SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 18, 2010

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

257

CA 09-01445

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

BETTY L. KIMMEL, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

STATE OF NEW YORK
AND NEW YORK STATE DIVISION OF STATE POLICE,
DEFENDANTS-RESPONDENTS.

EMMELYN LOGAN-BALDWIN, APPELLANT.

HARRIET L. ZUNNO, HILTON, FOR PLAINTIFF-APPELLANT.

WILLIAMS & WILLIAMS, ROCHESTER (MITCHELL T. WILLIAMS OF COUNSEL), FOR APPELLANT.

JAECKLE, FLEISCHMANN & MUGEL, LLP, BUFFALO (MITCHELL J. BANAS, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeals from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered May 18, 2009. The order, insofar as appealed from, denied those parts of the motions of plaintiff and plaintiff's former attorney for attorneys' fees and expenses pursuant to CPLR article 86 and granted the motions of defendants to quash the subpoenas duces tecum issued to their attorneys.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motions of defendants are denied in part, defendants are directed to produce only those documents pertaining to them, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Opinion by PERADOTTO, J.: The primary question presented by this appeal is whether a prevailing plaintiff in a sex discrimination action against the State may recover attorneys' fees and expenses pursuant to the New York State Equal Access to Justice Act ([EAJA] CPLR art 86). We agree with plaintiff and her former attorney, appellant Emmelyn Logan-Baldwin, that they are entitled to seek attorneys' fees and expenses under the plain language of the EAJA.

Facts and Procedural History

Plaintiff, a former State Trooper, commenced this action in 1995 alleging that she was subjected to discrimination on the basis of sex and to acts of sexual harassment and retaliation; she also alleged that she was exposed to a hostile work environment for approximately

15 years. Plaintiff asserted violations of, inter alia, the Human Rights Law (Executive Law art 15) and sought compensatory damages, declaratory and injunctive relief, and reinstatement as a State Trooper. Plaintiff was awarded damages upon a jury verdict in her favor, and this Court affirmed that judgment on a prior appeal (*Kimmel v State of New York*, 49 AD3d 1210, *lv dismissed* 11 NY3d 729). Thereafter, plaintiff and Logan-Baldwin each moved for, inter alia, an award of attorneys' fees and expenses pursuant to the EAJA. In opposition to the motions, defendants contended, inter alia, that the EAJA does not apply to this action and that the fees sought by plaintiff and Logan-Baldwin were unreasonable.

Logan-Baldwin's attorney issued a subpoena duces tecum directing the attorneys for defendants, Jaeckle, Fleischmann & Mugel, LLP (JFM), to produce

> "[a]ll documents, including but not limited to invoices, statements and New York State Standard Vouchers submitted by you to the State of New York for legal and paralegal services rendered by any member or employee of your firm and expenses and disbursements incurred in connection with your representation of any of the following parties to the above action,"

which included defendants and former defendants.

Plaintiff's attorney likewise issued a subpoena duces tecum directing JFM to produce

> "[a]ll documents, including but not limited to invoices, statements and New York State Standard Voucher[s] submitted by you to the State of New York for legal and other non-attorney personnel services rendered by you and any member and/or employee of the firm of [JFM] and expenses and disbursements incurred in connection with your representation of the following parties,"

which also included defendants and a former defendant.

Defendants moved to quash the subpoenas pursuant to CPLR 2304 contending, inter alia, that their fee records were irrelevant to the court's determination of the reasonableness of the legal fees incurred by plaintiff.

Plaintiff and Logan-Baldwin appeal from the order denying their respective motions for, inter alia, attorneys' fees and expenses pursuant to the EAJA. Supreme Court concluded that "the EAJA does not apply to a situation where a plaintiff has recovered compensatory damages for tortious acts of the State and its employees." The court also in effect granted defendants' motions to quash the subpoenas. We conclude that the order should be reversed insofar as appealed from inasmuch as the court erred in determining that the EAJA is

inapplicable to this action and in granting in their entirety defendants' motions to quash the subpoenas.

The Motions of Plaintiff and Logan-Baldwin

New York enacted the EAJA in 1989 in order "to create a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the state of New York" (CPLR 8600). The purpose of the EAJA is "to assist economically disadvantaged litigants in obtaining legal assistance in the prosecution of actions seeking to obtain redress from wrongful actions of the state" (*Matter of Scott v Coleman*, 20 AD3d 631, 631, *lv dismissed* 5 NY3d 880). To that end, the EAJA provides that eligible parties who prevail in a civil action against the State are entitled to legal fees and other expenses incurred in the prosecution of that action (*see* CPLR 8601 [b]). Eligible parties include those individuals "whose net worth, not including the value of a homestead used and occupied as a principal residence, did not exceed [$50,000] at the time the civil action was filed" (CPLR 8602 [d] [i]).

1. The Plain Meaning of the EAJA

In determining the applicability of the EAJA to this action, it is axiomatic that we must "turn first to the plain language of the statute[] as the best evidence of legislative intent" (*Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568; *see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583). CPLR 8601 (a) states that,

> "except as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust."

The EAJA defines " '[a]ction' " as "any civil action or proceeding brought to seek judicial review of an action of the state as defined in subdivision (g) of [CPLR 8602], including an appellate proceeding, but does not include an action brought in the court of claims" (CPLR 8602 [a]). CPLR 8602 (g) defines " '[s]tate' " as "the state or any of its agencies or any of its officials acting in his or her official capacity."

We conclude that, under a plain reading of the statute, the EAJA applies to this action. The EAJA unambiguously applies to "*any civil action* brought against the state" (CPLR 8601 [a] [emphasis added]; *see Matter of Greer v Wing*, 95 NY2d 676, 680), "except as otherwise specifically provided by statute" (CPLR 8601 [a]). As defendants acknowledge, the Human Rights Law does not specifically provide for counsel fees (*see* Executive Law art 15) and, accordingly, this action does not fall within that statutory exception (*cf. Matter of Beechwood*

Restorative Care Ctr. v Signor, 5 NY3d 435, 443). The only other statutory exception is for "action[s] brought in the court of claims" (CPLR 8602 [a]). The instant action was commenced in Supreme Court pursuant to Executive Law § 297 (9) and thus does not fall within that exception.

Contrary to the contention of defendants and the conclusion of the court, there is nothing in the text of the EAJA that limits recovery of attorneys' fees to CPLR article 78 proceedings or to declaratory judgment actions. Indeed, if the Legislature had intended the EAJA to apply exclusively to those types of proceedings, then the language excluding actions commenced in the Court of Claims would be unnecessary inasmuch as such proceedings do not generally fall within that court's limited jurisdiction (*see* Court of Claims Act § 9; *Matter of Capruso v New York State Police*, 300 AD2d 27, 28 [the State is "not a 'body or officer' against whom a CPLR article 78 proceeding may be brought"]; *Ferrick v State of New York*, 198 AD2d 822, 823 [same]; *Wikarski v State of New York*, 91 AD2d 1174 [Court of Claims generally does not have authority to render a declaratory judgment]). It is well established that "legislation is to be interpreted so as to give effect to every provision . . .[, and a] construction that would render a provision superfluous is to be avoided" (*Majewski*, 91 NY2d at 587).

Moreover, the EAJA was modeled on its federal counterpart that, notably, is not limited to proceedings brought to review administrative determinations. Rather, the federal Equal Access to Justice Act provides that,

> "[e]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States" (28 USC 2412 [d] [1] [A]).

We agree with plaintiff and Logan-Baldwin that the court improperly characterized this action as a "tort action." "A discrimination claim under the Human Rights Law is an action created by statute, which did not exist at common law, and therefore cannot give rise to tort liability" (*Monsanto v Electronic Data Sys. Corp.*, 141 AD2d 514, 515; *see also Mills v County of Monroe*, 89 AD2d 776, *affd* 59 NY2d 307, *cert denied* 464 US 1018; *Polvino v Island Group Admin.*, 264 AD2d 720). In any event, "tort actions" are not specifically excluded from the scope of the EAJA (*see* CPLR 8602 [a]; *see generally Matter of Alfonso v Fernandez*, 167 Misc 2d 793, 798 [CPLR 8601 "applies to actions in *any* civil litigation . . . includ(ing) actions brought to enforce one's civil rights, or to remedy a violation thereof, against the State"]).

Generally, where the language of a statute is clear and

unambiguous, a court must give effect to its plain meaning (*see Matter of M.B.*, 6 NY3d 437, 447; *see also Matter of Polan v State of N.Y. Ins. Dept.*, 3 NY3d 54, 58 [A "statute's plain language is dispositive"]; *Riley v County of Broome*, 95 NY2d 455, 463 ["As a general rule, unambiguous language of a statute is alone determinative"]). As explained by this Court:

> " 'Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation' . . ., and the intent of the Legislature must be discerned from the language of the statute . . . without resort to extrinsic material such as legislative history or memoranda" (*Matter of Rochester Community Sav. Bank v Board of Assessors of City of Rochester*, 248 AD2d 949, 950, *lv denied* 92 NY2d 811).

Of course, a court may look beyond the text of a statute where the plain language would lead to absurd, futile or unreasonable results (*see New York State Bankers Assn. v Albright*, 38 NY2d 430, 436-437, *mot to amend remittitur granted* 39 NY2d 744). That principle, however, is "to be adopted with extreme caution and only where the plain intent and purpose of a statute would otherwise be defeated" (*Bright Homes v Wright*, 8 NY2d 157, 161-162). If the language employed has "a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to *or take away from* that meaning" (*Tompkins v Hunter*, 149 NY 117, 123 [emphasis added]).

We conclude that the phrase "any civil action" contained in the EAJA means just that—*any* civil action, including this action seeking relief pursuant to the Human Rights Law. Defendants urge us to limit the scope of the EAJA based upon its legislative history. This we decline to do. Because attorneys' fees are available to plaintiff under the plain language of the EAJA, there is no need to resort to legislative history to discern the intent of the Legislature (*see Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367, 372-373; *Sega v State of New York*, 60 NY2d 183, 191, *rearg denied* 61 NY2d 670 ["While legislative intent is the great and controlling principle . . ., it should not be confused with legislative history, as the two are not coextensive. Inasmuch as the legislative intent is apparent from the language of [the statute], there is no occasion to consider the import, if any, of the legislative memorandum" (internal citations omitted)]).

2. The Legislative History of the EAJA

Even if we were to consider the legislative history of the EAJA, we would reach the same result. Although defendants rely heavily on the 1982, 1983, 1984 and 1986 drafts of the bill, the text of the EAJA that was enacted into law in 1989 bears little resemblance to those

prior versions. Notably, the earlier versions of the bill, which were vetoed by two governors, were intended to amend the State Administrative Procedure Act rather than the CPLR. The 1982 bill explicitly excluded state employees from its purview and was limited to cases involving "judicial review of an *agency action*"—defined as "an action by a state agency [that] compels a regulated entity to act, enjoins a regulated entity from acting[] or fines a regulated entity" (1982 NY Assembly Bill A11940-A). According to one of its sponsors, the bill was designed to "cut red-tape and . . . relieve the regulatory burden on New York State small businesses" (Letter from Sponsor, at 2, 1982 NY Assembly Bill A11940-A, Veto Jacket, Veto 273 of 1982). In vetoing the 1982 bill, the Governor noted that the "bill has nothing to do with helping the poor to gain access to the courts to redress wrongs——its 'Equal Access to Justice' title is a misnomer——and that its clear intent is to discourage governmental entities from exercising legally mandated regulatory responsibilities with respect to business entities" (Governor's Veto Message, at 2, 1982 NY Assembly Bill A11940-A, Veto Jacket, Veto 273 of 1982).

