evidence with respect to the appreciation of the life insurance policies, and thus there was no basis for the court to distribute such alleged appreciation as marital property (*see La Barre v La Barre*, 251 AD2d 1008, 1008-1009; *Turner v Turner*, 145 AD2d 752, 753). Also contrary to defendant's contention, the court did not abuse its discretion in distributing the artwork acquired by the parties during the marriage (*see McPheeters v McPheeters*, 284 AD2d 968). The parties failed to have the artwork appraised and provided the court with only the acquisition costs of the artwork and the parties' preferences for certain pieces of art.

We conclude that the court's award of maintenance was not an abuse of discretion inasmuch as the court properly considered the factors set forth in Domestic Relations Law § 236 (B) (6) (a) (*see Mayle v Mayle*, 299 AD2d 869). In determining the amount and duration of maintenance, the court took into consideration the marital standard of living, the ability of defendant to be self-supporting, the length of the marriage and the significant distributive award made to defendant, as well as other factors (*see generally Gulisano v Gulisano*, 214 AD2d 999).

We agree with defendant, however, that the court erred in failing to identify and classify the personal checking accounts of plaintiff at Evans National Bank and HSBC Bank. It is undisputed that plaintiff deposited his earnings into the accounts during the marriage, and thus the accounts are marital property subject to distribution (*see generally LeRoy v LeRoy*, 274 AD2d 362). We value the accounts based on their respective balances as of the date of commencement of the action and, based on the record before us, we conclude that the Evans National Bank account is valued at $17,808.98 and the HSBC account is valued at $4,851.32. An equal division of the accounts results in an award to defendant in the amount of $11,330.15. We therefore modify the supplemental judgment accordingly. In addition, the court erred in failing to grant defendant interest on her net distributive award at the statutory rate commencing from the date of the court's decision (*see Singh v Singh*, 51 AD3d 1379; *see also* CPLR 5002; *see generally Grunfeld v Grunfeld*, 255 AD2d 12, 22, *mod on other grounds* 94 NY2d 696). We therefore further modify the supplemental judgment accordingly.

We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

722

CA 08-01527

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

YVETTE HUFF, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANITA L. RODRIGUEZ, FORMERLY KNOWN AS ANITA L. ROSARIO, AND ENRIQUE RODRIGUEZ, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (PATRICK S. KENNEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered April 23, 2008 in a personal injury action. The judgment dismissed the complaint upon a jury verdict in favor of defendants on liability.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the complaint is reinstated, and a new trial is granted on liability.

Memorandum: As we noted when this case previously was before us on appeal (*Huff v Rodriguez*, 45 AD3d 1430), plaintiff commenced this action seeking damages for injuries she sustained in a motor vehicle accident while she was a passenger in a vehicle owned by defendant Enrique Rodriguez and operated by Anita L. Rodriguez, formerly known as Anita L. Rosario (defendant). Following a trial, the jury found defendant 100% liable for the accident and awarded plaintiff damages. On the prior appeal, we reversed the amended judgment and granted defendants' post-trial motion in part by, inter alia, setting aside the verdict on liability. We granted a new trial on liability and specified that, in the event that the new trial resulted in a finding of liability against defendants, a new trial on specified categories of damages was also granted unless plaintiff stipulated to reduce the award of damages for those categories to certain amounts (*id.*). Plaintiff stipulated to the reduction in damages and, following a new trial on liability, the jury found in favor of defendants. In appeal No. 1, plaintiff appeals from the judgment entered upon that jury verdict and, in appeal No. 2, plaintiff appeals from the order settling the record in appeal No. 1.

We note at the outset that we reject defendants' contention that all but one of plaintiff's contentions are not preserved for our review inasmuch as they were not raised in plaintiff's post-trial motion following the new trial on liability (*see* CPLR 4404 [a]). All of plaintiff's contentions on appeal are properly before us, either because they were raised in the post-trial motion or during the trial (*see Rochester Gas & Elec. Corp. v State of New York*, 225 AD2d 1047).

Contrary to plaintiff's contention, Supreme Court did not abuse its discretion in granting a mistrial following the opening statement of plaintiff's attorney (*see generally Harris v Village of E. Hills*, 41 NY2d 446, 451). Plaintiff's attorney stated therein that Roger M. Harriss, Jr., the driver of the vehicle that collided with the vehicle in which plaintiff was a passenger, would not be present at the trial because he was "serving a military tour in Iraq." In seeking a mistrial based on that statement, defendants' attorney contended that Harriss had in fact returned from Iraq. According to plaintiff's attorney, he had been informed by family members of Harriss that Harriss "[was] away, he [was] in military confinement," but he could not verify that Harriss was presently in Iraq. The court did not abuse its discretion in granting the mistrial on the ground of potential prejudice to defendants, i.e., "by indicating that . . . [Harriss] is an Iraq veteran and [the jury] won't be concentrating on the case." We note in any event that defendants' attorney stated that he would not question the absence of Harriss at the second of the new trials, which began the following day, and thus there was no need for plaintiff's attorney to explain the reason for Harriss's absence at that second new trial.

Contrary to plaintiff's further contention, the court properly allowed defendants' attorney to cross-examine a witness using the medical records of that witness. The cross-examination concerned medications that the witness was taking at the time of the accident, in order to establish whether those medications affected her "ability to perceive and remember events" in connection with the accident (*Bivona v Nassau Ophthalmic Servs.*, 276 AD2d 455; *see generally Badr v Hogan*, 75 NY2d 629, 634-635). Inasmuch as those medical records were not admitted in evidence, we reject plaintiff's sole contention in appeal No. 2 that the court erred in refusing to include them in the record on appeal in appeal No. 1 (*see Matter of Gullo v Semon*, 265 AD2d 656, 657; *cf. Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.*, 180 AD2d 222, 225, 234). We further conclude that plaintiff lacks standing to seek penalties based on the alleged violation of the witness's rights under the Health Insurance Portability and Accountability Act of 1996 ([HIPAA] 42 USC § 1320d *et seq.*).

Also contrary to plaintiff's contention, the court properly charged the jury pursuant to PJI 1:55 and 2:26 inasmuch as both charges were supported by the evidence submitted to the jury. PJI 1:55 was properly charged because there was evidence at trial that Harriss apologized for hitting defendant's vehicle and stated that he had not seen the vehicle, and those statements could be deemed admissions against interest. In addition, PJI 2:26 was properly charged because the Harriss vehicle struck defendant's vehicle while

it was stopped (*see DiLillo v B. Reitman Blacktop*, 299 AD2d 517; *Barile v Lazzarini*, 222 AD2d 635, 636).

We agree with plaintiff, however, that comments made by defendants' attorney on summation warrant reversal. One day before opening statements, defendants' attorney acknowledged that he had received a report of plaintiff's accident reconstruction expert concluding "that the sole proximate cause of the accident was the . . . action of [defendant]." Plaintiff did not call her expert at trial and, during his summation, defendants' attorney stated that plaintiff failed to call that expert "because his testimony would not support [plaintiff's] claim that . . . [defendant] caused [the] accident." We note that plaintiff preserved her contention for our review (*see generally* CPLR 4017), and that even if she had failed to do so we would reach the issue in the interest of justice (*see generally Butler v County of Chautauqua*, 277 AD2d 964). The comment by defendants' attorney was incorrect, and we are unable to conclude on the record before us that the comment did not influence the jury's verdict in this close case (*cf. Keeler v Reardon*, 49 AD3d 1211, 1213; *Pagano v Murray*, 309 AD2d 910, 911; *see generally Weinberger v City of New York*, 97 AD2d 819, 820; *Caraballo v City of New York*, 86 AD2d 580).

In view of our determination, we do not reach plaintiff's contention that the verdict is against the weight of the evidence.

All concur except SMITH and PINE, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm the judgment inasmuch as we cannot agree with the majority that the comments of defendants' attorney during his summation warrant reversal. During his summation, defendants' attorney noted that he had been served with a notice that plaintiff would call an expert witness, and he thereafter stated that plaintiff failed to call her expert because the expert's testimony would not have supported her case. Contrary to plaintiff's contention, where a party retains an expert and gives notice of that expert to the opposing party, the failure to call the expert may be brought to the jury's attention (*see Sanders v Otis El. Co.*, 232 AD2d 327, 327-328, *lv denied* 89 NY2d 813; *cf. Mason v Black & Decker [U.S.]*, 274 AD2d 622, 623, *lv denied* 95 NY2d 770). The record establishes that, earlier in the trial, defendants' attorney had admitted that he received a report of plaintiff's expert in which the expert concluded "that the sole proximate cause of the accident was . . . the action of [defendant driver]." Although plaintiff's attorney did not make a specific objection to the statements of defendants' attorney during his summation, Supreme Court had earlier granted plaintiff's attorney an exception with respect to any "conversation" relating to plaintiff's expert. We thus assume, for purposes of this appeal, that the exception preserved for our review plaintiff's contention that defendants' attorney knowingly made a false statement during his summation. "[A]lthough we do not condone the . . . misconduct [of defendants' attorney], we are satisfied that such conduct . . . did not have an effect upon the jury's finding[] and, therefore, constituted harmless error" (*Kavanaugh v Nussbaum*, 129 AD2d 559, 561,

mod on other grounds 71 NY2d 535). We note in particular that, during his summation, plaintiff's attorney refuted the statements of defendants' attorney by informing the jury that the "expert was certainly prepared to state that [defendant driver's actions were] the sole and proximate cause of this accident" and that plaintiff's attorney did not call the expert to testify because, in his view, "it wasn't necessary."

Because we conclude that reversal is not required based on the misconduct of defendants' attorney during his summation, we must address plaintiff's final contention that the verdict is against the weight of the evidence. We reject that contention inasmuch as "the evidence does not 'so preponderate in favor of plaintiff that the verdict could not have been reached upon any fair interpretation of the evidence' " (*Bizub v Baumer*, 38 AD3d 1209, 1210; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

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

723

CA 08-02078

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

YVETTE HUFF, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANITA L. RODRIGUEZ, FORMERLY KNOWN AS ANITA L. ROSARIO, AND ENRIQUE RODRIGUEZ, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (PATRICK S. KENNEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered September 26, 2008 in a personal injury action. The order settled the record in appeal No. 1.

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

Same Memorandum as in *Huff v Rodriguez* ([appeal No. 1] ___ AD3d ___ [July 10, 2009]).

All concur; SMITH and PINE, JJ., concur in the Memorandum insofar as it concerns appeal No. 2 only.

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

747

CA 08-02541

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

CLYDE PERRY AND ROSE PERRY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF GENEVA, DEFENDANT-RESPONDENT.

ALEXANDER & CATALANO, LLC, ROCHESTER (FRANCES P. MANCE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (J. MICHAEL WOOD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered April 23, 2008 in a personal injury action. The order, insofar as appealed from, granted defendant's motion for preclusion.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by providing that the motion is granted unless plaintiff Clyde Perry, within 15 days of service of the order of this Court with notice of entry, serves a verified bill of particulars complying with each item of the demand for a bill of particulars and pays defendant's attorney $1,500 toward costs and attorney's fees as a sanction and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Clyde Perry (plaintiff) when he was catapulted from the all-terrain vehicle (ATV) he was riding after the ATV struck some logs that had been left on his property by defendant's employees. After plaintiffs repeatedly failed to provide responses to defendant's demand for a bill of particulars, defendant moved to preclude plaintiffs "from giving evidence/testimony on the trial of this action of the items of which particulars have not been delivered, as demanded." In its attorney's reply affidavit, defendant also sought dismissal of the claim of plaintiff Rose Perry based on her failure to comply with General Municipal Law § 50-i by serving defendant with a notice of claim. Supreme Court, inter alia, granted the motion, and plaintiffs on appeal challenge only that part of the order concerning preclusion.

We conclude that the court improvidently exercised its discretion in determining that preclusion was appropriate. Generally, "[t]he

nature and degree of the penalty to be imposed on a CPLR 3126 motion lies within the sound discretion of the trial court and will be disturbed only if there has been an abuse or [an] improvident exercise of discretion" (*Kimmel v State of New York*, 267 AD2d 1079, 1080; *see Optic Plus Enters., Ltd. v Bausch & Lomb Inc.*, 37 AD3d 1185, 1186-1187). Nevertheless, this Court has repeatedly held that the striking of a pleading is appropriate only " 'where there is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith' " (*Hill v Oberoi*, 13 AD3d 1095, 1096; *see e.g. Sayomi v Rolls Kohn & Assoc., LLP*, 16 AD3d 1069; *Whitley v Industrial Funding Corp.*, 8 AD3d 963). Defendant made no such showing in this case. Thus, in the exercise of our discretion we modify the order by providing that the preclusion motion is granted unless plaintiff, within 15 days of service of the order of this Court with notice of entry, serves a verified bill of particulars complying with each item of the demand and pays defendant's attorney $1,500 toward costs and attorney's fees as a sanction.

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

761

CA 08-02390

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

DONNA M. AYLSWORTH (FORMERLY KNOWN AS KOWALCZYK), PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GREGORY KOWALCZYK, DEFENDANT-RESPONDENT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered September 16, 2008 in a postjudgment divorce action. The order, among other things, determined defendant's current weekly child support obligation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the objections in part and vacating the first and second ordering paragraphs and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: In this postjudgment divorce action, plaintiff moved, inter alia, for a recalculation of defendant's child support obligation and a determination of the arrears owed by defendant to plaintiff pursuant to a 2002 stipulated order. That order sets forth defendant's then-current child support obligation and provides that defendant's child support obligation "shall be recalculated annually in accordance with the . . . guidelines of [the Child Support Standards Act (CSSA)] on the first day of the year." Following a hearing in this action, the Support Magistrate recalculated the current child support obligation of defendant and determined that defendant owed arrears in the amount of $37,448 for the years 2003 through 2007. Defendant filed objections to the order of the Support Magistrate, whereupon Supreme Court determined that the current weekly support obligation of defendant is $214.46 and that he owes no arrears to plaintiff.

Contrary to the court's conclusion, plaintiff is entitled to recalculation of defendant's child support obligation pursuant to the stipulated order beginning in 2003, not from the date of her motion. Plaintiff is not requesting an upward modification of defendant's support obligation but, instead, seeks enforcement of the child support provision in the stipulated order that requires annual

recalculation of defendant's support obligation on the first day of each year in accordance with the CSSA guidelines (*see generally Ramon v Ramon*, 49 AD3d 843; *Mirkin v Mirkin*, 43 AD3d 1115, 1116; *Matter of Bugdin v Bugdin*, 17 AD3d 585; *Matter of Wolf v Wolf*, 293 AD2d 811, 813). Contrary to defendant's contention, the delay by plaintiff in seeking retroactive recalculations of defendant's obligation and an award of child support arrears did not constitute an implicit waiver of her rights under the stipulated order (*see Binette v Binette-Acker*, 18 AD3d 589).