The 1983 and 1984 versions of the bill specifically limited recovery of attorneys' fees to small businesses (*see* 1984 NY Senate Bill S9054-B; 1983 NY Senate Bill S434-A). The Governor's veto messages again noted that the bills did not establish a policy of enabling the poor to gain access to the judicial forum but instead shifted to taxpayers the litigation costs of certain businesses (*see* Governor's Veto Message, 1984 NY Senate Bill S9054-B, Veto Jacket, Veto 26 of 1984, at 14; Governor's Veto Message, 1983 NY Senate Bill S434-A, Veto Jacket, Veto 71 of 1983, at 90).

In contrast to the earlier versions of the EAJA, the 1989 bill that was subsequently codified as CPLR article 86 contains no exclusion for state employees and is not limited to judicial review of "agency actions" (*see* L 1989, ch 770). Although the bill jacket for the 1989 bill contains statements suggesting that the primary intent of the bill was to award attorneys' fees in proceedings challenging agency action or inaction, there is nothing in the bill jacket that evinces a legislative intent to restrict the application of the EAJA to those types of actions or to exclude actions such as the one at issue here from the purview of the statute. To the contrary, many statements contained in the bill jacket reflect a broader view of the 1989 bill. For example, a September 21, 1989 letter from one of the sponsors to the Governor states that the bill "would allow . . . individuals with a net worth of up to $50,000 (excluding their primary residence) to be reimbursed for their legal fees *if they win a civil action brought against the State* and the court finds that the State's position lacks substantial justification" (Letter from Sponsor, Bill Jacket, L 1989, ch 770, at 6 [emphasis added]). The Assembly Memorandum in Support of Legislation likewise states that "certain parties who prevail in *adversary adjudications and civil actions brought against the State of New York* will be entitled to attorneys' fees and related expenses unless the government action was substantially justified or special circumstances make an award unjust" (Assembly Mem in Support, Bill Jacket, L 1989, ch 770, at 12 [emphasis added]).

Similarly, the Report on Legislation (Report) issued by the Association of the Bar of the City of New York states that the 1989 bill "seeks to promote equal justice by authorizing an award of attorneys[']fees and other reasonable expenses incurred by prevailing parties in civil proceedings, with the exception of tort actions, against the State" (Rep of Assn of Bar of City of NY, Bill Jacket, L 1989, ch 770, at 55). The Report notes that,

> "[w]hile fees are currently available to parties who prevail in challenges to unjustified federal governmental action and to parties who prevail against the State on federal statutory or constitutional grounds, *there is no State statute authorizing attorneys[']fees to parties who successfully contest unreasonable State actions on state law grounds*" (*id.* at 56 [emphasis added]).

The Report further observes that

> "[b]ills denominated 'Equal Access to Justice' Acts have been passed by both houses of the state legislature during the past several years, only to be vetoed by the Governor. Those bills, however, were not truly Equal Access to Justice Acts because, although they assisted small businesses regulated by state agencies, *they failed to confer any benefits on low income individuals seeking to enforce civil and legal rights through the courts*" (*id.* at 57 [emphasis added]).

We thus conclude that the legislative history of the EAJA does not reveal a clear legislative intent to exclude the instant action from the purview of the statute. Although defendants contend that the Legislature did not intend the EAJA to apply to actions "seeking monetary damages for the tortious and/or otherwise wrongful acts of state officials generally, and an action for millions of dollars in damages for alleged sexual harassment and discrimination under the Human Rights Law particularly," we note that the plain language of the EAJA contains no such exceptions. This Court may not "legislate under the guise of interpretation" (*Bright Homes*, 8 NY2d at 162) and, if application of the EAJA to this action is an unintended result of the plain language of the statute, then that is a consequence best left to the Legislature to evaluate and, if necessary, resolve (*see Amorosi*, 9 NY3d at 372-373).

Defendants' Motions to Quash

We further agree with plaintiff and Logan-Baldwin that the court erred in granting in its entirety defendants' motions to quash the subpoenas duces tecum issued to JFM. "The standard to be applied on a motion to quash a subpoena duces tecum is whether the requested information is 'utterly irrelevant to any proper inquiry' " (*Ayubo v Eastman Kodak Co.*, 158 AD2d 641, 642; *see Calabrese v PHF Life Ins.*

Co., 190 AD2d 1069). Here, we agree with defendants that the rates charged by JFM—a large firm representing government parties—are not relevant to whether the rates charged by plaintiff's attorney and Logan-Baldwin are reasonable (*see Blowers v Lawyers Coop. Publ. Co.*, 526 F Supp 1324, 1327-1328; *see also Chambless v Masters, Mates & Pilots Pension Plan*, 885 F2d 1053, 1059, *cert denied* 496 US 905). We cannot similarly conclude, however, that the number of hours expended by JFM in defending this matter is " 'utterly irrelevant' " to the reasonableness of the fees sought by plaintiff and Logan-Baldwin (*Del Vecchio v White Plains Unit, Westchester County Ch., Civil Serv. Empls. Assn., Local 860*, 64 AD2d 975, 976). "Pertinent to any consideration of a reasonable amount of time expended in the prosecution of a [lawsuit] is the amount of time expended by the defendant[s] in defending that [lawsuit]" (*Mitroff v Xomax Corp.*, 631 F Supp 25, 28; *see Blowers*, 526 F Supp at 1327 ["The amount of time spent by defendants' attorneys on a particular matter may have significant bearing on the question whether plaintiff's attorney(s) expended a reasonable (amount of) time on the same matter"]).

As the Eleventh Circuit stated in *Henson v Columbus Bank & Trust Co.* (770 F2d 1566, 1575),

> "[t]his litigation has been going on for over [10] years now. [The defendant] has spiritedly contested [the plaintiff's] claims at every stage, including the reasonableness of his petition for attorneys' fees. While [the defendant] is entitled to contest vigorously [plaintiff's] claims, once it does so it cannot then complain that the fees award should be less than claimed because the case could have been tried with less resources and with fewer hours expended."

Similarly, the instant litigation was commenced in 1995 and has involved no fewer than six prior appeals. Inasmuch as defendants contest the reasonableness of the fees sought by plaintiff and Logan-Baldwin, they may not fairly contend that the amount of time expended by their own attorneys is irrelevant.

Thus, while the court ultimately may choose to disregard or discount the records sought by plaintiff and Logan-Baldwin based upon, inter alia, differences in the parties' respective burdens and litigation incentives (*see Serricchio v Wachovia Sec., LLC*, 258 FRD 43, 45; *Coalition to Save Our Children v State Bd. of Educ. of State of Del.*, 143 FRD 61, 65), that is not a proper basis upon which to grant defendants' motions to quash the subpoenas.

We agree with defendants, however, that documents, including time records and/or invoices, pertaining to parties that have been dismissed from the action are not relevant and need not be produced in response to the subpoenas.

Finally, we note that Logan-Baldwin does not contend that the

court erred in denying that part of her motion seeking discovery, and we therefore deem abandoned any issues with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Conclusion

Accordingly, we conclude that the part of the order denying those parts of the motions of plaintiff and Logan-Baldwin for attorneys' fees and expenses should be reversed and the matter remitted to Supreme Court to determine whether plaintiff and/or Logan-Baldwin are entitled to such fees and expenses under the EAJA and, if so, the reasonable amount of those fees and expenses. We further conclude that the part of the order granting defendants' motions to quash the subpoenas duces tecum should be reversed, the motions denied in part, and defendants directed to produce only those documents pertaining to them. In light of our conclusion, we do not address the remaining contentions of the parties.

GREEN and GORSKI, JJ., concur with PERADOTTO, J.; SCUDDER, P.J., dissents and votes to affirm in the following Opinion in which CARNI, J., concurs: We respectfully dissent. In our view, plaintiff and her former attorney, appellant Emmelyn Logan-Baldwin, are not entitled to seek attorneys' fees and expenses pursuant to the New York State Equal Access to Justice Act ([EAJA] CPLR art 86), and we would therefore affirm the order denying the motions of plaintiff and Logan-Baldwin seeking, inter alia, that relief. Although we recognize that, under the unique circumstances of this case, an award of attorneys' fees and expenses may be an equitable result, we nevertheless conclude that, in drafting the EAJA, the Legislature intended that attorneys' fees and expenses be sought only in civil actions that involve the review of the actions of the State that are administrative in nature (*see generally Matter of Greer v Wing*, 95 NY2d 676; *Matter of Scott v Coleman*, 20 AD3d 631, *lv dismissed* 5 NY3d 880). Indeed, the Court of Appeals stated that "[t]he Legislature enacted the [EAJA] to help litigants secure legal assistance to contest wrongful actions of state agencies" (*Matter of Wittlinger v Wing*, 99 NY2d 425, 431, citing Governor's Mem approving L 1989, ch 770, 1989 McKinney's Session Laws of NY, at 2436). Our research has revealed more than 70 cases in which the EAJA was applied to award attorneys' fees in cases that involved administrative actions of the State, and none that did not.

We agree with the majority that we must "turn first to the plain language of the statute[] as the best evidence of legislative intent" (*Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568). We nevertheless respectfully disagree with the majority's conclusion that the Legislature intended to permit a prevailing party in a sex discrimination action against the State to seek attorneys' fees and expenses. "Legislative intent may be discerned from the face of a statute, but an apparent lack of ambiguity is rarely, if ever, conclusive . . . Generally, 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" (*Matter of Sutka v Conners*, 73 NY2d 395, 403).

In our view, when construing the EAJA as a whole (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 97), the "spirit and purpose of the legislation" (*Matter of Sutka*, 73 NY2d at 403), as gleaned from the statutory context and the legislative history, is to provide redress for litigants contesting the actions of the State in administrative matters (*see Wittlinger*, 99 NY2d at 431).

CPLR 8601 (a) provides that "a court shall award to a prevailing party . . . fees and other expenses incurred by such party *in any civil action brought against the state, unless the court finds that the position of the state was substantially justified* or that special circumstances make an award unjust. Whether the position of the state was substantially justified shall be determined *solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action*" (emphasis added). CPLR 8602 (e) defines the "position of the state" as "the act, acts or failure to act *from which judicial review is sought*" (emphasis added). CPLR 8602 (b) defines "fees and other expenses" as, inter alia, the "reasonable attorney fees . . . incurred in connection with *an administrative proceeding and judicial action*" (emphasis added). We note that the Court of Appeals clarified that the fees for administrative proceedings are available only with respect to those proceedings that follow the civil action and not those that preceded it (*see Greer*, 95 NY2d at 681).

As the majority correctly notes, the EAJA was originally intended to be an amendment to the State Administrative Procedure Act; however, it was subsequently codified as CPLR article 86 in 1989. Although Governor Carey and Governor Cuomo both noted the misnomer of the title in their respective vetos of proposed legislation in 1982, 1983 and 1984 (*see* Governor's Veto Message, 1984 NY Senate Bill S9054-B, Veto Jacket, Veto 26 of 1984, at 14; Governor's Veto Message, 1983 NY Senate Bill S434-A, Veto Jacket, Veto 71 of 1983, at 90; Governor's Veto Message, at 2, 1982 NY Assembly Bill A11940-A, Veto Jacket, Veto 273 of 1982), the substantive objections of both Governor Carey in 1982 and Governor Cuomo in 1983, 1984 and 1986 were not related to the misnomer. Rather, their objections were that the EAJA would have an inhibitory effect on agencies in the performance of their statutory responsibilities (*see* Governor's Veto Message, 1986 NY Senate Bill S8567-A, Veto Jacket, Veto 26 of 1986, at 71; Governor's Veto Message, 1984 NY Senate Bill S9054-B, Veto Jacket, Veto 26 of 1984, at 14; Governor's Veto Message, 1983 NY Senate Bill S434-A, Veto Jacket, Veto 71 of 1983, at 90; Governor's Veto Message, at 2, 1982 NY Assembly Bill A11940-A, Veto Jacket, Veto 273 of 1982); would shift to taxpayers the litigation costs of certain businesses; and would create a presumption that agencies and their employees were acting in an irresponsible fashion (*see* Governor's Veto Message, 1986 NY Senate Bill S8567-A, Veto Jacket, Veto 26 of 1986, at 71; Governor's Veto Message, 1984 NY Senate Bill S9054-B, Veto Jacket, Veto 26 of 1984, at 14; Governor's Veto Message, 1983 NY Senate Bill S434-A, Veto Jacket, Veto 71 of 1983, at 90).