In calculating defendant's past and current child support obligation, the Support Magistrate applied the CSSA percentage to the combined parental income in excess of $80,000 and the court, in calculating defendant's current child support obligation, capped the amount of combined parental income at $80,000 and based its award on that sum. In our view, neither the Support Magistrate nor the court set forth the statutory factors considered or otherwise provided a sufficient "record articulation" for their respective determinations concerning the combined parental income in excess of $80,000 (*Matter of Cassano v Cassano*, 85 NY2d 649, 655; *see* Domestic Relations Law § 240 [1-b] [c] [3]; *Matter of Miller v Miller*, 55 AD3d 1267, 1268). We therefore modify the order accordingly, and we remit the matter to Supreme Court to recalculate defendant's past and current child support obligation in compliance with the CSSA following a further hearing, if necessary (*see Matter of Malecki v Fernandez*, 24 AD3d 1214, 1215).

Entered: July 10, 2009 Patricia L. Morgan
Clerk of the Court

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

784

CA 08-01821

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

CAPITAL HEAT, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL R. BLATNER FAMILY TRUST, ET AL.,
DEFENDANTS.

JOHN R. BLATNER, ET AL., INTERPLEADER
PLAINTIFFS,

V

DEBORAH A. BLATNER, INTERPLEADER
DEFENDANT-APPELLANT.

DEE LAW FIRM, WILLIAMSVILLE (THOMAS E. WOJTAN OF COUNSEL), FOR INTERPLEADER DEFENDANT-APPELLANT.

ROBERT R. RADEL, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered April 1, 2008. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment against defendant Michael R. Blatner Family Trust.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied and those parts of the fourth and fifth ordering paragraphs with respect to plaintiff are vacated.

Memorandum: Interpleader defendant, Deborah A. Blatner, appeals from an order that, inter alia, granted plaintiff's motion seeking partial summary judgment against defendant Michael R. Blatner Family Trust (Trust) in the amount of $39,258.46, together with interest. The Trust was formed by Michael R. Blatner in 1995 for the benefit of Deborah Blatner and the descendants of Michael Blatner, and defendant John R. Blatner was named as trustee. The Trust owned two life insurance policies (policies), and plaintiff, Michael Blatner's former employer, paid premiums for those policies in the total amount of $39,258.46. Michael Blatner resigned from his position with plaintiff on or before December 31, 2005.

On May 2, 2007, John Blatner, in his capacity as trustee, entered into a Split-Dollar Agreement (Agreement) with plaintiff,

acknowledging therein that plaintiff had paid the above premiums and providing that, inter alia, plaintiff was entitled to receive an amount equal to the lesser of the then-cash surrender value of the policies or the total premiums paid by plaintiff in the event that the employment of Michael Blatner with plaintiff terminated for a reason other than his death. The Agreement also provided that plaintiff was entitled to identical reimbursement upon the termination of the Agreement, which could be accomplished by way of a written notice provided by either of the parties to the Agreement. John Blatner was an employee of plaintiff when the Agreement was executed and has acknowledged that he became a shareholder of plaintiff in 2005.

On the same day on which it entered the Agreement, plaintiff gave written notice to John Blatner pursuant to the terms of the Agreement seeking payment in the amount of the premiums it had paid. Plaintiff thereafter commenced this action when it did not receive that payment. The Trust and John Blatner commenced an interpleader action against Deborah Blatner, and plaintiff subsequently moved for partial summary judgment against the Trust.

We conclude that Supreme Court should have denied plaintiff's motion, inasmuch as there is an issue of fact whether John Blatner breached his fiduciary duty with respect to the Trust by entering into the Agreement. A fiduciary's duty requires " '[n]ot honesty alone, but the punctilio of an honor the most sensitive' " (*Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 270, quoting *Meinhard v Salmon*, 249 NY 458, 464), with "undivided and undiluted loyalty to those whose interests the fiduciary is to protect" (*Birnbaum v Birnbaum*, 73 NY2d 461, 466, *rearg denied* 74 NY2d 843; *see Matter of Mergenhagen*, 50 AD3d 1486, 1488). In our view, the involvement of John Blatner with plaintiff when the Agreement was executed creates issues of fact whether he acted with "undivided and undiluted loyalty" to the Trust and its beneficiaries, and thus whether Deborah Blatner, as a beneficiary of the Trust, is entitled to have the Agreement set aside (*Birnbaum*, 73 NY2d at 466; *see generally Matter of Rothko*, 43 NY2d 305, 318-319; *Albright v Jefferson County Natl. Bank*, 292 NY 31, 40).

Entered: July 10, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

785

CA 08-02594

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

TINA STRNAD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PAUL J. GARVIN, DEFENDANT-APPELLANT.
(ACTION NO. 1.)

VERIZON NEW YORK, INC., PLAINTIFF-RESPONDENT,

V

PAUL J. GARVIN, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(ACTION NO. 2.)

BARTH SULLIVAN BEHR, LLP, BUFFALO (DEBORAH A. CHIMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHALAK & DOBSON, WILLIAMSVILLE (ROBERT W. MICHALAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT TINA STRNAD.

COSGROVE LAW FIRM, BUFFALO (JAMES C. COSGROVE OF COUNSEL), FOR PLAINTIFF-RESPONDENT VERIZON NEW YORK, INC.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered September 5, 2008 in actions for property damage. The order denied the motion of defendant Paul J. Garvin for summary judgment in action Nos. 1 and 2.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted and the complaint in action No. 1 and the complaint in action No. 2 against defendant Paul J. Garvin are dismissed.

Memorandum: Plaintiffs commenced these actions seeking damages sustained as the result of a fire that occurred on property owned by Paul J. Garvin, the defendant in action No. 1 and a defendant in action No. 2 (defendant). The plaintiff in action No. 1 owned property in proximity to defendant’s property, and the plaintiff in action No. 2 owned aerial cables adjacent to the property owned by defendant. We conclude that Supreme Court erred in denying the motion of defendant for summary judgment dismissing the complaint in action No. 1, and for summary judgment dismissing the complaint in action No. 2 against him. In support of the motion, defendant submitted an

expert's affidavit and report, the statement of a tenant who had been smoking in the building prior to the fire, and a Sheriff's office memorandum. Defendant thereby met his initial burden of establishing that his acts or omissions did not cause the fire but, rather, that the tenant's careless smoking caused the fire (*see Delgado v New York City Hous. Auth.*, 51 AD3d 570, 571, *lv denied* 11 NY3d 706; *see also Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130). Although plaintiffs raised an issue of fact whether the smoke detectors in the building were inoperable at the time of the fire, we nevertheless conclude that summary judgment is appropriate because plaintiffs failed to raise a triable issue of fact whether the alleged absence of operable smoke detectors was a substantial factor in causing the fire to spread and thus to damage their properties (*see State Farm Ins. Co. v Nichols*, 34 AD3d 994, 996).

All concur except FAHEY and GREEN, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm the order denying the motion of Paul J. Garvin, the defendant in action No. 1 and a defendant in action No. 2 (defendant), for summary judgment dismissing the complaint in action No. 1 and the complaint in action No. 2 against him. Although we agree with the majority that there is no dispute that defendant is not responsible for *starting* the fire, we cannot agree that his submissions in support of the motion establish as a matter of law that he is not responsible for the *spread* of the fire and the ensuing damage to the property of plaintiffs adjacent to the property owned by defendant.

Here, the Sheriff's office memorandum submitted in support of the motion establishes that the fire smoldered for at least five hours before it combusted and spread to other areas of the property owned by defendant. Defendant submitted no evidence establishing that the smoke detectors installed at his property were operational at the time of the fire. Moreover, the affidavit of defendant's expert did not state either that the smoldering fire would not have emitted enough smoke to trigger the smoke detectors installed at defendant's property, thus alerting the two residents of the apartment building of the fire, or that the alleged absence of operational smoke detectors could not have been a substantial factor in causing the fire to spread to the adjacent property of plaintiffs. Consequently, we respectfully disagree with the majority that defendant met his initial burden of establishing that he was not negligent (*cf. Delgado v New York City Hous. Auth.*, 51 AD3d 570, 571, *lv denied* 11 NY3d 706). Moreover, we conclude that the submissions by defendant in support of the motion are insufficient to establish as a matter of law that any negligence on his part was not a proximate cause of the spread of the fire (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784*; see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, we note that the affidavit of defendant's expert did not address that issue.

Even assuming, arguendo, that defendant met his initial burden on the motion, we further conclude that plaintiffs raised an issue of fact whether defendant was responsible for the spread of the fire.

The police report submitted by plaintiff Verizon New York, Inc. in opposition to the motion indicates that no smoke alarm sounded at defendant's property and that two tenants of that building were present at the time of the fire. In our view, because the losses for which plaintiffs seek recovery were the result of a fire that smoldered for several hours before detection, and because defendant's property was occupied at the time of the fire, plaintiffs raised an issue of fact whether the absence of devices sufficient to warn those tenants or passersby of the fire allowed the fire to spread from defendant's property to the adjacent property of plaintiffs.

Finally, we respectfully conclude that the majority mistakenly relies on *State Farm Ins. Co. v Nichols* (34 AD3d 994) inasmuch as the facts of that case are distinguishable from those herein. Unlike the fire in this case, the fire at issue in *State Farm* was a fast-moving blaze that was "incendiary in origin" and was detected soon after it was started (*id.* at 996). Moreover, the spread of the fire from the building in which it originated to the interior of the adjacent building owned by the plaintiff's insured was caused by an unsecured accelerant stored next to the building owned by the plaintiff's insured rather than by the failure of any alarm in the building of origin (*id.* at 996-997).

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

809

CA 09-00137

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

CHARLES TERWILLIGER AND HELEN TERWILLIGER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MAX CO., LTD., MAX USA CORP.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

GOLDBERG SEGALLA LLP, BUFFALO (JOSEPH L. MOONEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered September 5, 2008 in a personal injury action. The order, inter alia, granted that part of the motion of plaintiffs to compel defendants Max Co., Ltd. and Max USA Corp. to respond to specified interrogatories.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for a protective order limiting disclosure of the information and documents with respect to the design, manufacture, testing, and inspection processes in interrogatory Nos. 3(a), 4(c), and 18 to the extent specified by Supreme Court, Erie County, to the parties, their attorneys, and their retained experts and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by plaintiff Charles Terwilliger when he was struck by a nail discharged from a pneumatic nail gun. Max Co., Ltd. and Max USA Corp. (defendants), the nail gun's manufacturer and distributor, respectively, contend that Supreme Court erred in granting that part of plaintiffs' motion insofar as it sought to compel defendants to respond to specified interrogatories and in denying in part their motion for a protective order with respect to the relief sought by plaintiffs against them. We agree with defendants that the information and documents sought by plaintiffs with respect to the design, manufacture, testing, and inspection processes in interrogatory Nos. 3(a), 4(c), and 18 were trade secrets and thus that the court erred in directing defendants to respond to those interrogatories to the extent specified in its decision. The

affidavit of the international division manager of Max Co., Ltd. established that the information and documents sought therein concerning the nail gun in question were not known by those outside the business, were kept under lock and key, were the product of substantial effort and expense, and could not easily be acquired or duplicated (*see generally Ashland Mgt. v Janien*, 82 NY2d 395, 407). Nevertheless, we conclude that plaintiffs established that the information and documents sought in those interrogatories, to the extent specified in the court's decision, were indispensable to their case and were otherwise unavailable if they could not be obtained from defendants (*see Mann v Cooper Tire Co.*, 33 AD3d 24, 30-31, *lv denied* 7 NY3d 718, 8 NY3d 956; *Hodgson, Russ, Andrews, Woods & Goodyear v Isolatek Intl. Corp.*, 300 AD2d 1047, 1048). We thus conclude that the court should have further granted defendants' motion insofar as it sought a protective order limiting disclosure of the information and documents with respect to the design, manufacture, testing, and inspection processes in interrogatory Nos. 3(a), 4(c), and 18 to the extent specified by the court to the parties, their attorneys, and their retained experts, and we therefore modify the order accordingly. Such limited disclosure is necessary to protect the confidentiality of defendants' proprietary information, and plaintiffs have not shown any need for further dissemination of the information and documents in question (*see Whalen v Kawasaki Motors Corp.*, 175 AD2d 667, 669; *cf. Mann*, 33 AD3d at 36). We note that any further dispute concerning defendants' designation of materials as trade secrets requiring confidentiality shall be decided by Supreme Court.

Entered: July 10, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

845

CA 08-02260

PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, CARNI, AND GORSKI, JJ.

SEVENSON ENVIRONMENTAL SERVICES, INC. AND
THE GOODYEAR TIRE AND RUBBER COMPANY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SIRIUS AMERICA INSURANCE COMPANY, ALSO KNOWN
AS SIRIUS INSURANCE COMPANY, DEFENDANT-APPELLANT,
AND THOMAS JOHNSON, INC., DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (TIMOTHY E. DELAHUNT OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM D. CHRIST OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

SLIWA & LANE, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 13, 2008 in a declaratory judgment action. The judgment, insofar as appealed from, granted in part the motion of defendant Thomas Johnson, Inc. for summary judgment and declared that defendant Sirius America Insurance Company, also known as Sirius Insurance Company, is obligated to defend and indemnify defendant Thomas Johnson, Inc. in an underlying action, denied the cross motion of defendant Sirius America Insurance Company, also known as Sirius Insurance Company, for summary judgment, and granted the cross motion of plaintiffs to compel defendant Sirius America Insurance Company, also known as Sirius Insurance Company, to provide complete responses to all outstanding discovery requests.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Thomas Johnson, Inc. is denied in its entirety and the declaration is vacated, the cross motion of defendant Sirius America Insurance Company, also known as Sirius Insurance Company, is granted and judgment is granted in its favor as follows:

> It is ADJUDGED and DECLARED that defendant Sirius America Insurance Company, also known as Sirius Insurance Company, is not obligated to defend or indemnify defendant Thomas Johnson, Inc. in the underlying action,

and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Plaintiffs, Sevenson Environmental Services, Inc. (Sevenson) and The Goodyear Tire and Rubber Company (Goodyear), commenced this action seeking, inter alia, a declaration that defendant Sirius America Insurance Company, also known as Sirius Insurance Company (Sirius), is obligated to defend and indemnify them in an underlying personal injury action. Defendant Thomas Johnson, Inc. (TJI) likewise cross-claimed for a declaration that Sirius is obligated to defend and indemnify it in the underlying action, and thereafter moved for that relief, as well as other relief. Sirius contends on appeal that Supreme Court erred in granting the motion of TJI insofar as it sought that declaration and denying the cross motion of Sirius for summary judgment declaring that it has no such obligation with respect to TJI. We agree, inasmuch as we conclude that Sirius established as a matter of law that it validly disclaimed coverage based on TJI's late notice of the accident.