One of the sponsors of the 1989 bill, Assemblyman Robin

Schimminger, advised Governor Cuomo that the bill "would protect private litigants with limited resources from unjustified State agency actions," explaining that

> "[s]mall business owners and public interest groups have called for this proposal to protect such parties from unfair agency enforcement actions . . . Too often, people have no choice but to concede to an action taken against them by a State agency . . . because of the prohibitive cost of contesting such actions . . . [The EAJA] would place the State and these litigants on more equal footing" (Letter from Sponsor, Bill Jacket, L 1989, ch 770, at 6).

In approving the version of the bill submitted in 1989, Governor Cuomo stated:

> "[T]he [EAJA] will add a new [a]rticle 86 to the [CPLR] to authorize a court to award attorneys' fees to certain plaintiffs or petitioners who prevail in litigation reviewing State agency action or inaction when the State's position in the case is not substantially justified . . . I believe that a program of providing recompense for the cost of correcting official error is highly desirable as long as it is limited to helping those who need assistance, it does not deter State agencies from pursuing legitimate goals and it contains adequate restraints on the amount of fees awarded. It is a worthwhile experiment in improving access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency that is acting without justification" (Governor's Approval Mem, Bill Jacket, L 1989, ch 770, at 20).

In our view, the statutory context and the legislative history compel a conclusion that the Legislature intended that the EAJA would be utilized to seek attorneys' fees and expenses in an action that involved review of an administrative action of the State, and that is not the case here. We must "apply the will of the Legislature [and] not [our] own perception of what might be equitable" (*Sutka*, 73 NY2d at 403). Accordingly, we would affirm the order.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

268

KA 08-02639

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL URBANSKI, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered November 20, 2008. The order determined that defendant is a level three risk and a predicate sex offender pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the determination that defendant is a predicate sex offender and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk and a predicate sex offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). With respect to the finding that he is a level three risk, defendant contends that Supreme Court failed to set forth its findings of fact and conclusions of law, as required by Correction Law § 168-n (3). Although defendant is correct that the court failed to do so, we nevertheless conclude that the record before us is sufficient to enable us to make our own findings of fact and conclusions of law, thus rendering remittal unnecessary (*see People v Pardo*, 50 AD3d 992, *lv denied* 11 NY3d 703; *People v Banks*, 48 AD3d 656, *lv denied* 10 NY3d 709).

Defendant further contends that the People failed to meet their burden of establishing both that he has a history of drug or alcohol abuse and that he failed to accept responsibility, to support that risk level. Defendant does not contest the court's determination with respect to any of the other risk factors and we therefore do not address them. Based on our review of the evidence at the SORA hearing, we conclude that the People established both of the disputed risk factors by the requisite clear and convincing evidence (*see* Correction Law § 168-n [3]). According to statements made by

defendant that are set forth in the presentence report, defendant began drinking alcohol and smoking marihuana at age 15, and he started using cocaine several years later. Defendant also admitted that he had used LSD. Those admissions constitute clear and convincing evidence that defendant has a history of alcohol or drug abuse, thus justifying the assessment of 25 points with respect to that risk category (*see People v Guitard*, 57 AD3d 751, *lv denied* 12 NY3d 704). The fact that defendant may have abstained from the use of alcohol and drugs while incarcerated is "not necessarily predictive of his behavior when [he is] no longer under such supervision" (*People v Warren*, 42 AD3d 593, 594, *lv denied* 9 NY3d 810; *see People v Vangorder*, 72 AD3d 1614). With respect to defendant's alleged failure to accept responsibility, the case summary establishes that, when interviewed by the Board of Examiners of Sex Offenders, defendant stated that he was not sure he committed the crime and that he pleaded guilty "in order to receive a lesser sentence." Those statements constitute clear and convincing evidence of defendant's failure to accept responsibility, thus justifying the assessment of 10 additional points for that risk factor. Based on the assessment of the points for the two risk factors challenged by defendant on appeal, along with the assessment of 95 points for the remaining risk factors not challenged by defendant on appeal, we conclude that defendant's presumptive classification as a level three risk was proper, and that defendant failed to show by clear and convincing evidence that a downward departure from that risk level was warranted (*see People v Pearsall*, 67 AD3d 876, *lv denied* 14 NY3d 703). The statement of defendant that he is physically unable to reoffend was made for the first time in a memorandum of law submitted following the SORA hearing, and defendant offered no evidence to support that statement in any event.

Finally, as the People correctly concede, the court erred in determining that defendant is a predicate sex offender, and we therefore modify the order accordingly.

Entered: June 18, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

471

CA 09-02378

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

VASILIY P. LITVINOV, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EILEEN M. HODSON, ET AL., DEFENDANTS,
JACK FOY AND NEW YORK CENTRAL MUTUAL FIRE
INSURANCE COMPANY, DEFENDANTS-APPELLANTS.

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

DANIEL J. HARTMAN, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 24, 2009 in a personal injury action. The order, among other things, denied the cross motion of defendants Jack Foy and New York Central Mutual Fire Insurance Company for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the motion in part and granting the cross motion in part and vacating the directive to disclose documents prepared after September 29, 2003, and by providing that the directive to disclose documents prepared on or before September 29, 2003 is subject to an in camera review of those documents 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: Plaintiff was injured in July 2003 when he fell while working on a porch located on rental property owned by defendants Eileen M. Hodson and Jeremy L. Hodson and managed by defendant Charles Renna. The property was insured under a commercial insurance policy issued by defendant New York Central Mutual Fire Insurance Company (NYCM). At the time of the accident, plaintiff was employed by Richard J. Laspro, doing business as Home Club of America. After the accident, NYCM instructed defendant Jack Foy to investigate and possibly settle plaintiff's claims arising from the accident. On September 29, 2003, plaintiff signed a release with respect to all claims against the Hodsons and Renna in exchange for $4,000. Thereafter, plaintiff commenced this action seeking, inter alia, rescission of the release based on fraud on the part of Foy and NYCM.

We conclude that Supreme Court properly denied the cross motion of Foy and NYCM for summary judgment dismissing the complaint against them inasmuch as there is an issue of fact whether the release was

indeed procured by fraud. It is well established that "a general release is governed by principles of contract law" (*Mangini v McClurg*, 24 NY2d 556, 562), and that a release " 'should not be set aside unless plaintiff demonstrates duress, illegality, fraud, or mutual mistake' " (*Schroeder v Connelly*, 46 AD3d 1439, 1440). Although there is no evidence in the record that Foy made any false statements directly to plaintiff, "it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof" (*Eaton Cole & Burnham Co. v Avery*, 83 NY 31, 33-34; *see Desser v Schatz*, 182 AD2d 478, 479-480; *John Blair Communications v Reliance Capital Group*, 157 AD2d 490, 492). Rather, fraud may be found " 'where a false representation is made to a third party, resulting in injury to the plaintiff' " (*Ruffing v Union Carbide Corp.*, 308 AD2d 526, 528).

Here, even assuming, arguendo, that Foy and NYCM met their initial burden on the cross motion, we conclude that plaintiff raised a triable issue of fact whether Foy made false representations to plaintiff's employer, Laspro, for the purpose of inducing plaintiff's detrimental reliance on those representations (*see Eaton Cole & Burnham Co.*, 83 NY at 35-36). Although Laspro was not an actual agent of NYCM or plaintiff, Foy knew that Laspro was acting as an intermediary between plaintiff and NYCM, as evidenced by the fact that the two meetings between Foy and plaintiff were set up by Foy through Laspro and took place at Laspro's residence. Laspro testified at his deposition that Foy told him, inter alia, that NYCM had no liability with respect to plaintiff's accident, that plaintiff did not need an attorney, and that the $4,000 paid by NYCM to plaintiff would be in addition to workers' compensation payments. It is undisputed that Laspro relayed that information to plaintiff before the release was signed.

We further conclude that the court erred in denying in its entirety the cross motion of Foy and NYCM with respect to the alternative relief sought by them, i.e., a protective order concerning the information sought in plaintiff's motion to compel disclosure, including the entire claim file of NYCM. It is well established that an insurance company's claim file is conditionally exempt from disclosure as material prepared in anticipation of litigation (*see* CPLR 3101 [d] [2]; *Lamberson v Village of Allegany*, 158 AD2d 943). Nevertheless, material prepared in anticipation of litigation may be subject to disclosure upon a showing of substantial need and the inability "without undue hardship to obtain the substantial equivalent" of the material from another source (CPLR 3101 [d] [2]) and, here, plaintiff made such a showing (*see Dempski v State Farm Mut. Auto. Ins. Co.*, 249 AD2d 895, 896). In order to establish his entitlement to rescission of the release based on fraud, plaintiff must establish, inter alia, a material misrepresentation of fact and defendants' knowledge of its falsity with intent to deceive (*see Liling v Segal*, 220 AD2d 724, 726). The handwritten notes made by Foy in the claim file may be the only direct evidence of his state of mind with respect to the release, particularly in light of the fact that he testified at his deposition that he could not recall the specifics of

his conversations with plaintiff or Laspro (*see Gaglia v Wells*, 112 AD2d 138, 139; *cf. Ainsworth v Union Free School Dist. No. 2, Queensbury*, 38 AD2d 770, 771). In addition, we note that the attorney representing Foy directed him at his deposition not to answer questions concerning his evaluation of plaintiff's claims or the reasonableness of the settlement amount. Moreover, plaintiff is unable to obtain those notes from any other source (*see Dempski*, 249 AD2d at 896).

We thus conclude that the court should have granted in part the cross motion of Foy and NYCM and should have denied in part plaintiff's motion to compel disclosure inasmuch as the motion is overly broad to the extent that it sought NYCM's entire claim file. Plaintiff is entitled only to documents in the claim file that were prepared from the date of the accident until and including the date of execution of the release, because anything prepared for the claim file after the release was executed is not relevant to plaintiff's claims (*see id.*). We therefore modify the order accordingly, and we remit the matter to Supreme Court for an in camera review of those documents prepared on or before the date of execution of the release to determine what documents are material and necessary in the prosecution of plaintiff's action and what documents, if any, should be shielded from disclosure on the ground of privilege (*see* CPLR 3101 [d] [2]; *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 378).

All concur except SCUDDER, P.J., and SMITH, J., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent. Unlike the majority, we would grant the cross motion of New York Central Mutual Fire Insurance Company and its agent, Jack Foy (collectively, defendants), for summary judgment dismissing the complaint against them.

Several months after injuring his arm in an accident at the home of defendants Eileen M. Hodson and Jeremy L. Hodson, plaintiff signed a release of all claims against the Hodsons arising from the accident. During his deposition testimony, plaintiff acknowledged that he read and understood the entire release before signing it, i.e., he understood that by signing it he would receive $4,000, and he admitted that he received that sum of money.