Pursuant to the terms of its insurance policy with Sirius, TJI was required to notify Sirius of any accident or occurrence "which may result in a claim" as soon as practicable. Compliance with that requirement is a condition precedent to coverage (*see Matter of Travelers Ins. Co. [Delosh]*, 249 AD2d 924) and, "[a]bsent a valid excuse, a failure to satisfy the notice requirement vitiates the policy" (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440). Here, TJI's employee, the plaintiff in the underlying action, was injured in a construction accident on October 6, 2003. TJI learned of the injury within days after the accident but failed to notify Sirius of the accident until December 31, 2004. The excuse of TJI for that delay of nearly 15 months, i.e., that it believed that its employee intended to assert only a workers' compensation claim, is unreasonable as a matter of law (*see generally Delosh*, 249 AD2d at 925).

We further conclude that Sirius provided TJI with timely written notice of its disclaimer, in accordance with Insurance Law § 3420 (d). Sirius issued its disclaimer letter upon completion of its investigation, 24 days after receiving TJI's notice of the claim (*see Dryden Mut. Ins. Co. v Greaser*, 269 AD2d 792, 793). Contrary to TJI's contention, the disclaimer letter was valid inasmuch as it " 'apprise[d] [TJI] with a high degree of specificity of the ground . . . on which the disclaimer [was] predicated' " (*Utica Mut. Ins. Co. v Gath*, 265 AD2d 805, 806). The court's determination that Sirius was not prejudiced by TJI's late notice of claim is of no moment. As the Court of Appeals wrote, "[w]e have long held, and recently reaffirmed, that an insurer that does not receive timely notice in accordance with a policy provision may disclaim coverage, whether it is prejudiced by the delay or not" (*Briggs Ave. LLC v Insurance Corp. of Hannover*, 11 NY3d 377, 382). We note that, in addressing the issue of prejudice, the court erred in relying on amendments to Insurance Law § 3420 that apply only to policies issued on or after January 17, 2009. The policy in question was issued before that effective date, and thus "[t]he common-law no-prejudice rule applies to this case" (*id.*).

Sirius further contends on appeal that the court erred in granting plaintiffs' motion to compel the disclosure of documents listed in its privilege log without first conducting an in camera review of those documents (*see Baliva v State Farm Mut. Auto. Ins. Co.*, 275 AD2d 1030, 1031). We also agree with that contention. The broad discretion afforded trial courts in supervising discovery is not unlimited (*see Hardy v Tops Mkts., Inc.*, 231 AD2d 879, 880), and here Sirius refused to disclose several documents based upon its contention that they included communications between its attorney and representatives of UTC Risk Management Services, Inc. (UTC), Sirius' third-party claims administrator. Thus, according to Sirius, the documents in question fall within the scope of the attorney-client privilege. As Sirius correctly contends, the attorney-client privilege extends to communications to "one serving as an agent of either attorney or client" (*First Am. Commercial Bancorp, Inc. v Saatchi & Saatchi Rowland, Inc.*, 56 AD3d 1137, 1139 [internal quotation marks omitted]) and, contrary to plaintiff's contention, the record establishes that UTC acted as an agent of Sirius. Significantly, UTC, acting on behalf of Sirius, issued the disclaimer letter to TJI and also sent a similar letter to Goodyear. Moreover, there is no evidence that TJI, Goodyear, or Sevenson questioned UTC's authority to act on behalf of Sirius. The determination whether a particular document is shielded from disclosure by the attorney-client privilege "is necessarily a fact-specific determination . . ., most often requiring an in camera review" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 378). We therefore remit the matter to Supreme Court to determine plaintiffs' motion following an in camera review of the documents in question.

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

857

KA 06-01912

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL LEE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered April 19, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Inasmuch as defendant was sentenced as a second felony offender, the People correctly concede that the sentence is illegal insofar as County Court ordered the sentence to run concurrently with a prior undischarged sentence (*see* § 70.25 [former (2-a)]; *People ex rel. Gill v Greene*, 12 NY3d 1, 6; *People v Ingoglia*, 305 AD2d 1002, 1003, *lv denied* 100 NY2d 583). The People contend, however, that defendant is receiving the benefit of his plea bargain because the Department of Correctional Services has not corrected the error, and defendant therefore should not be permitted to challenge the legality of the sentence. We reject that contention, in view of the well settled principle that " 'we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180, *lv denied* 8 NY3d 983). Thus, we modify the judgment by vacating the sentence, and we remit the matter to County Court to afford defendant the opportunity to withdraw his plea or to be resentenced as a second felony offender in compliance with Penal Law § 70.25 (former [2-a]) (*see People v Ciccarelli*, 32 AD3d 1175; *Ingoglia*, 305 AD2d at 1003).

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

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

865

CA 09-00024

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

MARK MCNABB, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

OOT BROS., INC., BUILD YOUR OWN HOME, LLC, DEFENDANTS-RESPONDENTS, BRYAN PLACE AND JACQUELINE PLACE, DEFENDANTS-APPELLANTS-RESPONDENTS.

ERNEST D. SANTORO, ESQ., P.C., ROCHESTER (JAMES R. SULLIVAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

STANLEY LAW OFFICES, LLP, SYRACUSE (ROBERT A. QUATTROCCI OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR DEFENDANT-RESPONDENT OOT BROS., INC.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL LONGSTREET OF COUNSEL), FOR DEFENDANT-RESPONDENT BUILD YOUR OWN HOME, LLC.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 2, 2008 in a personal injury action. The order granted the motion of defendant Oot Bros., Inc. for summary judgment, granted in part the motion of defendants Bryan Place and Jacqueline Place for summary judgment, and granted the cross motion of defendant Build Your Own Home, LLC for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants Bryan Place and Jacqueline Place in its entirety and dismissing the amended complaint against those defendants and as modified the order is affirmed without costs.

Memorandum: Plaintiff was injured while performing work for his employer, Fleetwood Drywall, Inc., at a house being built by defendants Bryan Place and Jacqueline Place. Plaintiff was working on stilts when he tripped over an electrical cord, causing him to fall and sustain injuries. The Places contracted with defendants Oot Bros., Inc. (Oot) and Build Your Own Home, LLC (BYOH) for consulting services in connection with the design and construction of the house. Plaintiff commenced this action alleging violations of Labor Law §§ 200, 241 (1) and § 241 (6), as well as common-law negligence.

Oot moved for summary judgment dismissing the amended complaint against it on the ground that it acted as a consultant, not a general contractor or agent, and thus that the Labor Law cause of action should be dismissed against it. In addition, Oot contended that it did not direct or control plaintiff's work and thus that both the common-law negligence cause of action and the Labor Law § 200 claim should be dismissed against it. The Places also moved for summary judgment dismissing the amended complaint against them, and BYOH cross-moved for that same relief.

Supreme Court concluded that none of the defendants was liable under Labor Law § 240 (1) because plaintiff's accident was not caused by an elevation-related hazard. The court further concluded that neither Oot nor BYOH acted as a general contractor or agent of the Places and therefore were not liable under Labor Law § 240 (1) or § 241 (6). The court also concluded that Oot and BYOH were not liable for common-law negligence or Labor Law § 200 because, inter alia, they did not exercise supervisory control over the safety of the work site. With respect to the Labor Law § 241 (6) claim against the Places, the court determined that plaintiff raised an issue of fact whether the Places directed or controlled the work and thus that they were not entitled to dismissal of that claim under the homeowner's exemption in the statute. The court, however, dismissed the Labor Law § 241 (6) claim against the Places insofar as it was based on 12 NYCRR 23-1.5 (a) because that regulation is not sufficiently specific to support that claim. Finally, with respect to the common-law negligence cause of action and Labor Law § 200 claim against the Places, the court concluded that the Places did not actually move for summary judgment with respect to that cause of action and claim. The Places appeal from the order, and plaintiff cross-appeals from the order with the exception, as limited by his brief, of that part dismissing the Labor Law § 241 (6) claim against all defendants based on 12 NYCRR 23-1.5 (a).

Contrary to the contention of plaintiff on his cross appeal, the court properly dismissed the Labor Law § 240 (1) claim against all defendants because the accident does not fall within the purview of that statute (*see Melber v 6333 Main St.*, 91 NY2d 759, 763-764; *Russell v Widewaters S. Bay Rd. Assoc.*, 289 AD2d 1025). We further conclude that neither Oot nor BYOH served as general contractors or agents of the owners and thus that the court properly determined that they are not liable under Labor Law § 240 (1) or § 241 (6) (*see generally Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318).

With respect to the Labor Law § 241 (6) claim against the Places, we conclude that the court erred in determining that they are not entitled to the homeowner's exemption set forth therein. The fact that they were in effect acting as their own general contractor "will not bar application of the single-family homeowner exemption so long as [they] did not control or direct the method or manner of the work being performed by plaintiff at the time of the injury" (*Soskin v Scharff*, 309 AD2d 1102, 1104). Here, the Places established that they did not control or direct the manner in which plaintiff or his employer performed the insulation work in the house, they did not

provide the electrical cord in plaintiff's work area, and they did not suggest that any particular tools, materials or safety devices be used (*see Jumawan v Schnitt*, 35 AD3d 382, *lv denied* 8 NY3d 809). The exemption applies "even though [the Places were] present at the construction site from time to time and hired subcontractors to perform [certain] work" (*Schultz v Iwachiw*, 284 AD2d 980, 980, *lv dismissed in part and denied in part* 97 NY2d 625).

Having addressed the Labor Law § 240 (1) and § 241 (6) claims against all defendants, we now turn to the remainder of the amended complaint, i.e., the common-law negligence cause of action and the Labor Law § 200 claim. We conclude with respect to Oot and BYOH that the court properly granted summary judgment dismissing that cause of action and claim against them. As the court properly concluded, those defendants established that they did not have the authority to control plaintiff's work and thus neither can be liable under the statute for failure to provide a safe place to work (*see Russin*, 54 NY2d at 317). The presence of either an Oot or BYOH employee at the site is insufficient to impose liability on those defendants for common-law negligence or under Labor Law § 200 (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381).

As previously noted, the court determined that the Places did not seek summary judgment dismissing the common-law negligence cause of action and Labor Law § 200 claim against them, and the court therefore did not address that cause of action and claim against them. We conclude, however, that the Places did in fact implicitly seek that relief by contending in support of their motion that they did not direct or control the work and thus could not be held liable for plaintiff's injuries. We further conclude that the Places are entitled to summary judgment with respect to common-law negligence and Labor Law § 200 because they established that they did not exercise supervisory control over the work of plaintiff and his employer and that they neither created nor had actual or constructive notice of the dangerous condition (*see Hennard v Boyce*, 6 AD3d 1132, 1133). Although the agreement between Oot and the Places gave the Places the authority to direct or control plaintiff's work and the safety at the site, the record establishes that they did not actually do so (*see Schultz*, 284 AD2d at 980).

We therefore modify the order by granting the motion of the Places in its entirety and dismissing the Labor Law § 241 (6) claim in its entirety, the common-law negligence cause of action and the Labor Law § 200 claim, thereby dismissing the amended complaint against them.

Entered: July 10, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

866

CA 08-01534

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

IN THE MATTER OF THE APPLICATION OF ELAINE J. PRIEVO, AS EXECUTRIX OF THE ESTATE OF FRANK J. MATUSZ, ALSO KNOWN AS FRANCIS J. MATUSZ, DECEASED, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

REVEREND LUCIAN URBANIAK, RESPONDENT-APPELLANT.

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

GETNICK LIVINGSTON ATKINSON GIGLIOTTI & PRIORE, LLP, UTICA (JANET M. RICHMOND OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Oneida County (Charles C. Merrell, A.S.), entered July 3, 2008 in a proceeding pursuant to SCPA 2103. The decree, following a jury trial, directed that certain assets be turned over to petitioner.

It is hereby ORDERED that the decree so appealed from is unanimously reversed in the interest of justice without costs and a new trial is granted.

Memorandum: Respondent appeals from a decree of Surrogate's Court, directing that certain assets be turned over to petitioner. The decree was entered upon a jury verdict finding that the transfer of the assets to respondent by Frank J. Matusz (decedent) had been effected through undue influence. We reject the contention of respondent that the Surrogate erred in denying his motion to dismiss the petition at the close of proof (*see generally Szczerbiak v Pilat*, 90 NY2d 553, 556). Petitioner presented evidence from which the jury could reasonably have found that respondent and decedent had a confidential relationship (*see Matter of Henderson*, 80 NY2d 388, 392; *Matter of Moran* [appeal No. 2], 261 AD2d 936), and that respondent exercised undue influence over decedent (*see Peters v Nicotera*, 248 AD2d 969; *Matter of Antoinette*, 238 AD2d 762, 763-764; *Spatz v Bajramoski*, 214 AD2d 436, 436-437).

We agree with respondent, however, that the Surrogate erred in charging the jury that he had a confidential relationship with decedent as a matter of law (*see Matter of Brand*, 185 App Div 134, 139-142, *affd* 227 NY 630; *see also Matter of Kaufmann*, 14 AD2d 411, 412-413; *see generally Gaston v New York City Hous. Auth.*, 258 AD2d

220, 224). When the issue of undue influence based upon a confidential relationship is raised, the initial burden is on the objectant, here, the petitioner, to make "the requisite threshold showing that a confidential relationship existed" (*Matter of Butta*, 3 AD3d 347). In the event that the objectant makes that showing, "the burden is shifted to the beneficiary of the transaction to prove the transaction fair and free from undue influence" (*Matter of Connelly*, 193 AD2d 602, 603, *lv denied* 82 NY2d 656). Here, there was conflicting evidence on the issue whether respondent and decedent had a confidential relationship, and the Surrogate thus erred in charging the jury that such a relationship existed as a matter of law. Although respondent did not object to the charge, we reverse the decree in the interest of justice and grant a new trial because the error in the charge was "so fundamental that it preclude[d] consideration of the central issue upon which the [proceeding was] founded" (*Breitung v Canzano*, 238 AD2d 901, 902; *see also Clark v Interlaken Owners, Inc.*, 2 AD3d 338, 340). In light of our determination to grant a new trial, we note that respondent's remaining contentions with respect to evidentiary rulings made by the Surrogate are without merit.

Entered: July 10, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

868

CA 08-02598

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

JOAN M. (FUDELLA) FLASH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT FUDELLA, DEFENDANT-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (EMILIO L. COLAIACOVO OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order (denominated judgment) of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered March 10, 2008 in a postjudgment divorce action. The order, inter alia, ordered defendant to pay child support arrears.

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

Memorandum: Defendant appeals from an order (denominated judgment) requiring him to pay child support arrears. We affirm.