"Where, as here, the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties" (*Booth v 3669 Delaware*, 92 NY2d 934, 935; *see Mangini v McClurg*, 24 NY2d 556, 563-564; *Marlowe v Muhlnickel*, 294 AD2d 830, 831). A release "should never be converted into a starting point for renewed litigation except under circumstances and under rules which would render any other result a grave injustice. It is for this reason that the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake, must be established or else the release stands" (*Mangini*, 24 NY2d at 563). Here, we reject the contention of plaintiff that his consent was the result of mutual mistake, mistake on his own part, or fraud and misrepresentation on the part of Foy.

With respect to plaintiff's allegation of mutual mistake, we note the well-established principle that a "contract or stipulation entered into under a mutual mistake of fact is subject to rescission if such mutual mistake existed at the time the contract was entered into and is so substantial that the agreement does not represent a true meeting of the parties' minds" (*Carney v Carozza*, 16 AD3d 867, 868-869). We conclude, however, that plaintiff failed to establish that such a mistake existed inasmuch as, in support of that contention, he alleges only that he now believes that his claim is worth more than he received, and that he did not know that his workers' compensation carrier would assert a claim against the settlement proceeds. Those allegations do not concern mutual mistake but, rather, they concern an alleged unilateral mistake on the part of plaintiff, and those allegations in any event also are insufficient to raise an issue of fact whether the release should be rescinded based on plaintiff's unilateral mistake. The fact that plaintiff "may not have understood collateral consequences of the release without pursuing the matter further with his workers' compensation insurer is of no moment insofar as [defendants are] concerned" (*Elliott v Gehen*, 105 AD2d 1112, 1113, *affd* 64 NY2d 832), and "plaintiff cannot avoid the release by now claiming that he did not understand its terms" (*Finklea v Heim*, 262 AD2d 1056, 1057). It is well settled that "a mere unilateral mistake on the part of [plaintiff] with respect to the meaning and effect of the release . . . does not constitute an adequate basis for invalidating a clear, unambiguous and validly executed release" (*Booth*, 242 AD2d 921, 922, *affd* 92 NY2d 934).

Plaintiff's allegations of fraud and misrepresentation on the part of Foy are similarly insufficient to raise an issue of fact whether the release should be rescinded. "A party seeking to set aside a release on the ground of fraud bears the burden of establishing 'a material misrepresentation of fact, made with knowledge of its falsity, with intent to deceive, justifiable reliance and damages' . . . The plaintiff's allegations of fraud[] are, on their face, insufficient" (*Liling v Segal*, 220 AD2d 724, 726). Here, "[t]he fraudulent misrepresentations alleged by [plaintiff] were not made by [defendants] and [plaintiff has] produced no evidence that [defendants] participated in the alleged fraud" (*Downes v Aran*, 229 AD2d 1025, *lv dismissed in part and denied in part* 89 NY2d 911; *see Key Bank v Ryan*, 132 AD2d 220, 222-223). Finally, although "a unilateral mistake induced by fraud will support a claim for rescission . . ., plaintiff's claims of fraud are insufficient, as previously noted" (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369-370).

Consequently, inasmuch as defendants met their initial burden with respect to the validity of the general release and plaintiff failed to raise a triable issue of fact, Supreme Court erred in denying the cross motion of defendants for summary judgment dismissing the complaint against them (*see Seff v Meltzer, Lippe, Goldstein & Schlissel, P.C.*, 55 AD3d 592; *Marlowe*, 294 AD2d at 831). In view of our determination with respect to the cross motion, we conclude that plaintiff's motion to compel disclosure with respect to defendants is

moot. We therefore would reverse the order, grant the cross motion, dismiss the complaint against defendants, and dismiss plaintiff's motion.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

549

CA 09-02438

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

DAVID M. AHLERS, ET AL., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ECOVATION, INC., ET AL., DEFENDANTS,
W. JEROME FRAUTSCHI, W. JEROME FRAUTSCHI
LIVING TRUST, PLEASANT T. ROWLAND,
PLEASANT T. ROWLAND REVOCABLE TRUST,
PLEASANT T. ROWLAND FOUNDATION, INC.,
OVERTURE FOUNDATION, INC., DIANE C. CREEL,
GEORGE SLOCUM, DAVID CALL, DAVID PATCHEN,
CREIGHTON K. (KIM) EARLY, RICHARD KOLLAUF,
RITA OBERLE, ROBERT SHEH, AND PHILIP
STRAWBRIDGE, DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS W. JEROME FRAUTSCHI, W. JEROME FRAUTSCHI LIVING TRUST, PLEASANT T. ROWLAND, PLEASANT T. ROWLAND REVOCABLE TRUST, PLEASANT T. ROWLAND FOUNDATION, INC., AND OVERTURE FOUNDATION, INC.

PEPPER HAMILTON LLP, PHILADELPHIA, PENNSYLVANIA (M. DUNCAN GRANT, OF THE PENNSYLVANIA AND DELAWARE BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND THE WOLFORD LAW FIRM LLP, ROCHESTER, FOR DEFENDANTS-APPELLANTS DIANE C. CREEL, GEORGE SLOCUM, DAVID CALL, DAVID PATCHEN, CREIGHTON K. (KIM) EARLY, RICHARD KOLLAUF, RITA OBERLE, ROBERT SHEH, AND PHILIP STRAWBRIDGE.

SONNENSCHEIN NATH & ROSENTHAL LLP, NEW YORK CITY (JONATHAN D. FORSTOT OF COUNSEL), AND WOODS OVIATT GILMAN LLP, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Ontario County (Kenneth R. Fisher, J.), entered October 7, 2009 in an action for, inter alia, breach of fiduciary duty. The order, insofar as appealed from, denied in part the motions of defendants-appellants to dismiss the second amended complaint against them.

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

Memorandum: Plaintiffs, former minority shareholders of defendant Ecovation, Inc. (Ecovation), commenced this action for, inter alia, breach of fiduciary duty and unjust enrichment as a result of defendants' alleged misconduct during a series of transactions

culminating in a merger agreement between Ecovation and defendant Ecolab, Inc. Two groups of defendants, i.e., the former directors of Ecovation, as well as two former controlling shareholders of Ecovation and several entities controlled by them (collectively, defendants), appeal from an order that, inter alia, denied those parts of their respective motions to dismiss the second through fourth and ninth causes of action against them.

Contrary to defendants' contention, plaintiffs have standing to assert the second through fourth and ninth causes of action. Under Delaware law, which we must apply to the issue of standing inasmuch as Delaware is the state of incorporation (*see generally Sweeney, Cohn, Stahl & Vaccaro v Kane*, 6 AD3d 72, 75, *lv dismissed* 3 NY3d 751), "a corporate merger generally extinguishes a plaintiff's standing to maintain a derivative [action] . . . [because] a derivative claim is a property right owned by the nominal corporate defendant [and] that right flows to the acquiring corporation by operation of a merger" (*Feldman v Cutaia*, 951 A2d 727, 731 [Del]). A direct action, however, survives a corporate merger because the relief flows directly to the stockholders rather than to the corporation (*see generally Gentile v Rosette*, 906 A2d 91, 99-100 [Del]; *Parnes v Bally Entertainment Corp.*, 722 A2d 1243, 1245 [Del]). Here, the second through fourth causes of action are both derivative and direct in nature because plaintiffs allege that "(1) . . . stockholder[s] having . . . effective control cause[d Ecovation] to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder[s] that have a lesser value; and (2) the exchange cause[d] an increase in the percentage of the outstanding shares owned by the controlling stockholder[s], and a corresponding decrease in the share percentage owned by the . . . [minority] shareholders" (*Gentile*, 906 A2d at 100).

Further, the second through fourth causes of action, as well as the ninth cause of action, are direct in nature because plaintiffs have "challenge[d] the validity of the merger itself, . . . by charging [defendants] with breaches of fiduciary duty resulting in unfair dealing" (*Parnes*, 722 A2d at 1245). Specifically, plaintiffs allege that the merger agreement was the product of unfair dealing inasmuch as it was knowingly designed to enrich two of the controlling shareholders at the expense of the common shareholders (*see id.*).

Contrary to defendants' further contention, the ninth cause of action, for unjust enrichment, is not barred by the existence of a valid contract, i.e., the merger agreement. Plaintiffs have alleged that the merger agreement was invalid (*see generally IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 405) and, in any event, plaintiffs are not parties to the merger agreement (*see Marc Contr., Inc. v 39 Winfield Assoc., LLC*, 63 AD3d 693, 695).

Finally, when viewed as a whole, the second amended complaint alleges sufficient control by defendants over the series of transactions that plaintiffs allege as the basis for their claims (*see generally Gatz v Ponsoldt*, 925 A2d 1265, 1275 [Del]; *Rhodes v Silkroad*

Equity, LLC, 2007 WL 2058736, *4-*5 [Del Ch]).

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

718

CA 09-02616

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

JAMES W. HILL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JENNIFER V. HILL, DEFENDANT-RESPONDENT.

MICHAEL J. PULVER, NORTH SYRACUSE, FOR PLAINTIFF-APPELLANT.

BARBARA T. WALZER, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

THEODORE W. STENUF, ATTORNEY FOR THE CHILDREN, MINOA, FOR MADISON H. AND KALEIGH H.

Appeal from a judgment of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered December 3, 2008 in a divorce action. The judgment awarded counsel fees to defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed in the interest of justice and on the law without costs and the matter is remitted to Supreme Court, Onondaga County, for a hearing in accordance with the following Memorandum: Plaintiff contends that Supreme Court should have conducted an evidentiary hearing before granting that part of defendant's cross motion seeking an award of counsel fees incurred in opposing plaintiff's motion seeking to modify the judgment of divorce. Although plaintiff failed to preserve that contention for our review (*see Petosa v Petosa*, 56 AD3d 1296, 1298), we nevertheless review it in the interest of justice (*see Redgrave v Redgrave*, 304 AD2d 1062, 1066-1067), and we agree with plaintiff that the court so erred (*see Matter of Mina v Weber*, 309 AD2d 1252; *Redgrave*, 304 AD2d at 1066-1067). Absent a stipulation by the parties, "the court should base its determination [to award counsel fees] upon testimonial and other trial evidence of the financial condition of the parties" (*Matter of Cook v Jasinski*, 20 AD3d 869, 870; *see Mina*, 309 AD2d 1252). Here, there is no stipulation in the record permitting the court to determine the issue of counsel fees without conducting a hearing. We therefore reverse the judgment and remit the matter to Supreme Court for a hearing on that issue and thus to decide that part of defendant's cross motion seeking an award of counsel fees.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

734

KA 08-02105

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY PETT, DEFENDANT-APPELLANT.

JOHN A. HERBOWY, ROME, FOR DEFENDANT-APPELLANT.

JOHN H. CRANDALL, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered June 5, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Herkimer County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [2] [b]), defendant contends that County Court erred in enhancing the sentence by imposing restitution inasmuch as restitution was not included in the plea agreement. We agree (*see People v Hunter*, 72 AD3d 1536). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the promised sentence or to afford defendant the opportunity to withdraw his plea. As noted by the Court of Appeals in *People v Maliszewski* (13 NY3d 756), "plea withdrawal can put the defendant in the position he was in prior to admitting guilt" (*id.* at 757). If the court elects to afford defendant the opportunity to withdraw his plea, and defendant chooses not to do so, the court may sentence defendant to any sentence authorized by law. If that sentence includes restitution, defendant is entitled to a restitution hearing if he so requests. Defendant failed to preserve for our review his contention that the court should have recused itself (*see People v Lebron*, 305 AD2d 799, *lv denied* 100 NY2d 583), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The sentence, absent the imposition of restitution, is not unduly harsh or severe.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

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

737

CA 09-02244

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

FRANCESCO STRANGIO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

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

SEVENSON ENVIRONMENTAL SERVICES, INC., ET AL.,
THIRD-PARTY PLAINTIFFS,

V

THOMAS JOHNSON, INC., THIRD-PARTY
DEFENDANT-RESPONDENT.