Pursuant to the parties' stipulation, which was incorporated but not merged in the parties' 1997 judgment of divorce, defendant was to pay child support for a period of five years, after which period either party could move to modify the amount of child support. By order to show cause filed June 29, 2005, plaintiff moved for child support arrears pursuant to the judgment of divorce and for other relief, and defendant cross-moved to vacate that part of the judgment incorporating the stipulation with respect to child support, health-related expenses and Catholic school education. Supreme Court issued two prior orders (denominated decisions) on the motion and cross motion, neither of which is the subject of this appeal. In one of those orders, the court granted the cross motion in part and vacated that part of the judgment incorporating the stipulation with respect to child support on the ground that the stipulation failed to comply with the Child Support Standards Act ([CSSA] Domestic Relations Law § 240 [1-b]). In the other order, the court determined that the child support arrears should be assessed from the year 2001 because defendant had failed to move to modify his child support obligation. The court thereafter issued the order that is the subject of this appeal, determining the amount of child support owed by defendant from the years 2001 through 2007 and ordering defendant to pay the amount

of those arrears, as well as future amounts.

In support of his contention that the court erred in ordering him to pay child support arrears, defendant asserts that plaintiff expressly waived her right to receive child support pursuant to an oral agreement in February 2001. We reject that contention. The court was entitled to credit the testimony of plaintiff over that of defendant at the hearing on the motion and cross motion, and the court's credibility determination is entitled to great deference (*see Mirand v Mirand*, 53 AD3d 1149).

We reject the further contention of defendant that the court erred in recalculating his child support arrears from February 2001, when defendant ceased making child support payments, rather than from June 29, 2005, the date on which plaintiff's order to show cause seeking enforcement of the judgment was filed. As noted, in one of the two prior orders the court granted defendant's cross motion insofar as it sought to vacate that part of the judgment incorporating the stipulation with respect to child support, which it properly determined to be invalid and unenforceable (*see Warnecke v Warnecke*, 12 AD3d 502, 503-504; *Tartaglia v Tartaglia*, 260 AD2d 628, 629). However, inasmuch as no evidence was presented with respect to defendant's child support obligation pursuant to the CSSA prior to February 2001, we will not disturb the court's determination of child support arrears pursuant to the CSSA from the date on which defendant ceased making child support payments (*see generally Binette v Binette-Acker*, 18 AD3d 589, 590).

Entered: July 10, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

896

CAF 08-02251

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF TYLER D.,
RESPONDENT-APPELLANT.

OSWEGO COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

SUSAN B. MARRIS, LAW GUARDIAN, MANLIUS, FOR RESPONDENT-APPELLANT.

RICHARD C. MITCHELL, COUNTY ATTORNEY, OSWEGO (JAMES K. EBY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oswego County (David J. Roman, J.), entered October 9, 2008 in a proceeding pursuant to Family Court Act article 3. The order placed respondent on probation for two years upon a juvenile delinquency adjudication.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the order entered June 27, 2008 is vacated, and the matter is remitted to Family Court, Oswego County, for further proceedings on the petition.

Memorandum: Respondent, who was adjudicated a juvenile delinquent based upon his commission of an act that, if committed by an adult, would constitute the crime of endangering the welfare of a child, appeals from an order of disposition that, inter alia, placed him on probation under the supervision of the Oswego County Probation Department for two years. We agree with respondent that his admission to the underlying act was defective based on Family Court's failure to comply with Family Court Act § 321.3 (1) by conducting an adequate allocution of his mother (*see Matter of Andrew J.S.*, 48 AD3d 1224; *Matter of Sean R.P.*, 24 AD3d 1200, *lv denied* 6 NY3d 711; *Matter of Brandon M.*, 299 AD2d 966). Although respondent did not preserve his contention for our review, we note that preservation is not required inasmuch as "[t]he statute's requirements . . . are mandatory and nonwaivable" (*Matter of Florence V.*, 222 AD2d 991, 992; *see Matter of Mary L.M.*, 5 AD3d 1069). Thus, the dispositional order is reversed and the fact-finding order is vacated (*see Andrew J.S.*, 48 AD3d at 1225; *Matter of Andres S.*, 34 AD3d 1340; *Brandon M.*, 299 AD2d at 967). Because the period of respondent's placement has not expired, we do not dismiss the petition (*cf. Sean R.P.*, 24 AD3d at 1201).

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

909

CA 09-00121

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

JAMES M. SCHREIBER AND SHEA M. SCHREIBER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SADIE L. KREHBIEL AND NANCY KREHBIEL,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF EPSTEIN & HARTFORD, WILLIAMSVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MICHAEL G. COOPER, HAMBURG, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 15, 2008 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for summary judgment dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that plaintiff James M. Schreiber sustained a serious injury under the permanent loss of use of a body organ, member, function or system category of serious injury within the meaning of Insurance Law § 5102 (d) and dismissing the complaint to that extent with respect to that plaintiff, and by granting that part of the motion for summary judgment dismissing the complaint in its entirety with respect to plaintiff Shea M. Schreiber and dismissing the complaint in its entirety with respect to that plaintiff, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries they allegedly sustained in a motor vehicle accident. Plaintiff husband was a passenger in a motor vehicle operated by plaintiff wife, who drove the vehicle into a ditch while attempting to avoid a head-on collision with a motor vehicle operated by defendant Sadie L. Krehbiel. Defendants moved for summary judgment dismissing the complaint on the ground that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident. Supreme Court granted the motion in part by dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that plaintiff wife sustained a serious injury under the permanent loss of use category. We agree with defendants

that they also established as a matter of law that plaintiff husband did not sustain a serious injury under the permanent loss of use category, i.e., he did not sustain a "total loss of use" of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 297), and we therefore modify the order accordingly. We further conclude, however, that the court properly denied the remainder of defendants' motion with respect to the remaining categories of serious injury allegedly sustained by plaintiff husband. Defendants failed to meet their initial burden of establishing that his "alleged injuries sustained in the accident were preexisting" (*Clark v Perry*, 21 AD3d 1373, 1374; *see Ashquabe v McConnell*, 46 AD3d 1419) or, if they were, that they were not exacerbated by the accident (*see Endres v Shelba D. Johnson Trucking, Inc.*, 60 AD3d 1481; *Cebularz v Diorio*, 32 AD3d 975). In support of their motion, defendants submitted the reports prepared following independent medical examinations that concluded that the injuries to plaintiff husband's lower back, neck, and left shoulder were caused by an injury at work that occurred prior to the motor vehicle accident. The independent medical examinations, however, were conducted in the context of a previous worker's compensation claim concerning the injuries sustained by plaintiff husband at work. The examinations were not conducted to determine whether the alleged injuries of plaintiff husband were exacerbated by the accident at issue on this appeal, nor did defendants submit the results of an examination of plaintiff husband conducted at their request with respect to that issue (*cf. Schader v Woyciesjes*, 55 AD3d 1292, 1293). In any event, we conclude that plaintiffs raised a triable issue of fact with respect to causation concerning the alleged injuries sustained by plaintiff husband (*see Yoonessi v Givens*, 39 AD3d 1164, 1165).

The court erred in denying the remainder of defendants' motion with respect to the remaining categories of serious injury allegedly sustained by plaintiff wife, and thus the court should have granted that part of defendants' motion for summary judgment dismissing the complaint in its entirety with respect to plaintiff wife. We agree with defendants that they met their burden by establishing as a matter of law that there was no objective evidence that plaintiff wife sustained a serious injury (*see Constantine v Serafin*, 16 AD3d 1145, 1145-1146; *see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350; *Caldwell v Malone*, 2 AD3d 1378, 1379). In any event, defendants established that plaintiff wife sustained only a slight limitation of use and therefore did not sustain a serious injury under the permanent consequential limitation of use or significant limitation of use categories of serious injury (*see generally Gaddy v Eyler*, 79 NY2d 955, 957; *Lutgen v Czapla*, 1 AD3d 1036). Finally, defendants established that the activities of plaintiff wife "were not curtailed to a great extent" and that she therefore did not sustain a serious injury under the 90/180 category of serious injury (*Burns v McCabe*, 17 AD3d 1111, 1111; *see Licari v Elliott*, 57 NY2d 230, 236). Plaintiffs failed to raise a triable issue of fact in opposition to that part of defendants' motion (*see generally Alvarez v Prospect Hosp.*, 68 NY2d

320, 324). We therefore further modify the order accordingly.