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

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

SLIWA & LANE, BUFFALO (MICHAEL T. COUTU OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 14, 2009 in a personal injury action. The order, insofar as appealed from, granted those parts of the motions of defendants-third-party plaintiffs and third-party defendant for summary judgment dismissing the Labor Law § 240 (1) claim and the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-6.1 (j).

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he was struck in the face by the handle of a hand-operated hoisting mechanism while he was raising a scaffold. As limited by his brief, plaintiff appeals from those parts of an order granting the respective motions of defendants-third-party plaintiffs (defendants) and third-party defendant, Thomas Johnson, Inc. (TJI), for summary judgment dismissing the Labor Law § 240 (1) claim as well as the Labor Law §

241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-6.1 (j). We affirm.

With respect to the Labor Law § 240 (1) claim, defendants and TJI established their entitlement to judgment as a matter of law, and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). As relevant to this case, the proper inquiry under Labor Law § 240 (1) is whether " 'the scaffold . . . or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*' " (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501). The fact that an accident is "connected in some tangential way with the effects of gravity" is insufficient to bring the injured worker within the protection of Labor Law § 240 (1) (*Ross*, 81 NY2d at 501; *see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 270; *Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 912). Here, the protective device, i.e., the scaffold, adequately shielded plaintiff and his coworkers on the platform from falling to the ground or sustaining other injuries as a result of the unchecked descent of the scaffold. "The mere fact that the force of gravity acted upon the hoisting mechanism is insufficient to establish a valid Labor Law § 240 (1) claim inasmuch as plaintiff's injury did not result from an elevation-related risk as contemplated by the statute" (*O'Donnell v Buffalo-DS Assoc., LLC*, 67 AD3d 1421, 1422-1423, *lv denied* 14 NY3d 704).

With respect to the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-6.1 (j), defendants and TJI met their initial burdens on their respective motions by establishing that the regulation applies to material hoists and thus is inapplicable to the accident, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562). Scaffolding is not "material hoisting equipment" within the meaning of that regulation (12 NYCRR 23-6.1 [b]) and, indeed, scaffolding is governed by a subpart 23-5 of the regulations, while material hoisting equipment is governed by subpart 23-6.

All concur except CARNI and LINDLEY, JJ., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully disagree with the conclusion of our colleagues that the circumstances giving rise to plaintiff's injury are not embraced by Labor Law § 240 (1). We therefore dissent in part.

The majority recognizes that the scaffold involved in plaintiff's injuries was subjected to an "unchecked descent," but nonetheless concludes that plaintiff's accident was only "connected in some tangential way with the effects of gravity," quoting *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494, 501). Defendants' expert conceded that the gear lock dog device in the cranking mechanism "was designed [to] prevent[ ] the scaffold from falling to the ground." Plaintiff's expert opined that plaintiff's injury was caused by a "malfunction" of the device, which resulted in "an unexpected fall of

the scaffold platform and an uncontrolled backward movement of the crank handle due to a defect in the cranking mechanism."

Thus, in our view, there can be no question that "the harm to plaintiff was the direct consequence of the application of the force of gravity to the [cranking mechanism]" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604; *see also Apel v City of New York*, 73 AD3d 406), and that the risk to be guarded against "arose from the force of the [scaffold's] unchecked, or insufficiently checked, descent" (*Runner*, 13 NY3d at 603). Unlike the majority, we conclude that it is irrelevant whether plaintiff's coworkers were prevented from "falling to the ground." This case does not involve a worker's fall from a height. Rather, this case falls within a now well-recognized variant of a "falling object" case under section 240 (1) (*see Runner*, 13 NY3d at 604), and does not depend upon whether plaintiff has fallen or been hit by the falling object (*see id.*; *see also Apel*, 73 AD3d 406). Here, as in *Runner*, we conclude that "the injury to plaintiff was every bit as direct a consequence of the descent of the [scaffold] as would have been an injury to a worker positioned in the descending [scaffold's] path" (*Runner*, 13 NY3d at 604). As the Court of Appeals has made clear, "[t]he latter worker would certainly be entitled to recover under section 240 (1) and [here] there appears [to be] no sensible basis to deny plaintiff the same legal recourse" (*id.*).

Therefore, we would modify the order by denying in part the respective motions of defendants-third-party plaintiffs and third-party defendant for summary judgment and reinstating the Labor Law § 240 (1) claim.

Entered: June 18, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

767

CA 09-01939

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

MARGUERITE JAMES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID WORMUTH, M.D., AND CNY THORACIC SURGERY, P.C., DEFENDANTS-RESPONDENTS.

WOODRUFF LEE CARROLL, SYRACUSE, FOR PLAINTIFF-APPELLANT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., SYRACUSE (JOHN GANOTIS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered September 10, 2009 in a medical malpractice action. The order, insofar as appealed from, granted defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint is reinstated.

Memorandum: Plaintiff appeals, as limited by her brief, from that part of an order granting the motion of defendants for summary judgment dismissing the complaint in this medical malpractice action. Defendants had " 'the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby' " (*Sandmann v Shapiro*, 53 AD3d 537, 537; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). "Where, as here, an expert's affidavit fails to address each of the specific factual claims of negligence raised in [the] plaintiff's bill of particulars, that affidavit is insufficient to support a motion for summary judgment as a matter of law" (*Larsen v Banwar*, 70 AD3d 1337, 1338; *see Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874). Indeed, defendants submitted affidavits from two medical experts, neither of which addressed the specific claims of negligence raised in the complaint, as amplified by the bill of particulars. Consequently, defendants' motion should have been denied, regardless of the sufficiency of plaintiff's opposing papers (*see Winegrad*, 64 NY2d at 853; *Kuri v Bhattacharya*, 44 AD3d 718).

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

797

KA 08-01312

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW SANDERS, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., CONFLICT DEFENDERS, WARSAW (ANNA JOST OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, SPECIAL DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered May 1, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]), defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to secure a more favorable sentence. To the extent that defendant's contention survives the plea (*see People v Gross*, 50 AD3d 1577), it is lacking in merit (*see generally People v Ford*, 86 NY2d 297, 404). "Defense counsel negotiated 'an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*Gross*, 50 AD3d 1577, quoting *Ford*, 86 NY2d at 404).

We reject the further contention of defendant that County Court erred in determining that he voluntarily waived his *Miranda* rights prior to making incriminating statements to the police and thus erred in refusing to suppress those statements. The court's determination is entitled to deference and will not be disturbed where it is supported by the record (*see People v McAvoy*, 70 AD3d 1467; *see generally People v Prochilo*, 41 NY2d 759, 761). Here, the record of the suppression hearing establishes that a detective read defendant his *Miranda* rights from a standard *Miranda* waiver form and defendant thereafter stated that he understood his rights and was willing to speak with the police.

Finally, the sentence is not unduly harsh or severe.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

812

TP 09-02518

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

IN THE MATTER OF JAMES I. JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, TOWN OF AMHERST TOWN BOARD, SATISH B. MOHAN, MARK A. MANNA, DANIEL J. WARD, SHELLY SCHRATZ, GUY R. MARLETTE AND BARRY A. WEINSTEIN, RESPONDENTS.

BARRY J. DONOHUE, TONAWANDA, FOR PETITIONER.

E. THOMAS JONES, WILLIAMSVILLE (PATRICK M. KELLY OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Timothy J. Drury, J.], dated November 17, 2009) to annul a determination of respondents. The determination terminated petitioner from his employment with respondent Town of Amherst.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination terminating his employment with respondent Town of Amherst (Town) for failure to satisfy the residency requirement of the Town Code, which requires Town employees to be domiciliaries of the Town. "[D]omicile means living in [a] locality with intent to make it a fixed and permanent home" (*Matter of Newcomb*, 192 NY 238, 250). "For a change to a new domicile to be effected, there must be a union of residence in fact and an 'absolute and fixed intention' to abandon the former and make the new locality a fixed and permanent home" (*Matter of Hosley v Curry*, 85 NY2d 447, 451, *rearg denied* 85 NY2d 1033; *see Newcomb*, 192 NY at 250-251).

"Judicial review of an administrative determination following a hearing required by law is limited to whether the determination is supported by substantial evidence" (*Matter of Langler v County of Cayuga*, 68 AD3d 1775, 1776; *see* CPLR 7803 [4]). "Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' " (*Langler*, 68 AD3d at 1776, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180). The evidence presented at the hearing established that

petitioner's family lived in a home in Elba, New York, that petitioner listed the Elba address on his New York State income tax forms, that he had no intention of moving his family to the Town and that he established residency in the Town solely to comply with the original residency requirements of his employment. We thus conclude that the determination that petitioner is a domiciliary of Elba rather than the Town is supported by substantial evidence (*see Hosley*, 85 NY2d at 451; *see generally 300 Gramatan Ave. Assoc.*, 45 NY2d at 180). Contrary to the further contention of petitioner, he was fully apprised of the evidence that respondents would consider in making their determination, and he was given numerous opportunities to respond and to present his own evidence (*see generally Matter of Simpson v Wolansky*, 38 NY2d 391, 395-396). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

822

KA 09-00940

PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANNE E. ADAMS, DEFENDANT-APPELLANT.

DAVID GERALD JAY, BUFFALO (KEVIN J. BAUER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Michael F. Griffith, A.J.), rendered April 23, 2009. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated, offering a false instrument for filing in the second degree, and attempted tampering with physical evidence.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of driving while intoxicated (Vehicle and Traffic Law § 1192 [3]), offering a false instrument for filing in the second degree (Penal Law § 175.30), and attempted tampering with physical evidence (§§ 110.00, 215.40 [1] [a]). Defendant agreed to be charged by superior court information (SCI), and she pleaded guilty in County Court to the crimes charged in the SCI. Subsequent to the entry of the plea, the Erie County Court Judge assigned to the case recused herself. Wyoming County Court Judge Griffith, who was serving as an Acting Supreme Court Justice (ASCJ) for the Eighth Judicial District, informed the People and defendant that he would preside over the sentencing, which would take place in Erie County. Although the record contains no documentation that ASCJ Griffith had been assigned to the case, he nevertheless thereafter presided over the sentencing in Supreme Court, Erie County. The People concede that the record does not contain any evidence of a transfer of the case from County Court to Supreme Court pursuant to 22 NYCRR 200.11 (d) (4). Defendant was sentenced to, inter alia, 15 days in jail, and the court ordered her to write letters of apology both to the police officers involved and to the Bar Association of Erie County. A stay of execution of the judgment was granted by a Justice of this Court.

Contrary to defendant's contention, the Erie County Court Judge who recused herself did not violate any provision of the law and the decision whether to recuse herself therefore was left to her sound discretion (*see* Judiciary Law § 14; 22 NYCRR 100.3 [E], [F]; *People v Williams*, 57 AD3d 1440, *lv denied* 12 NY3d 789; *People v Whitfield*, 275 AD2d 1034, *lv denied* 95 NY2d 971). We agree with defendant, however, that she was illegally sentenced in Supreme Court after her plea had been entered in County Court. We note at the outset that her contention that the sentence is illegal survives the waiver of her right to appeal (*see People v Seaberg*, 74 NY2d 1, 9; *People v Cheatham*, 266 AD2d 875, *lv denied* 94 NY2d 917, 926), and that her contention that ASCJ Griffith presided unlawfully may be raised for the first time on appeal and is not precluded by her guilty plea (*see People v Rodriguez y Paz*, 58 NY2d 327, 336-337). With respect to the merits of defendant's contention, defendant is correct that, in order to remove a criminal action from County Court to Supreme Court, the Uniform Rules for the New York State Trial Courts require that such removal be authorized by the Chief Administrator and that it occur prior to the entry of a plea or commencement of trial (*see* 22 NYCRR 200.14). Neither condition was met here, and thus ASCJ Griffith had no authority to preside over sentencing, rendering the sentence illegal. We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing. In light of our determination, we do not reach defendant's remaining contentions.

Entered: June 18, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

823.1

KA 08-02361

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TREMAINE A. GREEN, DEFENDANT-APPELLANT.

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

TREMAINE A. GREEN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 2, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) arising out of the early morning shooting of a man on a street in Geneva. By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his contention that the evidence at trial is legally insufficient to establish that he intended to kill the victim (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the intent element of the crime of which defendant was convicted. It was undisputed at trial that defendant retrieved an assault rifle from his house after one of his friends had an altercation with a friend of the victim, and that defendant was present in the area where the fatal shot was fired. Although defendant testified that he handed the assault rifle to another individual, who then fired several times, there was ample evidence that defendant himself committed the shooting. We note in particular that a prosecution witness who was one of defendant's friends testified that he saw defendant pull the trigger. Defendant's intent to kill the victim "may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Price*, 35 AD3d 1230, 1231, *lv denied* 8 NY3d 919, 926). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v*

Danielson, 9 NY3d 342, 349), we also reject defendant's contention that the verdict is against the weight of the evidence.

Defendant further contends that the People's motion to disqualify his trial counsel "unreasonably interfered" with his right to counsel by "paraly[zing] the defense for almost a month." We likewise reject that contention. The motion was appropriate in light of the potential conflict of interest arising from the possibility that defense counsel would be representing a witness to the crime as well as defendant. A conflict of interest exists when a defendant's attorney represents a prosecution witness and, indeed, the prosecution has "an affirmative duty to bring the facts of the potential conflict to the attention of the trial court" (*People v Green*, 145 AD2d 929, 930). To the extent that defendant contends that the defense was "paraly[zed] for almost a month" by virtue of the motion, we note that the motion was filed seven months before the commencement of trial and was denied by County Court two months after it was filed, thus affording defense counsel ample time in which to prepare for trial. We also reject the contention of defendant that the court erred in denying his request for a continuance on the first day of trial. "The decision whether to grant an adjournment is ordinarily committed to the sound discretion of the trial court" (*People v Spears*, 64 NY2d 698, 699), and we perceive no abuse of discretion in this case.

We agree with defendant, however, that the court erred in limiting his cross-examination of a police investigator concerning the statement he made to the investigator in which he denied that he shot the victim. At trial, the People introduced inculpatory portions of defendant's statement and thus defendant was entitled to admission of the exculpatory portions of the statement as well (*see People v Rodriguez*, 188 AD2d 566, 567). Nevertheless, we conclude that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). The proof of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted had the court properly admitted the exculpatory portions of defendant's statement in evidence (*see People v Perez*, 299 AD2d 197, *lv denied* 99 NY2d 618). The jury could readily infer from that part of the statement of defendant to the investigator that was admitted in evidence that he denied shooting the victim, inasmuch as defendant told the investigator that he saw an individual exit a silver vehicle and that he then heard shots being fired. We further note that defendant testified at trial that he did not shoot the victim. We also reject defendant's challenge to the severity of the sentence.

Contrary to the contention of defendant in his pro se supplemental brief, the People did not fail to turn over *Brady* material in a timely manner. Even assuming, arguendo, that the material at issue was exculpatory, we conclude on the record before us that defendant received it "as part of the *Rosario* material provided to him and was given a meaningful opportunity to use the exculpatory evidence" (*People v Middlebrooks*, 300 AD2d 1142, 1143-1144, *lv denied* 99 NY2d 630). Contrary to the further contention of defendant in his pro se supplemental brief, the court did not err in sua sponte advising a prosecution witness that his trial testimony on direct

examination appeared to contradict his grand jury testimony and that he may wish to consult with an attorney under those circumstances. "Our precedents approve the conduct of a trial court in advising a witness, who it can be reasonably anticipated will give self-incriminating testimony, of the possible legal consequences of giving such testimony and of the witness' Fifth Amendment privilege to refuse to testify" (*People v Siegel*, 87 NY2d 536, 542-543), and here the court in effect did so by advising the witness that he may wish to consult an attorney.

Finally, we have reviewed the remaining contentions of defendant, including those raised in his pro se supplemental brief, and conclude that they are without merit.

Entered: June 18, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

823

KA 08-01552

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MUNGRO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered June 30, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that his statutory right to a speedy trial was violated (*see* CPL 30.30). We reject that contention. Defendant could not be located following the robbery, and he was indicted for that crime in absentia on October 25, 2004. The People declared their readiness for trial three days later. Defendant thereafter was located in Columbus, Ohio and, on July 8, 2005, Federal Marshals attempted to arrest him there on an Erie County warrant that had been issued in this case. Defendant, however, crashed his vehicle into the Federal Marshals' vehicle and escaped. He was arrested in Ohio three days later, on July 11, 2005, and was charged in Ohio with federal and Ohio crimes as a result of injuring the Federal Marshals in the course of his escape. The Ohio charges were resolved on September 8, 2005, resulting in a sentence of nine months in jail. Approximately two months later, defendant was indicted by a federal grand jury for assaulting a federal agent, and the United States Attorney's Office notified the Erie County District Attorney's Office (Erie County DA) on May 3, 2006 that defendant had pleaded guilty and was awaiting sentencing. Defendant began serving his federal sentence of four years in August 2006, and in October 2006 the Erie County DA received a letter from defendant requesting that he be delivered to Erie County to resolve the instant charge. In December 2006 the Erie County DA filed a writ of habeas corpus with federal authorities seeking to have defendant transferred to Erie County for trial. Defendant thereafter was brought to New York on January 4, 2007 and was arraigned the

following day.

We reject the contention of defendant that the period from July 11, 2005, when he was arrested in Ohio, until January 5, 2007, when he was arraigned in Erie County, is chargeable to the People under CPL 30.30. The People have no obligation to exercise due diligence to locate a defendant "who flees *after* the People have announced their readiness for trial" (*People v Coplin*, 236 AD2d 552, 554, *lv denied* 90 NY2d 856). Nevertheless, pursuant to CPL 30.30 (4) (e), the period of postreadiness delay during which a defendant is detained in another jurisdiction with the People's knowledge is chargeable to the People unless they have been diligent and have made "reasonable efforts to obtain the presence of the defendant for trial" (*see People v Anderson*, 66 NY2d 529, 539-540). That obligation is predicated upon the theory that the People's "ability to proceed to trial is said to be actually implicated . . . [i.e., because] the People have it within their means to petition another State for the defendant's return to our jurisdiction, the burden is placed upon them to act diligently in facilitating the defendant's return" (*People v Myers*, 184 Misc 2d 394, 396; *see People v McKenna*, 76 NY2d 59, 63-64).

Here, defendant contends that the People failed to exercise the requisite diligence in obtaining his presence once they learned that he was incarcerated in Ohio based on the fact that they did not seek a writ of habeas corpus until the federal prosecution was completed. We disagree. The People were not obligated to take measures to secure defendant's presence in New York when they knew that, until defendant was prosecuted and sentenced in federal court, such measures would be futile (*see People v Gonzalez*, 235 AD2d 366, *lv denied* 89 NY2d 1093; *see generally* CPL 580.20; *People v Vrlaku*, 73 NY2d 800).

Defendant failed to preserve for our review his further contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit inasmuch as there is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant committed the robbery in question (*see generally People v Bleakley*, 69 NY2d 490, 495). Also contrary to defendant's contention, viewing the evidence in light of the elements of the crime of robbery as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: June 18, 2010 Patricia L. Morgan
Clerk of the Court

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

825

CAF 09-01662

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

IN THE MATTER OF KALI MCDADE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DIANA K. SPINK, RESPONDENT-RESPONDENT.

WAGNER & HART, LLP, OLEAN (JANINE C. FODOR OF COUNSEL), FOR PETITIONER-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, FOR RESPONDENT-RESPONDENT.

JAY D. CARR, LAW GUARDIAN, OLEAN, FOR JALYN J.P.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered August 4, 2009 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, determined that petitioner was entitled to a certain period of extended visitation with the parties' child during summer vacation should petitioner take a vacation.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Cattaraugus County, for a hearing in accordance with the following Memorandum: Petitioner father, as limited by his brief on appeal, contends that Family Court erred in failing to conduct an evidentiary hearing prior to ordering that he was entitled to one week of extended visitation with his child during summer vacation "should [the father] be taking a vacation." As a general rule, " '[d]eterminations affecting custody and visitation should be made following a full evidentiary hearing, not on the basis of conflicting allegations' " (*Matter of Kenneth M. v Monique M.*, 48 AD3d 1174, 1174-1175). Although no hearing is required where "it is clear from the record that the court 'possessed sufficient information to render an informed determination that was consistent with the child's best interests' " (*Matter of Bogdan v Bogdan*, 291 AD2d 909), that is not the case here (*see Matter of Almasi v Bauer*, 27 AD3d 1155, 1156; *cf. Matter of Jeffers v Hicks*, 67 AD3d 800, *lv denied* 14 NY3d 705). In his petition, the father sought modification of a prior visitation order by, inter alia, extending his visitation with the child during the summer vacation. There is no indication in the record that there was any prior hearing involving the child, and the only evidence before the court with respect to the current visitation schedule was based upon brief allegations of the parties' attorneys

and the Law Guardian during one court appearance. In the absence of evidence presented at a hearing, we are unable to determine the propriety of the court's modification of the father's visitation schedule with the child during summer vacation. We therefore reverse the order insofar as appealed from and remit the matter to Family Court for a hearing to determine whether extended visitation with the father during summer vacation is in the child's best interests.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

827

CAF 09-00655

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

IN THE MATTER OF PAUL L. CHAPMAN, ESQ.,
LAW GUARDIAN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM M. TUCKER, RESPONDENT-RESPONDENT.

IN THE MATTER OF WILLIAM M. TUCKER,
PETITIONER-RESPONDENT,

V

PAUL L. CHAPMAN, ESQ., LAW GUARDIAN,
AND SHAUNA C. TUCKER, RESPONDENTS-APPELLANTS.

THEODORE W. STENUF, MINOA, FOR PETITIONER-APPELLANT AND RESPONDENT APPELLANT PAUL L. CHAPMAN, ESQ., LAW GUARDIAN.

J. SCOTT PORTER, SENECA FALLS, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR RESPONDENT-APPELLANT SHAUNA C. TUCKER.

Appeals from an order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered March 20, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the petition of the Law Guardian and imposed sanctions upon him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second and third ordering paragraphs and as modified the order is affirmed without costs.

Memorandum: The Law Guardian, the petitioner in one proceeding as well as a respondent along with respondent mother in the other proceeding (Law Guardian), appeals from an order that denied his petition seeking to suspend respondent father's supervised visitation with the subject children and directed the Law Guardian to pay the attorney's fees and costs incurred by the father based on the "frivolity" of the petition. The mother appeals from the same order that, in the proceeding commenced by the father against the Law Guardian and the mother, found her to be in willful violation of a prior order of custody and visitation.