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

924

KA 08-02143

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ATULKUMAR PATEL, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered October 9, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration and probation with electronic monitoring.

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice by vacating that part revoking the sentence of probation and imposing sentence and by continuing the sentence of probation originally imposed and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of driving while intoxicated as a felony (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]) and aggravated unlicensed operation of a motor vehicle in the third degree (§ 511 [1] [a]) and sentencing him to a definite term of incarceration of 120 days and continued probation with electronic monitoring. Defendant admitted that he violated one of the terms of his probation by traveling to India without the consent of the Probation Department, to be with his dying grandfather. Although we conclude that County Court did not abuse its discretion in revoking defendant's probation based upon that admitted violation, "we can substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence" (*People v Suitte*, 90 AD2d 80, 86; *see People v Dunn*, 306 AD2d 945). In view of the compelling mitigating factors in this case, we modify the judgment as a matter of discretion in the interest of justice by vacating that part revoking the sentence of probation and imposing sentence and by continuing the sentence of probation originally imposed.

All concur except SCUDDER, P.J., and SMITH, J., who dissent in part and vote to affirm in accordance with the following Memorandum: We respectfully dissent in part and would affirm the judgment because we cannot agree with the majority that the sentence imposed by County Court is so unduly harsh and severe as to warrant our interference

with the court's sentencing discretion. The record establishes that, in September 2006, defendant was sentenced to four months of intermittent incarceration and to five years of probation based upon his conviction of driving while intoxicated as a felony (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]). Approximately 15 months later, in December 2007, defendant sought permission to travel to India to be with his dying grandfather, and his request was denied by the Department of Probation. Defendant went to India despite the denial of his request, and he did not return to the United States until March 5, 2008, approximately two months after his grandfather died. While in India, defendant contacted his probation officer only once.

Although we have broad, plenary power to substitute our own discretion for that of the sentencing court in the interest of justice (*see People v Delgado*, 80 NY2d 780; *People v Hearn*, 248 AD2d 889, 890), that power should be exercised only in extraordinary circumstances (*see generally People v Massey*, 45 AD3d 1044, 1048, *lv denied* 9 NY3d 1036). The facts of this case, which include the intentional defiance of the Probation Department's directive and the continued truancy of defendant for approximately two months after the death of his grandfather, do not present such extraordinary circumstances. We note that the court carefully considered and was sympathetic with respect to defendant's reason for traveling to India, and we further note that the court imposed a sentence of incarceration in large part because of the failure of defendant to return to the United States during the period of approximately two months following the death of his grandfather. In addition, we note that the court could have imposed a significantly longer term of incarceration than that imposed, and that the court credited defendant for time served such that defendant's actual incarceration was increased only by an additional 69 days, according to the presentence report. By continuing the sentence of probation originally imposed, the majority has in effect permitted defendant to violate the conditions of his probation without consequence. We therefore would affirm the judgment and remit the matter to County Court for proceedings pursuant to CPL 460.50 (5).

Entered: July 10, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

962

KA 07-00745

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD C. ROBINSON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered May 4, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]). Defendant failed to preserve for our review his contention that his guilty plea was coerced by County Court inasmuch as he failed to raise that issue in his motion to withdraw his plea at sentencing and failed to move to vacate the judgment of conviction on that ground (*see People v Carlisle*, 50 AD3d 1451, *lv denied* 10 NY3d 957). In any event, we reject defendant's contention. Upon our review of the record, we conclude that the court's discussion of the sentence that defendant could face were he to proceed to trial was properly informative, and was not coercive (*see People v Pagan*, 297 AD2d 582, *lv denied* 99 NY2d 562; *see also People v Rice*, 18 AD3d 351, *lv denied* 5 NY3d 768). Finally, the bargained-for sentence is not unduly harsh or severe.

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

967

KA 08-01677

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFTON A. JACKSON, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (WALTER M. JERAM, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered June 30, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of marihuana in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of marihuana in the second degree (Penal Law § 221.25). We reject the contention of defendant that his plea was coerced by statements of County Court. Although the statements to which defendant objects are similar to those that we determined to be coercive in *People v Flinn* (60 AD3d 1304), here the court engaged defendant in an extensive discussion concerning the consequences of pleading guilty prior to the plea colloquy, unlike the court in *Flinn*. In addition, the court explained to defendant that he could enter an *Alford* plea and afforded defendant an opportunity to discuss the plea offer with his family. The court further indicated that defendant had raised "some really good arguments" but informed defendant that those arguments would have to be raised at trial. We thus conclude on the record before us that defendant's reliance on *Flinn* is misplaced.

We agree with defendant, however, that his plea was not knowingly, intelligently and voluntarily entered. Although defendant failed to preserve that contention for our review by failing to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v VanDeViver*, 56 AD3d 1118, *lv denied* 11 NY3d 931, 12 NY3d 788), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). It is clear from the record that defendant retained his right

to appeal pursuant to the plea agreement. There is no indication in the record, however, that defendant understood that he forfeited other rights by pleading guilty, including his right to contend that he was denied his statutory right to a speedy trial (*see generally People v O'Brien*, 56 NY2d 1009, 1010). Although we would thus vacate the plea (*see generally People v Morbillo*, 56 AD3d 694, *lv denied* 12 NY3d 786, 788), defendant has expressly rejected that relief, and we therefore affirm the judgment (*see People v Dean*, 52 AD3d 1308, *lv denied* 11 NY3d 736).

Although the contention of defendant that he was denied his statutory right to a speedy trial is properly before us inasmuch as it was not forfeited by the involuntary plea, we reject that contention (*see generally* CPL 30.30). The People's notice of readiness was not illusory despite the fact that it was filed prior to defendant's arraignment because "it was possible for the defendant to be arraigned——and the trial to proceed——" during the 24 days remaining in the statutory six-month period (*People v Goss*, 87 NY2d 792, 794; *see* CPL 30.30 [1] [a]). Any postreadiness delay in arraigning defendant is not attributable to the People inasmuch as "[a]rraigning . . . defendant upon indictment is exclusively a court function" (*Goss*, 87 NY2d at 797; *see generally* CPL 210.10). Even assuming, arguendo, that the 22 days between the date on which defense counsel informed the court that defendant was in federal custody and the date on which the order to produce defendant was issued are chargeable to the People, based on their failure to utilize the applicable statutory procedure to secure defendant's presence (*see People v Cropper*, 202 AD2d 603, 605, *lv denied* 84 NY2d 824; *see generally* CPL 560.10), we nevertheless conclude that the People declared their readiness for trial within the six-month period. We reject the further contention of defendant that the failure of defense counsel to pursue his contention that he was denied his statutory right to a speedy trial constituted ineffective assistance of counsel, inasmuch as defendant was not in fact denied his statutory right to a speedy trial (*see People v Caban*, 5 NY3d 143, 152; *cf. People v O'Connell*, 133 AD2d 970, 971-972).

Entered: July 10, 2009 Patricia L. Morgan
Clerk of the Court