Addressing first the imposition of sanctions, we agree with the Law Guardian that Family Court abused its discretion in sua sponte sanctioning him upon determining that the petition filed on behalf of the children was frivolous, inasmuch as the court failed to afford the Law Guardian a reasonable opportunity to be heard before doing so (*see* 22 NYCRR 130-1.1 [a], [d]; *Matter of Ariola v DeLaura*, 51 AD3d 1389, *lv denied* 11 NY3d 701). In addition, the court erred in determining that the Law Guardian engaged in frivolous conduct in filing the petition. Indeed, we conclude that he in fact complied with 22 NYCRR 7.2 by zealously representing the interests of the children. We therefore modify the order accordingly (*see Ariola*, 51 AD3d at 1389).

We agree with the father, however, that the court properly denied the petition of the Law Guardian seeking to suspend his supervised visitation with the children. "The denial of visitation . . . is a drastic remedy to be employed only where there are compelling reasons for doing so and substantial evidence that visitation will be harmful to the child[ren]'s welfare" (*Matter of Cameron C.*, 283 AD2d 946, 947, *lv denied* 97 NY2d 606). " 'The court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*Matter of Hill v Rogers*, 213 AD2d 1079, 1079; *see Paul G. v Donna G.*, 175 AD2d 236, 237; *see also D'Errico v D'Errico*, 158 AD2d 503, 504). Here, there is an evidentiary basis in the record to support the court's determination that continuation of the father's supervised visitation with the children is in their best interests (*see Hill*, 213 AD2d at 1079-1080).

With respect to the mother's appeal, we note that, although the court failed to comply with CPLR 4213 (b) by stating "the facts it deem[ed] essential" in determining that the mother willfully violated the prior custody and visitation order, the record is sufficient to permit us to make such findings (*see Matter of Forjone v Platner*, 191 AD2d 1033). The evidence presented at the hearing establishes that the mother disparaged and belittled the father in the presence of the children, in direct violation of the prior order of custody and visitation in question. In addition, the evidence establishes that the mother failed to participate in individual therapy and to apprise the father of the children's "significant medical, dental or mental health appointments," as required by the prior order. Therefore, contrary to the contention of the mother, the court's determination that she willfully violated the prior order has "a sound and substantial basis in the record" (*Matter of Stuttard v Stuttard*, 2 AD3d 1415, 1416).

Entered: June 18, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

833

CA 09-02506

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND PINE, JJ.

STEPHEN HALE, INDIVIDUALLY AND DOING BUSINESS AS HALE'S BUS GARAGE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PAUL SCOPAC, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS VICE-PRESIDENT OF CLINTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, AND GUY VAN BAALEN, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS MEMBER OF CLINTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, DEFENDANTS-RESPONDENTS.

NORMAN P. DEEP, ROME, FOR PLAINTIFF-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered February 10, 2009. The order granted defendants' motion to dismiss the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, slander arising out of statements made by defendant Paul Scopac, vice-president of the Clinton Central School District Board of Education (School Board), and defendant Guy Van Baalen, a member thereof, concerning plaintiff's bid to provide bus maintenance and storage services to the school district. Supreme Court properly granted defendants' pre-answer motion to dismiss the amended complaint for failure to file a timely notice of claim. We reject the contentions of plaintiff that he was not required to file a notice of claim because the complaint alleges intentional wrongdoing on the part of defendants, and because he was suing defendants both individually and in their official capacities. The record establishes that the alleged statements were made by defendants in the context of addressing official business at a School Board meeting and not in their individual capacities. A notice of claim is required where, as here, "the conduct complained of [by plaintiff, e.g., slander,] occurred during the discharge of the defendant[s'] duties within the scope of [their] employment" (*DeRise v Kreinik*, 10 AD3d 381, 382). Furthermore, although plaintiff sued defendants in their individual

capacities, plaintiff was nevertheless required to file a notice of claim prior to commencing this action in view of the context in which the alleged statements were made (*see* Education Law § 3813 [1]; *see generally Ruggiero v Phillips*, 292 AD2d 41, 44-45), and it is undisputed that plaintiff failed to do so.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

838

KA 09-01517

PRESENT: MARTOCHE, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEBORAH A. KOZODY, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered July 7, 2009. The judgment convicted defendant, upon her plea of guilty, of reckless endangerment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of reckless endangerment in the first degree (Penal Law § 120.25). We reject the contention of defendant that her waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Straw*, 70 AD3d 1341, *lv denied* 14 NY3d 844). It is well settled that "[n]o particular litany is required for an effective waiver of the right to appeal" (*People v McDonald*, 270 AD2d 955, *lv denied* 95 NY2d 800; *see People v Callahan*, 80 NY2d 273, 283), and the responses of defendant to County Court's questions during the plea colloquy established that she understood the plea proceedings and voluntarily waived the right to appeal (*see People v Tantao*, 41 AD3d 1274, *lv denied* 9 NY3d 882). The valid waiver by defendant of the right to appeal encompasses her challenge to the factual sufficiency of the plea allocution (*see People v Zulian*, 68 AD3d 1731; *People v Harris*, 269 AD2d 839), as well as her challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737). Moreover, by failing to move to withdraw her plea or to vacate the judgment of conviction, defendant failed to preserve for our review her challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665).

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

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

848

CA 10-00196

PRESENT: MARTOCHE, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

IN THE MATTER OF PAUL D'ACCURSIO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MONROE COUNTY AND MONROE COUNTY SHERIFF,
RESPONDENTS-APPELLANTS.

JENNIFER M. SOMMERS, ROCHESTER, FOR RESPONDENTS-APPELLANTS.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 7, 2009 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Memorandum: Petitioner, a "Deputy Sheriff Jailor" with the Monroe County Sheriff's Department, commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination denying his application for General Municipal Law § 207-c benefits on the ground that petitioner did not sustain the injury in question in the performance of his job duties. Supreme Court properly concluded that the determination was arbitrary and capricious and granted the petition.

"General Municipal Law § 207-c provides for the payment of full regular salary or wages to certain law enforcement officers . . . injured in the performance of their duties or taken sick as a result of the performance of their duties 'so as to necessitate medical or other lawful remedial treatment' " (*Matter of Laudico v Netzel*, 254 AD2d 811, 812, quoting § 207-c [1]). The statute "does not require that [officers] additionally demonstrate that their disability is related in a substantial degree to their job duties" (*Matter of White v County of Cortland*, 97 NY2d 336, 339). Rather, an officer "need only prove a direct causal relationship between job duties and the resulting illness or injury" (*id*. at 340). Indeed, a preexisting condition does not bar recovery under section 207-c if the officer establishes "that the job duties were a direct cause of the disability" (*id*.).

Based on the record before us, we conclude that petitioner established "such a direct causal relationship and thus demonstrated his entitlement to benefits under General Municipal Law § 207-c" (*Matter of Casselman v Village of Lowville*, 2 AD3d 1281, 1281-1282).

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

855.1

CA 09-02588

PRESENT: MARTOCHE, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

EUGENE PALLADINO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CNY CENTRO, INC., DEFENDANT-RESPONDENT,
AND AMALGAMATED TRANSIT UNION LOCAL 580,
DEFENDANT-APPELLANT.

EUGENE PALLADINO, PLAINTIFF-RESPONDENT,

V

CNY CENTRO, INC., DEFENDANT-RESPONDENT,
CHARLES WATSON, AS BUSINESS AGENT OF
AMALGAMATED TRANSIT UNION LOCAL 580,
AND AMALGAMATED TRANSIT UNION LOCAL 580,
DEFENDANTS-APPELLANTS.

BLITMAN & KING LLP, SYRACUSE (KENNETH L. WAGNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT LOUIS RILEY, SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 27, 2009. The order granted the motion of plaintiff to disqualify the law firm representing defendants Charles Watson, as business agent of Amalgamated Transit Union Local 580, and Amalgamated Transit Union Local 580.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion is denied.

Memorandum: Plaintiff commenced these consolidated actions seeking damages arising from the allegedly wrongful termination of his employment by defendant CNY Centro, Inc. (Centro). Prior to his termination, Centro disciplined plaintiff on two separate occasions, and the union that represented him, defendant Amalgamated Transit Union Local 580 (ATU), declined to submit his grievances to arbitration. Plaintiff moved to disqualify the law firm representing defendant Charles Watson, as business agent of ATU, and ATU on the ground that he intended to call a partner of that firm as a witness. According to plaintiff, the partner misrepresented himself as plaintiff’s attorney to two potential witnesses and collected evidence

against plaintiff for defendants' benefit. We conclude that Supreme Court erred in granting plaintiff's motion.

Plaintiff "failed to demonstrate that the [partner] was a necessary witness . . . and that his testimony would prejudice [Watson and ATU]" (*McElroy v Kitchen*, 254 AD2d 828; *see Plotkin v Interco Dev. Corp.*, 137 AD2d 671, 673-674; *see also Goldstein v Held*, 52 AD3d 471). At most, plaintiff demonstrated that the partner's testimony may be relevant to the litigation, which is insufficient to warrant disqualification (*see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 445-446; *McElroy*, 254 AD2d 828). Finally, we conclude that the law firm's continued representation of Watson and ATU would not create an appearance of impropriety (*see generally Kassis v Teacher's Ins. and Annuity Assn.*, 93 NY2d 611, 617).

Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

855

TP 10-00126

PRESENT: MARTOCHE, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

IN THE MATTER OF KT'S JUNCTION, INC., PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, ON THE COMPLAINT OF CARRIE A. OURSLER, RESPONDENT.

TERRI BRIGHT, FABIUS, FOR PETITIONER.

CAROLINE J. DOWNEY, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Donald A. Greenwood, J.], entered January 6, 2010) to annul a determination of respondent. The determination, inter alia, found that petitioner had unlawfully discriminated against complainant.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by reducing the award of compensatory damages for mental anguish to $5,000 and as modified the determination is confirmed without costs.

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking, inter alia, to annul the determination of respondent, New York State Division of Human Rights (hereafter, SDHR), that petitioner discharged complainant based solely on her pregnant condition in violation of the Human Rights Law (*see* Executive Law § 296 [1] [a]; *Matter of Binghamton GHS Empls. Fed. Credit Union v State Div. of Human Rights*, 77 NY2d 12, 17). Contrary to petitioner's contention, we conclude that the determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-181). We reject petitioner's further contention that the transfer of this proceeding from the Administrative Law Judge (ALJ) who presided over the hearing to a second ALJ who rendered the determination violated Judiciary Law § 21 and the New York State Constitution. Judiciary Law § 21 has never been applied to administrative proceedings, and "the substitution of ALJs during the course of a hearing is generally permissible and will not, standing alone, warrant a finding of prejudice" (*Matter of Schweizer Aircraft Corp. v New York State Div. of Human Rights*, 220 AD2d 855, 855, *lv denied* 87 NY2d 805). The fact that the second ALJ did not hear or observe any witnesses does not constitute prejudice

(*see id.* at 856) and, indeed, petitioner failed to demonstrate any actual prejudice (*see Matter of Kreppein v New York State & Local Police & Fire Retirement Sys.*, 270 AD2d 732).

We agree with petitioner, however, that the award of $10,000 for mental anguish is not supported by the evidence. "In reviewing such an award, we must 'determine[, inter alia,] whether the relief was reasonably related to the wrongdoing[and] whether the award was supported by evidence before [the SDHR]' " (*Matter of Anagnostakos v New York State Div. of Human Rights*, 46 AD3d 992, 994, quoting *Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 219), and that is not the case here. The evidence of mental anguish experienced by the complainant consisted of her testimony at the hearing that she was diagnosed with depression or anxiety as a result of the reduction in her hours of employment and that she suffered from high blood pressure. The complainant was suffering from high blood pressure at the time of the hearing, however, and there is no evidence that her condition was related to the reduction in her hours of employment or her termination. In addition, the complainant obtained an offer of employment following the birth of her child and, at most, her mental anguish would have been limited to the brief period of time when she was not collecting unemployment or disability benefits. In light of the nonspecific nature of the complainant's mental distress, we conclude that the maximum award for mental anguish supported by the evidence is $5,000 (*see generally Matter of Diaz Chem. Corp. v New York State Div. of Human Rights*, 237 AD2d 932, 933, *affd* 91 NY2d 932; *Matter of New York State Tug Hill Commn. v New York State Div. of Human Rights*, 52 AD3d 1169, 1171-1172). We therefore modify the determination accordingly.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

859

KA 07-01258

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SANTOS ANTONETTI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered May 4, 2007. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]). We agree with defendant that the judgment of conviction must be reversed and his plea vacated because Supreme Court failed to advise him before he entered his plea that his sentence would include a period of postrelease supervision, and thus that his plea was not knowing, voluntary and intelligent (*see People v Hill*, 9 NY3d 189, 191-192, *cert denied* ___ US ___, 128 S Ct 2430; *People v Burns*, 70 AD3d 1301; *People v Dillon*, 67 AD3d 1382, 1382-1383). We reach our conclusion even in the absence of a postallocution motion (*see People v Louree*, 8 NY3d 541, 545-546; *Burns*, 70 AD3d at 1302; *Dillon*, 67 AD3d at 1383). Finally, because it is the obligation of the court to advise a defendant of the postrelease supervision component of the sentence, we reject the People's contention that a reconstruction hearing is warranted to determine whether defense counsel had informed defendant of the postrelease supervision requirement.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

861

KA 08-01212

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEOTIS JOHNSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 14, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and criminal mischief in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal possession of a weapon in the second degree under count four of the indictment and as modified the judgment is affirmed, and a new trial is granted on count four of the indictment.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of criminal mischief in the fourth degree (§ 145.00 [1]). We note at the outset that, although Supreme Court denied his *Batson* challenges with respect to the prosecutor's exercise of peremptory challenges to three prospective jurors, defendant contends on appeal that the court erred only with respect to two of those prospective jurors and thus has abandoned any issues with respect to the third prospective juror (*see generally People v Simmons*, 63 AD3d 1605, *lv denied* 12 NY3d 929; *People v Bridgeland*, 19 AD3d 1122, 1123). We conclude with respect to the two prospective jurors in question that the court properly determined that the prosecutor provided race-neutral explanations for exercising peremptory challenges to exclude them, e.g., that defense counsel had represented the son of one of those prospective jurors (*see generally People v McCoy*, 46 AD3d 1348, 1349, *lv denied* 10 NY3d 813), and the other had a family member who had recently been accused of committing a crime (*see People v Craig*, 194 AD2d 687, *lv denied* 82 NY2d 716; *People v McArthur*, 178 AD2d 612, *lv denied* 79 NY2d 950). Defendant, as the moving party, failed to meet "the ultimate burden of

persuading the court that the reasons [were] merely a pretext for intentional discrimination" (*People v Smocum*, 99 NY2d 418, 422; *see People v James*, 99 NY2d 264, 270).

We agree with defendant, however, that the court erred in denying his request to charge criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [1]) as a lesser included offense of criminal possession of a weapon in the second degree as charged in count four of the indictment (§ 265.03 [1] [b]). As the People correctly concede, "[c]riminal possession of a weapon in the fourth degree [under subdivision (1)] is a proper lesser included offense of criminal possession of a weapon in the second degree [under subdivision (1) (b)] because it is theoretically impossible to commit the greater offense without concomitantly committing the lesser offense" (*People v Pulley*, 302 AD2d 899, 900, *lv denied* 100 NY2d 565). In addition, we agree with defendant that there is a reasonable view of the evidence to support a finding that he committed the lesser offense but not the greater (*see id.*; *see generally People v Glover*, 57 NY2d 61, 63). We therefore modify the judgment by reversing that part convicting defendant of criminal possession of a weapon in the second degree under count four of the indictment, and we grant a new trial on that count of the indictment.

In light of our determination, we do not address defendant's contention with respect to the sentence imposed on count four of the indictment, and the sentence otherwise is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

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

867

CAF 09-00233

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

IN THE MATTER OF ANITA BARNES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL MCKOWN, RESPONDENT-RESPONDENT.

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

ROBERT L. GOSPER, CANANDAIGUA, FOR RESPONDENT-RESPONDENT.

ALEXANDRA BURKETT, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR HOLLY B.

Appeal from an order of the Family Court, Ontario County (Craig J. Doran, J.), entered October 22, 2008. The order, among other things, dismissed the petition to modify a custody order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph and as modified the order is affirmed without costs.

Memorandum: Petitioner mother, who resides in Florida, commenced this proceeding seeking to modify an order granting sole custody of the parties' child to respondent father, who resides in New York. She contends that Family Court erred in refusing to allow her to testify at the custody hearing by electronic means because the court was required to allow her to do so. We reject that contention. Indeed, pursuant to the express language of Domestic Relations Law § 75-j (2), "[a] court of this state *may* permit an individual residing in another state to be deposed or to testify by . . . electronic means before a designated court or at another location in that state" (emphasis added). Contrary to the alternative contention of the mother, the court was not required to allow her to testify by electronic means as a reasonable accommodation under the Americans with Disabilities Act (42 USC § 12101 *et seq*.), inasmuch as she failed to meet her burden of demonstrating that she has a covered disability under that act (*see generally Matter of Abram v New York State Div. of Human Rights*, 71 AD3d 1471).

We note, however, that both the Attorney for the Child and the father correctly conceded at oral argument of this appeal that the court erred in making any future filings by the mother contingent on

her submission of medical proof establishing her ability to travel to New York. We therefore modify the order accordingly.

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

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

869

CA 09-02226

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

VICKIE GOLISANO AND THOMAS A. GOLISANO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KEELER CONSTRUCTION CO., INC. AND UPSTATE
UTILITIES, INC., DEFENDANTS-APPELLANTS.

LAW OFFICES OF TAYLOR & SANTACROSE, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANT-APPELLANT KEELER CONSTRUCTION CO., INC.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (TIMOTHY N. MCMAHON OF COUNSEL), FOR DEFENDANT-APPELLANT UPSTATE UTILITIES, INC.

Appeals from an order of the Supreme Court, Orleans County (James H. Dillon, J.), entered February 6, 2009 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Upstate Utilities, Inc. and the cross motion of defendant Keeler Construction Co., Inc. for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Vickie Golisano (plaintiff) when she tripped on a stone that was approximately two inches in diameter while crossing a street. Plaintiffs alleged that the stone was construction debris left in the street as a result of a massive road construction project pursuant to which both defendants had contracted to perform work. Defendants moved and cross-moved, respectively, for summary judgment dismissing the complaint against them, each contending that it was not working in the area of plaintiff's fall in the days before plaintiff's accident and that, in any event, neither owed plaintiff a duty of care. We conclude that Supreme Court properly denied the motion and cross motion.

In support of its motion, defendant Upstate Utilities, Inc. (Upstate) submitted evidence establishing that it was performing work in the area of plaintiff's fall before the date of the accident and that part of its work involved the use of two-inch crusher stone. Upstate also submitted evidence that defendant Keeler Construction Co., Inc. (Keeler) had worked in the area in question within three to four days before plaintiff's fall and that Keeler had also used two-inch crusher stone. In addition, in support of its cross motion,

Keeler submitted evidence establishing that its employees were working in the location of plaintiff's fall within days of the fall. We thus conclude that defendants themselves raised an issue of fact whether they were responsible for construction debris in the area (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude that neither defendant established as a matter of law that it did not owe a duty to plaintiff. Although plaintiff was a noncontracting third party with respect to defendants' construction contracts, defendants may still be liable if, "in failing to exercise reasonable care in the performance of [their] duties, [they] 'launche[d] a force of instrument of harm' " (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140; *see Church v Callanan Indus.*, 99 NY2d 104, 111), or otherwise made the construction area "less safe than before the construction project began" (*Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 67, *lv dismissed* 4 NY3d 739, *rearg denied* 4 NY3d 795). We conclude that there are issues of fact whether the two-inch crusher stone used by both defendants, when left in the middle of the road, constituted a force or instrument of harm or otherwise made the area less safe than before the construction project began, to establish a duty to plaintiff (*see e.g. Schosek v Amherst Paving, Inc.*, 11 NY3d 882; *Cornell v 360 W. 51st St. Realty, LLC*, 51 AD3d 469, 470; *cf. Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257-258).

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

874

CA 09-02329

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

IN THE MATTER OF WENDY'S RESTAURANTS, LLC,
RICHARD C. FOX AND JOANNE D. FOX,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ASSESSOR, TOWN OF HENRIETTA, AND BOARD OF
ASSESSMENT REVIEW FOR TOWN OF HENRIETTA,
RESPONDENTS-RESPONDENTS.

WOLFGANG & WEINMANN, BUFFALO (PETER ALLEN WEINMANN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

GOLDMAN & GOLDMAN, ROCHESTER (ARNOLD J. GOLDMAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 27, 2009 in proceedings pursuant to RPTL article 7. The order granted the motion of respondents to compel discovery.

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

Memorandum: Petitioners commenced the underlying proceedings seeking to reduce the tax assessments for the years 2006-2007, 2007-2008 and 2008-2009 on owner-occupied properties on which they operate fast-food businesses. They contend that Supreme Court erred in granting respondents' motion to compel discovery of, inter alia, profit and loss statements, balance sheets, asset depreciation schedules and gross and net sales revenues for the years 2005 through 2008 inasmuch as the income of the businesses is irrelevant to the valuation of the properties. We reject that contention.

Discovery in RPTL article 7 proceedings "is governed by CPLR 408, pursuant to which trial courts have broad discretion in directing the disclosure of material and necessary information" (*Matter of Niagara Mohawk Power Corp. v City of Saratoga Springs Assessor*, 2 AD3d 953, 954; *see Matter of Town of Pleasant Val. v New York State Bd. of Real Prop. Servs.*, 253 AD2d 8, 15-16; *Matter of Xerox Corp. v Duminuco* [appeal No. 1], 216 AD2d 950). When leave of court for requested discovery is given pursuant to CPLR 408, such "discovery takes place pursuant to CPLR 3101 (a), which provides generally that [t]here shall be full disclosure of all matter material and necessary in the

prosecution or defense of an action [or proceeding]. The Court of Appeals has ruled that [the phrase] material and necessary should be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Town of Pleasant Val.*, 253 AD2d at 15-16 [internal quotation marks omitted]; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407).

Contrary to petitioners' contention, owners of owner-occupied business property are not exempt from the requirements of 22 NYCRR 202.59 (b) (*see Matter of Syms Corp. v Assessor of Town of Clarence*, 5 AD3d 984; *cf. Matter of Atlantic Ref. & Mktg. Corp. v Assessor of City of Ithaca*, 246 AD2d 875). We conclude that respondents established that the information sought in their motion will assist them in their preparation for trial (*see Matter of Norton Co. v Assessor of City of Watervliet*, 3 AD3d 760, 761-762; *Matter of Farone & Son v Srogi*, 96 AD2d 711, *lv denied* 60 NY2d 556).

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court